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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

COMMON AND STATUTE LAW

AS AT PRESENT ADMINISTERED:

WITH

A Dictionary

OF

TECHNICAL LAW TERMS AND MAXIMS,

AND WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

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I. Private Nuisances.

(A) *General Principles.*[1]

[1] As to what constitutes a nuisance, technically so called, a precise definition is impracticable, and the law is best explained by the particular instances of annoyance or injury which have been adjudged to be or not to be nuisances. The following criterion has been suggested by high authority:—"Is the inconvenience more than fanciful, or one of mere delicacy or fastidiousness; as, an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people?" *Per Knight-Bruce, V. C. Walter v. Telfe*, 4 De Gex & S. 315. It is indirect or remote, as distinguished from an immediate invasion by one man of another's property; and for this reason the proper subject of an action on the case, which is a remedy appropriate to the misuse of a party's own right or property to the damage of his neighbour, and not of trespass or conversion, which lies for an unlawful taking or appropriation of the property of another. Torts of this nature are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion. 1 Chit. Pl. 135; 2 Hill. on Torts.

Nuisance, in its largest sense, signifies "anything that worketh hurt, inconvenience, or damage." 3 Bl. Com. 215. "All the acts put forth by man which tend directly to create evil consequences to the community at large, or to individuals, may be deemed nuisances, where they are of such magnitude as to require the interposition of the courts." 2 Russ. on Crimes, 374; Aldreds, 9 Co. 58, a; 1 Burr. 337.

The word is sometimes used as equivalent to "tort," and applied as well to wrongs against the person or personal property as against real estate (3 Stark. Ev. 979); while by other writers it is restricted to acts "injuriously affecting the lands, tenements, or hereditaments of an individual." 2 Greenl. Ev. s. 465. It is principally in the latter sense the term is applied in the present article.

The general rule is, that if one carry on a lawful business in such a manner as to prove a nuisance to his neighbour, he is answerable for the damages; but it is said, that what is authorised by an act of the legislature cannot be a nuisance. Neither an injunction nor an action will lie to redress a consequential injury necessarily resulting from the lawful exercise of a right granted by act of parliament, or authorised by competent municipal authority. Thus it is held partly upon this ground, where commissioners appointed under an act of the legislature to drain swamp lands are acting in good faith, and are not violating the plain and manifest intent of the statute, a court would not be justified in restraining their proceedings by injunction. 2 Hill. on Torts, 68.

And where one act gave a company power to make a railway, and another unqualified power to use locomotive steam-engines thereon, and the railway was constructed in some parts within five yards of a highway; upon an indictment for a nuisance, alleging that horses passing along the highway were terrified by the engines, it was held that the proceedings complained of must have been sanctioned by statute, and the benefit derived by the public from the railway showed the reasonableness of the privilege granted. *Pease's case*, 4 B. & Adol. 30. But where the defendant, proprietor of a colliery, without authority of parliament, made a railway from his colliery to a seaport town upon the turnpike-road, which in some places it narrowed so that there was not room for two carriages to pass, although he gave the public for a toll the use of the railway:—*Held*, indictable. *Morris's case*, 1 B. & Adol. 441.

Where a man by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land.

The fitness of the locality does not prevent the carrying on of an offensive, though lawful trade, from being an actionable nuisance; but whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's en-

(B) *Particular Instances.*

(*a*) *Animals, Dangerous.*[1] *See* vol. i. p. 352; and *post*, Div. IV. Public Nuisance, p. 14.

(*b*) *Brick-making, Lime-burning, &c.*[2]

(*c*) *Canals, Docks, &c., Mismanagement of.*[3] *See* also vol. v. p. 526.

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joyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie, whatever the locality may be. *Bamford v. Turnley*, 31 L. J. Q. B. Ex. Ch. 286; 10 W. R. 803; 6 L. T. (N. S.) 721; overruling *Hole v. Barlow*, 4 C. B. 334; 27 L. J. C. P. 207. See *Carey v. Lidbetter*, 32 L. J. C. P. 104.

Hole v. Barlow was an action for a nuisance for keeping a brick-kiln on the defendant's land in front of the plaintiff's house, the judge left it to the jury to say whether the place in which the bricks were burned was a proper and convenient place, and if it was not a proper place, whether the plaintiff's enjoyment of life and property was thereby rendered uncomfortable; and told them that, although the nuisance rendered the enjoyment of life and property uncomfortable, yet if the trade under the circumstances was carried on in a proper and convenient place, no action would lie:— *Held*, that this was a proper direction. 4 Jur. N. S. 1019; 27 L. J. C. P. 207.

An action will lie at the suit of a private individual who actually sustains an injury by reason of a common nuisance, which may possibly affect the public, and for which the person committing the nuisance would be indictable. *Rose v. Groves*, 5 Man. & G. 613; 6 Scott, N. R. 645; 1 D. & L. 61; 7 Jur. 951; 12 L. J. C. P. 251.

Where the defendant had burnt bricks in a kiln within twenty feet of the plaintiff's garden, and forty feet of his house, where he had lived and carried on business as a gardener for more than twenty years:— *Held*, that it was for the jury whether the smoke made the house substantially less comfortable, and the garden substantially less profitable, and that if so, it was an actionable nuisance. *Carey v. Lidbetter*, 3 F. & F. 14; and *supra*.

[1] If a horse strays on to a highway, and there kicks a child, the owner is not liable, unless he knew the horse was of a vicious temper. For the vicious acts of an animal of an ordinarily quiet nature the owner is, generally speaking, not liable; for such acts as are in accordance with his ordinary nature he is liable; and he is also liable for his vicious acts, if he knew that the animal was accustomed or was likely to commit any such acts. For the acts of an animal ordinarily vicious the owner is liable. *Cox v. Burbridge*, 32 L. J. C. P. 89.

[2] It has often been stated in general terms that burning lime or bricks, or keeping a brewhouse or glasshouse so near to another dwelling, that the smoke and smell enter the house and render it unfit for habitation, is actionable. Add. on Torts, 75. The doctrine connected with this subject has been recently much discussed, and the opinions expressed in *Hole v. Barlow*, 27 L. J. C. P. 207, "that although the carrying on of a lawful trade does annoy another, yet an action does not lie for the reasonable use of a lawful trade in a convenient place, was, we have seen, in *Bamford v. Turnley*, *supra*, expressly overruled; and in *Carey v. Lidbetter*, 32 L. J. C. P. 104, it was held, in an action for a nuisance caused by defendant burning bricks on his own land, near the house and land of plaintiff, it is no misdirection for the judge to refuse to leave to the jury the question, whether the bricks had been burnt in a convenient place for that purpose, such form of question having been decided by the Court of Exchequer Chamber, in *Bamford v. Turnley*, to be a misdirection. But *semble*, *per Erle*, *C. J.*, it would be a misdirection if the judge told the jury to consider solely the evidence adduced to show discomfort to the plaintiff, and not to take into their consideration any evidence showing that the act complained of was one of ownership on the part of the defendant, which was clearly lawful, if it did not cause additional discomfort to a neighbour, and that it was done with full intention to prevent discomfort in respect of time, and place, and manner, and degree.

[3] The proprietors of canals and docks, who keep them open for the public, are bound to take reasonable care that parties who use them may do so without danger to their lives or property. *Gibbs v. Trustees of Liverpool Docks*, 3 H. & N. 164; 27 L. J. Ex. 321. *Lancaster C. C. v. Parnaby*, 11 Ad. & E. 243. *Manley v. St. Helen's Canal Co.* 2 H. & N. 840; 27 L. J. Ex. 164. *Walker v. Goe*, 4 Ex. 350; 27 L. J. Ex. 427.

Defendants were possessed of a canal, and the land between it and the sluice; an ancient public footpath passed through the land close to the sluice; there was a towing-path nine feet wide by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By permission of the defendants, the intervening space had been lately used for carting; and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned. It was held the canal was

(*d*) *Excavations, Openings, &c. Unguarded.*[1] *See* also Negligence, vol. v. p. 517.

(*e*) *Fences, Hedges, &c., Defective.*[2]

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not so near the footpath as to be adjoining to it so as to throw upon the defendants the duty of fencing the canal off, and that the other facts did not render defendants liable for the accident. *Binks v. the South Yorkshire Railway and River Dun Co.* 32 L. J. Q. B. 26.

[1] As to highways, *see* 5 & 6 Wm. 4, c. 50, s. 70; Shelford on Highways, p. 167.

Where an excavation is made near to but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation. *Hardcastle v. South Yorkshire Railway and River Dun Co.* 4 H. & N. 67; 5 Jur. N. S. 150; 28 L. J. Ex. 139.

A person who excavates a hole in his own ground, abutting on an immemorial public highway, so that the use of such way be rendered unsafe to the public, even when using ordinary care, is responsible for an injury to a person accidentally falling into such hole while passing with ordinary caution along the highway. *Barnes v. Ward,* 2 C. & Kir. 661; 9 C. B. 392; 14 Jur. 334; 19 L. J. C. P. 195.

Blackburn, J., said, that the law is clear that if, after the erection of a highway, anything be newly made so near as to be dangerous to those using the highway, such, for instance, as an excavation (*Barnes v. Ward, supra*), this will be unlawful and a nuisance, as it also is if an ancient erection, as a house, is suffered to become ruinous so as to be dangerous (*Reg. v. Watts,* 1 Salk. 357); and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as if the nuisance arose from an obstruction in the highway itself. But the question still remains whether an erection already existing, and not otherwise unlawful, becomes lawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them, subject to the inconvenience arising from the existing state of things. The court was of opinion that the latter is the correct view of the law. *Cooper v. Walker,* 6 L. T. (N. S.) 711. See *Cornwall v. Metropolitan Commissioners of Sewers,* 10 Ex. 771. *Coupland v. Hardingham,* 3 Camp. 398. *Jarvis v. Dean,* 3 Bing. 447.

An owner of land, having a private road for the use of persons coming to his house, gave permission to a builder, who was engaged in building on the land, to place materials upon the road. The builder availed himself of this permission by placing a quantity of slates there, in such a manner that A., the plaintiff, in using the road, sustained damage; the builder was held liable to an action. *Corby v. Hill,* 4 C. B. (N. S.) 556; 4 Jur. N. S. 512; 27 L. J. C. P. 318. And the declaration was not objectionable for not averring that the obstruction was placed on the road without permission, inasmuch as such an allegation, if traversed, would have presented an immaterial issue (Id.)

Two highways lead across a waste; in the waste, and near to each of the highways, there is a quarry, unfenced and unguarded. A person crossing from one highway to the other in the dark falls into the quarry and is injured; no action lies against the owner of the quarry, without showing that the quarry is so near the highway as to be a public nuisance. *Hounsell v. Smith,* 7 C. B. (N. S.) 731; 6 Jur. N. S. 897; 29 L. J. C. P. 203; 8 W. R. 277.

Declaration stated that defendant was possessed of a theatre, and of a stage therein, on which dramatic entertainments were given, and of a dressing-room for chorus-singers, and of a floor underneath the stage, in which floor was a cut or hole, and along which floor the performers of the theatre were accustomed to pass from the dressing-room to the back of the stage. The plaintiff was engaged by defendant to sing on the stage as a chorus-singer; that it became defendant's duty to cause the floor to be so sufficiently lighted and the hole so fenced as to prevent accidents to persons passing from the dressing-room to the stage. The defendant, well knowing the premises, suffered the floor to be insufficiently lighted, and the whole to be open without any sufficient fence, so that the plaintiff was injured by falling into the hole:—*Held,* that the declaration was bad on motion in arrest of judgment, because the facts stated did not raise the duty, a breach of which was complained of, and that the express allegation of duty would not aid. *Seymour v. Maddox,* 16 Q. B. 326; 15 Jur. 723; 20 L. J. Q. B. 327.

[2] Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbour (Roll. Abr. 105; 2 id. 565, pl. 7; Dyer, 372, b), unless one proprietor has acquired a right or title, by grant or prescription, to have the boundary fence between his close and that of the adjoining proprietor maintained and repaired at the expense of such adjoining proprietor.

If one landowner is bound to maintain and repair a fence for the benefit of the adjoining landowner, and cattle escape out of the land of the latter, and trespass upon the land of the party who ought to have kept up the fence, it is no excuse that the fences were out of repair if the beasts were trespassers in the place from whence they came.

Cattle of the plaintiff were being driven

(*h*) *Polluting and Defiling Springs, Streams, &c.*[1] *See* also *post*, River; Watercourse.

(*i*) *Projections over adjacent Buildings.*[2]

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along a road in the dark; some of them strayed into a field of the defendant's through a gap in the fence. The driver went on with the rest, and put them in a place of safety, and then returned to take those which had strayed, but which the defendant by that time had distrained. The defendant, in an action of trespass for the taking, pleaded that he had distrained the cattle damage feasant, and that he had not distrained until a reasonable time had elapsed to remove them:—*Held* (*dissentiente*, *Bramwell*, *B.*), that a reasonable time meant not merely a reasonable time for the act of removal, but what was reasonable under all the circumstances of the case, and that this was for the jury to determine. *Goodwyn v. Cheveley*, 28 L. J. Ex. 298.

[1] The proprietor of land has a right to have the natural streams of water which run through his land run in their natural course, and in their natural state, according to the maxim of the law: *Aqua currit et debet currere, ut currere solebat.* *Wood v. Waud*, 3 Ex. 748, 755; vol. i. p. 425. He has also a right to use it as it passes. *Mason v. Hill*, 5 B. & Adol. 17. *Embrey v. Owen*, 6 Ex. 369.

All riparian proprietors have these rights, and the right of each is subject to the same rights as the others. *Embrey v. Owen*, *supra.*

A riparian proprietor is entitled to an action for any injury to such natural or acquired rights, as by diverting the stream, or obstructing the water, or by fouling the water. And he is entitled to nominal damages in such an action, in order to prevent the injury, although no actual loss be in fact sustained. *Wood v. Waud*, *supra.* *Embrey v. Owen*, *supra.*

A. has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates, and thence passes through the contiguous soil of B., below the surface, without producing visible injury. B. builds a new house on his land, below the level of his soil, in the current of the percolating water:—*Held*, that A. cannot justify filling his channel if the percolating water thereby injures the house of B. *Cooper v. Barber*, 3 Taunt. 99.

The declaration stated that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down to a ditch at the back thereof. The evidence was, that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden and fell into the ditch, and obstructed it:—*Held*, that this was a fatal variance. *Fitzsimons v. Inglis*, 5 Taunt. 534.

If a man in his own soil do anything which is a nuisance to another, as by stopping a rivulet and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. *Raikes v. Townsend*, 2 Smith, 9.

The defendants, calico-printers, had for many years been in the habit of using the water of a brook, for the purposes of their works. Arsenite of soda had latterly been used in large quantities in the process of dyeing calico, and arsenic from the defendant's works was traced in the mud of the reservoir of the Stockport Waterworks Company, which was eleven miles below the defendants' works, and also in the water supplied by them to the town. The company gave evidence that the defendants might have prevented the arsenic from escaping if they had constructed a large settling reservoir below their works. The witnesses were cross-examined to show that this would have been very expensive, but the defendants gave no evidence as to the mode in which they carried on their works. In answer to a question put by the judge, the jury found that the defendants' trade was a lawful trade, carried on for the purposes necessary or useful to the community, in a reasonable and proper manner, and in a reasonable and proper place:—*Held*, that there was no evidence that the defendants' trade was carried on in a reasonable and proper manner, and in a proper place. *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160.

[2] It is an actionable nuisance if an adjoining occupier constructs a cornice, or forms a spout or any projection which occasions a fall of water to descend on his neighbour's house or land. *Penruddock's case*, 5 Co. 205. *Baten's case*, id. 96.

A declaration in case stated that the defendants, being possessed of a messuage adjoining a garden and messuage of the plaintiff, placed a cornice upon his messuage, projecting over the plaintiff's garden, by means whereof quantities of rain flowed from the cornice on to the garden, and did damage, and by reason of the premises the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his garden and messuage, and the same were damaged and deteriorated in value:—*Held*, that the projection in itself was a nuisance, from which the law inferred a damage, and that the plaintiff was entitled to maintain his action in respect of that alone, even though no rain had fallen; and that the statement of damage in the declaration was not confined to damage from the

(*l*) *Removing adjoining Buildings or adjacent Land, and omitting to take care to prevent Injury.*[1]

rain; and that the declaration did not disclose a trespass, and therefore preclude the plaintiff from recovering in respect of the general injury:—*Held*, also, that the court will take judicial notice that rain falls, and after the lapse of some time, in the absence of evidence that none has fallen, will presume there has been rain. *Fay v. Prentice*, 14 L. J. Rep. (N. S.) C. P. 298; 1 C. B. 828.

[1] It is a good ground of action that a next-door neighbour conducts himself so negligently and unskilfully in pulling down his own wall, or excavating his own ground, as by reason thereof to injure his neighbour's wall. *Trower v. Chadwick*, 3 Bing. N. C. 334; 3 Scott, 699; 2 Hodges, 267. *Dodd v. Holme*, 1 Ad. & E. 493; 3 Nev. & M. 739. *Buckle v. Christ's Hospital*, 4 Man. & G. 714; 5 Scott, 79. Therefore where, in 1803, the plaintiff's house was built against the pine-end wall of the defendant's house by permission; in 1829 the defendant made an excavation in a careless and unskilful manner in his own land, near to his pine-end wall, by which he weakened his pine-end wall, and consequently injured the house of the plaintiff:—*Held*, that an action on the cause was maintainable for this injury. *Brown v. Windsor*, 1 C. & J. 20.

The declaration alleged that the plaintiff was possessed of a messuage, &c., belonging to and supporting which there were certain foundations which the plaintiff had enjoyed, &c., and ought, &c. to enjoy. On evidence it appeared that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant. This was held to be no objection. *King v. Wilkinson*, 3 Stark. 162. But the possessor of a house which is not ancient cannot maintain an action against the owner of adjoining lands for digging away that land so that the house falls in; and therefore, where a declaration stated that A. was lawfully possessed of a dwelling-house adjoining to a dwelling-house of B., and that B. dug into the soil and foundation of the last-mentioned house, so negligently and near to the house of A. that the wall of the latter house gave way, on demurrer to so much of the declaration as alleged the digging so near, &c., the defendant had judgment (*Wyatt v. Harrison*, 3 B. & Adol. 871); though if it had appeared that the plaintiff's house was ancient, or if the complaint had been that the digging occasioned a falling in of soil of the plaintiff, to which no artificial weight had been added, *quære*, whether an action would not have lain? (Id.)

Two persons having adjacent lands: the one built a house at the extremity of his land; the other afterwards excavated his own soil near to, but without touching, the ground so built upon. *Quære*, whether the party making such excavation is bound to see that his neighbour's foundations do not thereby become weakened; and whether, if they be so, he is guilty of an actionable negligence in having so used his own soil without protecting that of his neighbour, although no negligence be shown in the mode of carrying on the work? *Dodd v. Holme*, *supra*. Supposing him not liable in the case of a newly-built house, *quære*, whether he would be so if the house had stood so twenty years before the excavation was made? (Id.) But where it is alleged and proved that the defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured, an action lies; and although it be shown that the house was infirm and could at all events have stood only a few months, still the plaintiff may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and in determining the question of negligence, the jury ought to consider the state of the plaintiff's house. (Id.)

A. and B. were the owners of adjoining lands, and the house of A. had, for more than twenty years, been supported by the adjoining land of B., who dug a foundation for some intended buildings so near the house of A. that it fell:—*Held*, that if A.'s house had been so supported that both parties knew it, the plaintiff had a right to such support as an easement, and that the defendant could not withdraw that support without being liable in damages for any injury that the plaintiff might sustain thereby, which damages should be such as to put the plaintiff in the same state in which he was before; but the jury ought not to give him a new house for an old one. *Hide v. Thornborough*, 2 C. & Kir. 250.

Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested, it was held that the party giving notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey v. Goyder*, 4 C. & P. 161.

In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury (*Walters v. Pfeil*, M. & M. 362); but only to such sum in damages as was the value of the old house,

(*m*) *Removing Chattels wrongfully placed on a Party's Land.*[1]

(*n*) *Reversion, Nuisance affecting the.*[2]

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and not the whole expense of building a new one. *Lukin v. Godsall*, Peake's *Add. Cas.* 15: *Kenyon.*

An action lies against a party for so negligently constructing and keeping a hayrick on the extremity of his land, that in consequence of its spontaneous ignition his neighbour's house is burnt down. *Vaughan v. Menlove*, 3 Bing. N. C. 468; 4 Scott, 244; 7 Car. & P. 525; 3 Hodges, 51; 1 Jur. 215. *See* vol. iv. p. 465.

[1] One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance (*Forsdick v. Collins*, 1 Stark. 173: *Ellenborough*); and such removal supersedes the necessity of proving a formal demand in an action for trover. (Id.) *Semble*, that a copyholder has a right to remove from off his land stones or other things which by any convulsions of nature are thrown upon it during his tenancy. *Dearden v. Evans*, 5 Mee. & W. 11; 2 Horn. & H. 7; 3 Jur. 703.

A copyholder, or any other tenant, may remove stones from off his land, when they impede the necessary progress of agriculture (Id.) *See post*, Trespass; and vol. i. p. 5.

[2] A reversioner may maintain an action for a nuisance which produces no present injury beyond that to his reversionary right, and which may be removed before the reversion comes into possession. *Shadwell v. Hutchinson*, M. & M. 350; 4 Car. & P. 333. *Boxten v. Taylor*, 4 B. & Adol. 72. *Jesser v. Gifford*, 4 Burr. 2141. *Marker v. Kenrick*, 13 C. B. 188; 22 L. J. C. P. 129. But he cannot maintain an action against a stranger for merely entering upon his land, held by a tenant on lease, though the entry be made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion. (Id.)

It is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Egremont v. Pulman*, M. & M. 404: *Tindal.*

The erection on the defendant's house of eaves, and a pipe overhanging and conducting water on land in the occupation of a tenant, is a permanent injury, which gives a right of action to the reversioner. *Tucker v. Newman*, 3 Per. & D. 14; 11 Ad. & E. 40; 3 Jur. 1145.

Plaintiff having demised a cottage without exception of mines: — *Held*, that he might sue in case for an injury occasioned to the cottage by a stranger who had excavated coals, though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house in the occupation of plaintiff. *Raine v. Alderson*, 4 Bing. N. S. 702; 6 Scott, 691. *See* 1 Amb. 329.

If the plaintiff declare as a reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion, otherwise the omission of such allegation will be cause for arresting the judgment. Therefore, where the plaintiff declared as a reversioner of a yard, and part of a wall, which W. F. occupied as tenant to him, and that the defendant on, &c., and on divers days, &c., wrongfully placed on the said part of the wall quantities of bricks and mortar, &c., and thereby raised it to a greater height than before, and placed pieces of timber, &c., on the said wall overhanging the yard, *per quod* the plaintiff during all the time lost the use of the said part of the wall, and also, by means of the timber, &c., overhanging the yard, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and the said part of the wall have been injured, to the damage of the plaintiff, &c. Without stating that his reversion was prejudiced, the court arrested the judgment. *Jackson v. Pesked*, 1 M. & S. 234. *Metropolitan Association v. Patch*, 27 L. J. C. P. 330. Injury to reversion in personal chattels, 28 L. J. Ex. 362.

Where, in an action by the reversioner against the tenant of a house for opening a door in a wall without the consent of the plaintiff, and thereby damaging the house and prejudicing the plaintiff's reversionary interest, the opening of the door is proved, and all actual damage is disproved, the jury should be directed to inquire whether the reversionary interest of the plaintiff has or has not been injured. A nominal verdict entered for the plaintiff without such direction or inquiry, on the ground that the defendant had no right to make the alteration, was set aside. *Young v. Spencer*, 5 M. & R. 47; 10 B. & C. 145.

The reversionary interest of the plaintiff might be injured, although the house itself was not. (Id.)

A declaration by reversioners stated that certain buildings and closes of land were in the occupation of A. and B. as tenants to the plaintiffs, the reversion belonging to them; that the defendant so negligently, and without leaving proper support, worked certain mines near and contiguous to the premises, and dug minerals out of the mines near and contiguous to the buildings and closes, whereby portions of the buildings became injured, and the ground on which the buildings stood, and the closes, swagged and gave way: — *Held*, on motion in arrest of judgment, that the declaration was good. That as it did not appear that the soil on which the mines were belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *primâ facie* a wrongdoer, and that it was unneces-

(*o*) *Rivers, Towing-Paths, &c., Obstructions to, &c.*[1]

(*q*) *Ruinous Buildings, &c.*[2]

(*t*) *Smells, Noisome, affecting the Air, or Injurious to Health.*[3] *See post,* Trades, p. 10.

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sary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jeffries v. Williams*, 5 Ex. 792; 20 L. J. Ex. 14. So, a declaration by a reversioner, after stating that he had a right of way for the tenants of his close over the close of the defendant, averred that the defendant wrongfully locked, chained, shut, and fastened a gate across the way, by means of which the premises of the plaintiff was injured: — *Held*, upon motion in arrest of judgment, that the declaration disclosed a good cause of action. *Kidgell v. Moor*, 9 C.B. 364; 14 Jur. 790; 19 L.J.C.P. 177.

[1] Where A. places any obstruction in the bed of the river, which deprives another of his right of free passage along it, he is liable to an action for the private and particular injury to the individual. *Rose v. Groves*, 6 Scott, N. R. 653; 12 L. J. C. P. 251; 5 Man. & G. 613. See *Dimes v. Petley*, 15 Q. B. 276. *Mayor of Colchester v. Brooks*, 7 id. 377.

Where, in a public navigable river, a decked barge, or dummy, was firmly moored alongside a quay, so as to be a private nuisance to persons having a right to land from the river on the quay, if it be so fixed as not to be readily abateable, any such person may pass over such dummy in order to get to the quay, there being no other route available, where, in so passing over it is not more injurious to the owners of it than the removal would be, and especially if to have removed it would have caused such person injurious delay in his affairs and business. *Eastern Counties Railway Co. v. Dorling*, 5 C. B. (N. S.) 821; 5 Jur. N. S. 869; 28 L. J. C. P. 202. But he is not entitled so to use the barge as a means of passage except in such states of the tide as, but for the barge, would have enabled him to land directly on the quay, and when the barge is, therefore, an obstruction and nuisance to his right of way. (Id.)

To a declaration charging the defendant with breaking and entering upon a dummy, or landing-stage of the plaintiff, the same being his barge, moored to a wharf on the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships or vessels against the same, the defendant pleaded that the Orwell was a public and common navigable river, and common highway; that he had a right to land, and was desirous of landing, passengers from his steam-vessel at the wharf; that the dummy, or landing-stage, at the time when, &c., was permanently moored and fixed alongside the wharf, so that his passengers could not embark or disembark there without his vessel being moored thereto, and his passengers passing over the same: —*Held*, a sufficient answer to the declaration, the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it. (Id.) See *Mayor of Colchester v. Brooks*, *supra*.

Issue having been taken upon the above plea, the cause went down to trial, when it appeared that the dummy was moored to the wharf so as to rise and fall with the tide; that vessels could not, if the dummy had not been there, have approached the wharf at low water; and that the defendant claimed the right of landing at all times over the dummy: — *Held*, that if the plaintiff had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if the dummy had not been there, he should have now assigned. (Id.) See *White v. Crisp*, 10 Ex. 312; 23 L. J. Ex. 317.

[2] *Primâ facie* the occupier of premises is liable to any persons injured by their being in a ruinous or dangerous state, however temporary his interest may be (*Reg. v. Watts*, 1 Salk. 357); and the landlord is responsible to the public, and the occupiers and proprietors of the adjoining property, if he demise houses which are in a ruinous state, and dangerous to the neighbourhood, either from original faulty construction, or from want of proper and timely repair. *Rex v. Pedley*, 1 Ad. & E. 822. But if the houses or buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighbourhood, the landlord is not, it seems, responsible for the nuisance, unless he has taken upon himself the burden of repairing and maintaining the premises during the existence of the lease (*Payne v. Rogers*, 2 H. Black. 349. *Leslie v. Pounds*, 4 Taunt. 648), or had renewed the lease after the houses had become ruinous and in danger of falling. Add. Torts, 85.

[3] Although there is a general similarity between the elements of light and air on the one hand, and running water on the other, as the subjects of qualified ownership, the marked distinction is, that the former have no owner until appropriated, while the latter, as incident to the land over and through which it flows, belongs in a qualified sense to the owners of such land, and cannot therefore be appropriated by one to the exclusion of others. *Per Story, J., Tyler v. Wilkinson*, cited 2 Hill. on Torts, 112. Every occupier has at common law a right to wholesome and untainted air. See *Hole v. Barlow*, *ante*, p. 4. *Elliotson v. Teethins*, 2 Bing. N. S. 134. *See* remarks of *Byles, J.*, in *Hole v. Barlow*.

(*v*) *Steam-Engines, &c. adjacent to Buildings, Public Ways, &c.*[1]

(*w*) *Sewers, Drains, and Watercourses.*[2]

(*x*) *Thoroughfares, Obstructing.*[3] *See* also *post*, p. 16.

(*y*) *Trades, Noxious and Offensive.*[4]

III. Remedies for.

(A) *By Abatement.*[5] *See* also vol. i. p. 4; and as to Notice to Abate, *see* id. p. 5.

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[1] A spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cartlodge and set it on fire, and the fire communicated to several other farm buildings and totally destroyed them; it was held that the very occurrence of the disaster was *primâ facie* proof of negligence on the part of a company and their servants having the management of their engine, rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks. *Piggot v. Eastern Counties Railway Co.* 3 C. B. 229. *Aldridge v. Great Western Railway Co.* 3 Man. & G. 515. See *Jillites v. Pluppard*, 11 Q. B. 347.

[2] The occupier, and not the owner, of premises, is *primâ facie* liable to the repair of the drains and sewers.

Where, therefore, a declaration stated the defendant to be the owner and proprietor of divers drains and sewers, &c., and charged, that by reason thereof, as such owner and proprietor, he ought to have kept cleansed and repaired the drains and sewers, but neither alleged that he was in the occupation of the premises nor showed the reason of his liability, this court held the declaration bad on general demurrer. *Russell v. Shenton*, 11 L. J. Rep. (N. S.) Q. B. 289; 3 Q. B. 449; 2 Gale & D. 573. *Alston v. Grant*, 3 E. & Bl. 128. *Cawkwell v. Russell*, 26 L. J. Ex. 35.

In an action for a nuisance occasioned by drains on the premises belonging to defendant, and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the owner and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so:—*Held*, after pleading over, that the declaration was bad, as it did not show that the defendant was the occupier of the premises, and the nuisance was not shown to be of a permanent or continuing character. *Russell v. Shenton*, 2 Gale & D. 573; 3 Q. B. 449; 6 Jur. 1059.

A., the owner of premises, caused a drain to be made on them, and the soil removed was placed on the highway near the spot, by the workmen employed by B., whom A. engaged to make the drain. In an action on the case against A., by a party who was thrown out of his cart in consequence of its passing over the heap, and so injured:—*Held*, that it was not necessary to render A. liable that B. should be his servant, and that A. could not complain that the judge on the trial directed the jury to consider, on the evidence, whether he had parted with all control over the making of the drain and the removal of the soil. *Burgess v. Gray*, 14 L. J. Rep. (N. S.) C. P. 184; 1 C. B. 578.

[3] Where an omnibus company headed and tailed the omnibus of a private individual with the company's omnibuses, and obstructed the highway with their vehicles, so as to create a nuisance and interrupt the free passage of the thoroughfare, it was held that the omnibus company was responsible in damages to the private omnibus proprietor, who had been wilfully delayed and impeded in the exercise of his right to pass along the public highway. *Green v. London General Omnibus Co.* 35 L. T. (N.S.) 185.

[4] Carrying on a lawful trade in the ordinary and obvious manner is not necessarily carrying it on in a proper manner. *Stockport Waterworks Co. v. Potter*, 7 Jur. N. S. 880; 31 L. J. Ex. 9.

The erection of a tobacco-mill near to the house of another:—*Held* to be a nuisance, and actionable. *Stigan v. Hutchinson*, 2 Selw. N. P. 1105: *Kenyon.*

A defendant having discharged arsenic and other injurious matter from his works into a stream, which he might have avoided doing by certain expedients:—*Held*, that he could not defend himself in an action arising therefrom by showing that his trade was a lawful trade carried on in a proper manner. (Id.)

When this defence is attempted, it lies on the defendant to show that the trade is a lawful trade, and not on the plaintiff to show that it is not. (Id.)

In an action for a nuisance created by a fellmonger's yard and business, the following questions were left by the judge to the jury: 1st. Was the plaintiff's enjoyment of his property sensibly diminished by the nuisance, if any, caused by the defendant? 2d. Is the trade of a fellmonger a proper trade? 3d. Was it carried on in a proper manner? and 4th. Was it carried on in a proper place? *Pinckney v. Ewens*, 4 L. T. (N. S.) 741. *See ante*, pp. 3, 4.

The law not only allows an action for damages, but also provides, as we have seen (*ante*, vol. i. p. 4), the remedy, by abatement or compulsory removal of the nuisance itself.

[5] The principle is well defined and of general application, that a private individual

(B) *By Action.*

(*a*) *Parties to.*[1]

cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him some special injury. *Dimes v. Petley*, 15 Q. B. 276; 19 L. J. Q. B. 449. *Lord Campbell's* judgment, id. 452. *Mayor of Colchester v. Brook*, 7 Q. B. 339. *Bateman v. Bluck*, 21 21 L. J. Q. B. 406. And in *Doves v. Mann*, 10 Mee. & W. 546, where an action was brought against a defendant for negligently driving against an ass that had strayed into a highway and injuring it, it was held no answer to show that the animal was unlawfully there, and an obstruction of the thoroughfare, unless proper care were taken to avoid injuring the animal.

[1] The original erector of a nuisance is liable in damages to the party injured for every continuing nuisance; and it makes no difference that the injured party has the power himself of abating the nuisance, or that the original erector has no means of removing it.

A building, which was an obstruction to a market, was erected under the superintendence and direction of the defendants, on land belonging to a corporate body, of which they were members. The then owner of the market afterwards demised it to the plaintiff:—*Held*, that the plaintiff might maintain an action against the defendants as for a continuing nuisance. *Thompson v. Gibson*, 10 L. J. Rep. N. S. Ex. 330; 7 Mee. & W. 456; 9 Dowl. P. C. 717.

The term "owner," as well as that of "proprietor" of premises, may mean one who has the whole legal interest in the premises, so that no one else has any estate in possession or reversion; or it may mean one who has a subsisting estate at the time of the wrong complained of, or one who is the owner of the whole or of some interest, as distinguishable from that of tenant in possession. *Chauntler v. Robinson*, 4 Ex. 163; 19 L. J. Ex. 170. Hence, an action lies against an owner of premises who lets them in a ruinous and dangerous condition, and who causes or permits them so to remain, until, by reason of the want of reparation, they fall upon and injure the house of an adjoining owner. *Todd v. Flight*, 9 C. B. (N. S.) 377; 30 L. J. C. P. 21; 7 Jur. N. S. 291. *Chauntler v. Robinson, supra.*

A person who lets premises with a nuisance upon them and subsequently receives rent, is liable for the continuance of the nuisance. *Rex v. Pedley*, 3 Nev. & M. 627; 1 Ad. & E. 822. But a landlord is not liable in respect of a new nuisance created by his tenant during the term. (Id.)

Where a landlord lets premises, the natural consequence of the regular use of which is that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use. (Id.) The landlord ought in such case either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose. (Id.)

The defendants employed A. for a sum of money to fill in the earth over a drain constructed for them across a highway from their house to the common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A. filled in the earth, but left it so heaped above the level of the road that, there being neither light nor signal, the plaintiff by night drove his carriage against it and sustained injury therefrom. The only evidence of interference or control on the part of the defendants was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained:—*Held*, that there was no evidence to go to the jury of the liability of the defendants, for, that the wrong complained of was a public nuisance by A., which the defendants (whether A. were their servant or only a contractor) had not authorised him to commit, having merely directed generally the doing of a thing which might have been done without committing a public nuisance. *Peachey v. Rowland*, 13 C. B. 182; 17 Jur. 764; 22 L. J. C. P. 81. S. P. *Ellis v. Sheffield Gas Consumers' Co.* 2 E. & B. 767.

If A. by the direction of B. build a wall on the lands of C., C. cannot maintain an action on the case against B. for the continuance of the wall. And it seems that if A., in building a house on his own land, encroach on the adjoining land of C., and dispose of his interest in the house to B., C. cannot maintain an action on the case against B. for the continuance of the wall. *Coventry v. Stone*, 2 Stark. 534: *Abbott.*

A., the owner of a house, with a fireplace and chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney the emission of the smoke was a nuisance to B., the occupier of an adjoining house. More than one week elapsed, during which this nuisance continued, and A. did not determine the tenancy. B. brought an action against A. for causing and continuing this nuisance, to which A. pleaded not guilty, and not possessed:—*Held*, that on both issues A. was entitled to the verdict.

1. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession.

2. If the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; so if he be a party to the creation of a nuisance after the demise: but he

is not responsible for a nuisance so created, though such nuisance be a probable consequence of the user of the land as demised.

3. An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises so as to make him responsible for such nuisance. *Rich v. Basterfield*, 16 L. J. Rep. (N. S.) C. P. 273; 4 C. B. Rep. 783; 2 C. & Kir. 259.

[1] In an action by the tenant in possession against a wrongdoer, it is sufficient to declare generally, without disclosing any title. *Grimstead v. Marlow*, 4 T. R. 717.

The plaintiff, in 1822, had a remainder in fee in a wharf, expectant on a tenancy for life of his father. The defendants in that year dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf. In 1823 the plaintiff's father died, and in 1824 the action of the water on the wall had undermined it so far that it fell:—*Held*, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. *Gillon v. Boddington*, 1 C. & P. 541; R. & M. 161: *Abbott.*

In declaring for a nuisance, the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation that, by means of the premises, the noxious matter damaged the plaintiff's house, it is not competent to give evidence of the intermediate causes. *Fitzsimons v. Inglis*, 5 Taunt. 534.

A count in the declaration which states the plaintiffs' possession of a messuage adjoining to and abutting on a public navigable river, and that by reason thereof the plaintiffs were entitled to the full and free use of the navigation of the said river, for the purpose of passing, &c., and of conveying their servants, goods, &c., from the said messuage, and that the defendant wrongfully placed planks and logs, &c., upon the said river, and upon that part of it which was near to the said messuage, and thereby prevented the plaintiffs from having the full use of the navigation of the river, *per quod* the plaintiffs had been put to expense in the conveyance of their servants, goods, &c., by a longer and less convenient route, discloses a sufficient ground of action at the suit of an individual. But a count which states that certain messuages were in the possession of tenants of the plaintiffs, and alleges a similar obstruction, and that the plaintiffs were injured thereby in their reversionary interest, is bad, as showing no act which *per se* imported any damage to their reversionary interest; and a verdict having been entered generally for the plaintiffs on a declaration containing both counts, and the jury having found no damages on the count alleging their possession of the messuages:—*Held*, that the judgment ought to be arrested generally. *Dobson v. Blackmore*, 16 L. J. Rep. (N. S.) Q. B. 233; 9 Q. B. Rep. 991; *ante*, p. 8.

In a declaration, each count alleged that the plaintiff was possessed of a dwelling-house, and the defendant of coal-mines lying near to and under it, and that the dwelling-house was supported in part by land between the same and the mines, and that the plaintiff "of right was entitled to, and of right ought to have his dwelling-house so supported in part by the land, without the hindrance or disturbance of any person." The first count alleged that defendant "wrongfully and injuriously, and in so unskilful, careless, negligent, and improper a manner worked and excavated" the mines, that the land by which the house was in part supported was disturbed and withdrawn, and the support of the house injured and destroyed, and the foundation of the house gave way. The second count alleged that the defendant wrongfully and injuriously made holes, excavations, and cuttings in, and loosened and disturbed, and removed a great part of the land by which the dwelling-house was in part supported, whereby the support of the house was injured:—*Held*, after verdict, a bad declaration, for not stating the grounds on which plaintiff was entitled to have his house supported by the land above the mines. *Hilton v. Whitehead*, 12 Q. B. 734.

The venue is local. *Warren v. Webb*, 1 Taunt. 279. *Jeffries v. Duncomb*, 11 East, 226.

[2] "Not guilty" denies that the defendant carried on the trade or did the act in such a way as to be a nuisance, and that the plaintiff suffered the alleged damage from it. R. 16, T. T. 1853.

In an action for constructing a cesspool near a well, and thereby contaminating the water of the well, it denies both the fact of the construction of the cesspool and that the water was thereby contaminated. *Norton v. Scholefield*, 9 Mee. & W. 665.

Under this issue the defendant cannot assert a right to make the alleged nuisance, as by an user for twenty years, but must plead it specially. *Flight v. Thomas*, 10 Ad. & E. 590.

In an action by a reversioner for an injury done to his reversion to land (*see ante*, p. 8), it denies the injurious act of the defendant, and the damage thereby caused to the reversion. *Young v. Spencer*, 10 B. & C. 145. *Redgill v. Moor*, 9 C. B. 365.

In an action for waste by non-repair, it puts in issue only the want of repair, and not the wrongfulness of it. *Bacon v. Smith*, 1 Q. B. 345, 346.

In an action for a nuisance in carrying on the business of a tallow-chandler in a mes-

suage adjoining the messuage of the plaintiff, it is no plea that the defendant is possessed of his messuage, and the business was carried on there three years before the plaintiff became possessed of and occupied the adjoining messuage. *Bliss v. Hay*, 4 Bing. N. C. 183; 5 Scott, 500; 6 Dowl. P. C. 442; 1 Arn. 19; 2 Jur. 110. *Byles, J.*: "It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover; that, however, is not the law now." 27 L.J.C.P.208.

So, declaration in case for causing offensive stenches to come over the plaintiff's land, the defendant pleaded that he occupied premises adjoining those of the plaintiff, and for twenty years next before the commencement of the suit had enjoyed of right, and without interruption, the benefit of using a mixen on his own premises, near to premises of plaintiff; that thereby stenches unnecessarily arose, and that in using the mixen at the times when, &c., stenches necessarily arose, which were the grievances complained of:—*Held*, that the plaintiff was entitled to judgment *non obstante veredicto*, as the plea did not state the stenches had for twenty years passed over the plaintiff's land. *Flight v. Thomas*, 2 Per. & D. 531; 10 Ad. & E. 590; 7 Dowl. P. C. 741; 3 Jur. 822.

In case for a nuisance, the declaration stated that the plaintiff was possessed of a term of years in a messuage, and that he was disturbed in its enjoyment by the alleged nuisance. The defendants pleaded that they were possessed of their workshop and manufactory (the nuisance complained of) for ten years before the plaintiff became possessed of his term. The plaintiff replied, that the term he held the residue of was created four years before the defendants were possessed of their said workshop and manufactory:—*Held*, on demurrer, that the plea was bad. The defendants should have alleged an user for twenty years. *Elliotson v. Teetham*, 2 Scott, 174; 2 Bing. N. C. 134; 1 Hodges, 259.

A., the owner of a house with a fireplace and chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney the emission of the smoke was a nuisance to B., the occupier of an adjoining house. More than one week elapsed during which this nuisance continued, and A. did not determine the tenancy. B. brought an action against A. for causing and continuing this nuisance, to which A. pleaded not guilty, and not possessed:—*Held*, that on both issues A. was entitled to the verdict. *Rich v. Batersfield*, 2 C. & Kir. 257; 4 C. B. 783; 11 Jur. 696; 16 L. J. C. P. 273.

A declaration stated that a messuage was in the occupation of T. S., as tenant to the plaintiff, the reversion belonging to the plaintiff, and that the defendant was owner and proprietor of another messuage, and by reason thereof as such owner and proprietor of such messuage ought to have repaired in a substantial manner the messuage secondly mentioned. *Breach*, non-repair by the defendant. *Plea*, that the messuages were contiguous to and abutting on each other, and were divided by a party-wall, whereof the plaintiff was seised of an undivided moiety; that the wall was in a ruinous state, and being parcel of the messuage in the declaration secondly mentioned, had fallen on the first-mentioned messuage. *Replication*, traversing that the wall was a party-wall, and that the plaintiff was seised thereof:—*Held*, that the replication was good. *Chauntler v. Robinson*, 4 Ex. 163; 19 L. J. Ex. 170.

[1] The plaintiff must prove that the nuisance was caused by the defendant, or by some person for whom he is responsible (*Knight v. Henderson*, 20 L.J.Ex. 9. *Peachey v. Rowland*, *ante*, p. 11. *Holloway v. St. Leonards*, 30 L. J. C. P. 361), and sustain any allegations in the declaration which have been traversed. In general, proving the plaintiff to be in actual possession establishes an apparent right, and if not denied by plea, the possessory right of the plaintiff is admitted.

An averment that the plaintiff's close at the time of the injury was in the occupation of I. V. and H. V., is sufficiently proved if, at the time of the injury, it was in their occupation, though the tenancy be since changed before action brought. *Vowles v. Miller*, 3 Taunt. 137.

A notice to remove the nuisance left at the premises is evidence against a subsequent occupier. *Salmon v. Bensley*, R. & M. 189: *Abbott*.

Upon a declaration for negligence in pulling down a house adjoining the plaintiff's house, without shoring up the latter, whereby it fell, the plaintiff cannot recover without evidence from which a grant of a right to the support of the adjoining house can be inferred. *Peyton v. St. Thomas's Hospital*, 4 M. & R. 625; S. C. nom. *Peyton v. London* (*Mayor, &c.*), 9 B. & C. 725; 3 C. & P. 363. See *Partridge v. Scott*, 3 Mee. & W. 220.

First count, injuring plaintiff's reversion in land, by cutting and carrying away branches from trees growing on it. Second count, in trover for the branches. Proof that plaintiff demised the land to a tenant by a written agreement not produced, and that defendant carried away some branches, the value of which was not shown:—*Held*, that plaintiff could not support the first count without producing the written agreement, but that on the second count he was entitled to nominal damages. *Cotterill v. Hobby*, 6 D. & R. 551; 4 B. & C. 465. So, in an action for an injury done to the plaintiffs' reversion. They proved that they were tenants in common under a demise, and a witness stated that he occupied part of the premises under both plaintiffs, and that he

had at first an agreement in writing, which he signed, and another witness said that he occupied under one of the plaintiffs only, and that he did not know the other:—*Held*, that there was sufficient evidence to go to the jury of a tenancy by both the occupiers under both the plaintiffs (*Strosner v. Burr*, 2 M. & P. 207; 5 Bing. 136). But *quære*, whether it was not incumbent on the plaintiffs to produce the agreement, in order to show the nature of their reversion. (Id.)

In an action on the case for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of one S. P., as tenant thereof to the plaintiff. It was proved that the house had been let to S. P. by a *cestui que trust*, to whom she had paid rent, the plaintiff being his trustee:—*Held*, to be no variance, as the legal estate was in the plaintiff; and the *cestui que trust* was to be considered as his agent or bailiff. *Vallance v. Savage*, 5 M. & P. 1; 7 Bing. 595.

On the trial of an issue "whether (during a certain period) there arose from the works of the defendants noisome, offensive, noxious, or unwholesome smoke and other vapours, to the nuisance of the plaintiff, whereby the produce of his garden was deteriorated," evidence was adduced for the plaintiff to show that the smoke and other vapours from defendant's works had injured the produce of other grounds in the neighbourhood, and also for the defendants to show that their works did not injure the produce of any other ground; and one of the defendants' witnesses having, on his examination in chief, described several gardens in the neighbourhood of the works as in the utmost health, was asked, in cross-examination by plaintiff's counsel, if he knew Glasgowfield (grounds in the neighbourhood) and having answered that he "knew Glasgowfield, and never knew of any damage done there," he was then asked "whether he had known of any sum having been paid by the defendants to the proprietors of Glasgowfield for alleged damage there occasioned by their works:"—*Held*, by the House of Lords, that the question was inadmissible, as leading to a new collateral inquiry which answered either way, and could not affect the issue or test the credit of the witness. If he answered that money had been paid, the payment would not be proof of damage done, as it might have been paid to buy peace. *Tennant v. Hamilton*, 7 Clark & Fin. 122.

In an action for a nuisance, an architect acquainted with the locality may be asked if the nuisance depreciated the value of the houses in the neighbourhood. *Gauntlett v. Whitworth*, 2 C. & Kir. 720.

[1] Under the C. L. P. Act, 1854, s. 82, the plaintiff may at any time after action brought apply *ex-parte* to the court or a judge for a writ of injunction to restrain the defendant from the repetition or continuance of the wrongful act, or injury of a like kind, or relating to some property or right, and such writ may be granted or denied by the court or judge upon such terms as shall seem reasonable and just. *See* vol. v. p. 156.

In order to justify the interposition of a court of equity, there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance must occasion a constantly-recurring grievance, which cannot be prevented otherwise than by an injunction.

If works likely to become a nuisance are erected and subsequently carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not protected when injury arises from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works: and when an action has been brought and damages recovered, a court of equity will not restrain the execution to obtain payment of the amount, or prevent the plaintiff in the action from taking other proceedings at law. *Bankart v. Houghton*, 5 Jur. N. S. 282; 28 L. J. Ch. 473, R.

Where the comfort and enjoyment of a mansion were injured, and the trees planted and standing for ornament, and to exclude the view of unsightly objects from the mansion, were in some cases destroyed, and in many cases injured, by brick-burning, the court granted an injunction to restrain such brick-burning, as, although the defendant carried on the business complained of in order to execute a contract for the construction of the fortifications on Portsdown Hill, near Portsmouth, it appeared that the brick-burning might have been carried on elsewhere on the land in the defendant's occupation, without any inconvenience to the plaintiff, or without that degree of injury to the plaintiff which would entitle her to complain. *Beardmore v. Tredwell*, 31 L. J. Ch. 892: V. C. S. See *Walter v. Self*, 15 Jur. 416; 20 L. J. Ch. 433.

[2] A common nuisance is something done or omitted which, in its consequences, is an annoyance to all the queen's subjects generally. A private nuisance (*see ante*, p. 3) affects some individual in particular. Those that are the subject of criminal prosecutions are public nuisances only. The annoyance or neglect must be of a real and substantial nature; and the fears of mankind, though they may be reasonable, will not create a nuisance. By *Lord Hardwicke*, 3 Atk. 750.

Where the legislature declares an act to be a public nuisance, the person doing the act is indictable. *Reg. v. Crawshaw*, 9 W. R. 38; 3 L. T. (N. S.) 510, C. C. R.

By 10 & 11 Wm. 4, c. 17, lotteries not

(B) *Particular Instances.*

(*a*) *Animals, Dangerous or Infectious.*[1] *See* also vol. i. p. 356; *ante*, p. 4.
(*b*) *Bathing.*[2]
(*c*) *Brothels.* *See infra*, Disorderly House.
(*d*) *Common Scold.*[3]
(*e*) *Diseases, Spreading.*[4] *See* also Animals, vol. i. p. 352.
(*f*) *Disorderly Houses.*[5]
(*g*) *Disturbers of Public Worship.*[6]
(*h*) *Eavesdroppers.*[7]
(*i*) *Fireworks.*[8]

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specially sanctioned by act of parliament are declared to be public nuisances; and 42 Geo. 3, c. 119, contains a similar declaration with regard to lotteries called "little goes:"—*Held*, on motion in arrest of judgment on an indictment containing counts framed under these statutes for keeping a lottery, that the counts were good and the offence indictable. (Id.) And where an act of parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected it should be deemed a common nuisance; by another clause justices were empowered to convict the proprietor and occupier of such building: it was held that the party who erected a building contrary to the act might be indicted for a nuisance. *Rex v. Gregory*, 5 B. & Adol. 555.

[1] To permit a *furious* mastiff or bull-dog to go unmuzzled, or any animal of a known dangerous kind to go at large, is an indictable nuisance. 1 Russ. on Cr. 327; 3 Chit. C. L. 643. As to bulls, *see* vol. v. p. 520. Provisions are made by 11 & 12 Vic. c. 107 (continued by 21 & 22 Vic. c. 62, until 1st August, 1863), to prevent the spreading of contagious or infectious diseases among sheep, cattle, and other animals.

[2] It is an indictable offence for a man to undress himself on the beach, and to bathe in the sea near inhabited houses, from which he might be distinctly seen, although they had been recently erected, and until their erection it had been usual for men to bathe in great numbers at the place in question. *Rex v. Crunden*, 2 Camp. 89. *See* an elaborate inquiry as to the right of using the sea-shore for bathing in Hall on Seashores, p. 184, and *Blundell v. Caterall*, 5 B. & A. 268.

[3] *Communis rixatrix* is a nuisance, and may be indicted. The indictment need not set forth the particulars; it is sufficient to prove that the defendant was continually scolding, and a nuisance to the neighbourhood. *See* 1 Russ. on Cr. 327. *R. v. Cooper*, 2 Stra. 1246. *I'Anson v. Stuart*, 1 T. R. 754: *Buller, J.*

[4] Persons infected with the plague going abroad and infecting others (Jac. 1, c. 31, s. 7) are guilty of an indictable offence. So, unlawfully and injuriously to carry a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the queen's subjects (1 Hawk. P. C. c. 52, 53); or unlawfully to expose a person infected with a contagious disorder in a public highway. *R. v. Vantandillo*, 4 M. & S. 73. And it is also an indictable offence in an apothecary, after having inoculated children, unlawfully and injuriously to cause them to be exposed in the public streets or places of public resort, to the danger of the public health. *See* 4 Burr. 2116. *R. v. Burnett*, 4 M. & S. 272.

Persons inoculating, or otherwise producing small-pox, to be subject to one month's imprisonment. 3 & 4 Vic. c. 29. As to Vaccination, *see* 16 & 17 Vic. c. 100, and 3 Ad. & E. 552. By 4 & 5 id. c. 32, s. 2, the expenses of vaccination are to be paid out of the poor-rate.

[5] All disorderly inns or alehouses, bawdy-houses, gaming-houses, playhouses, unlicensed or improperly-conducted booths and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may therefore be indicted. 4 Bl. Com. 167.

It seems that the keeper of an inn may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns, or keep it in a place, in respect of its situation, wholly unfit for such a purpose: or inns, from their number and situation, may become nuisances; they may be suppressed, and the parties keeping them may at common law be indicted and fined. 1 Russ. 322; 1 Hawk. P. C. c. 78, s. 1; and *see* in Bac. Abr. Inns, &c. (A); and *see* also as to exorbitant prices, id. (C); 21 Jac. 1, c. 21.

[6] *See* 52 Geo. 3, c. 155, s. 12. *R. v. Hube*, 5 T. R. 542. *Williams v. Glenister*, 2 B. & C. 699. *R. v. Cheere*, 4 id. 902. *R. v. Hube*, Peake, 132.

[7] Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and are indictable and punishable by fine and finding sureties for their good behaviour. 4 Bl. Com. 167, 168; Burn's *Just.* Eavesdroppers.

[8] The making and selling of fireworks and squibs, or throwing them about in the street, is declared to be a common nuisance by stat. 9 & 10 Wm. 3, c. 7.

(*k*) *Gaming-House.* *See* vol. iv. p. 596.
(*l*) *Gunpowder.*[1]
(*o*) *Lewdness, and Indecent Exposure.*[2]
(*p*) *Lotteries.*[3]
(*q*) *Monsters, Exhibiting.*[4]
(*r*) *Stage Plays.*[5]
(*s*) *Steam-Engines.*[6]
(*t*) *Thoroughfares.*[7]
(*u*) *Trades, Offensive or Dangerous.*[8]

[1] Erecting gunpowder mills, or keeping gunpowder magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. *Rex v. Williams*, E. 12, W.; 1 Russ. on Cr. 321.

[2] All open lewdness grossly scandalous, is punishable by indictment at the common law, and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. 1 Hawk. P. C. c. 5, s. 4; 1 East, P. C. c. 1, s. 1. An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance. *Reg. v. Webb*, 1 Den. C. C. 338; 2 C. & K. 933. An omnibus is a public place sufficient to support the indictment. *Reg. v. Holme*, Dears. C. C. 207; Arch. C. P. 792. *See* 5 Geo. 4, c. 85, s. 4; and 1 & 2 Vic. c. 38, which make persons guilty of the indecent exposure of obscene prints, pictures, wounds, deformities, &c., punishable as rogues and vagabonds.

[3] By 10 & 11 Wm. 3, c. 17, s. 1, all lotteries are declared to be public nuisances (unless specially sanctioned by statute), thereby making the offence indictable, although the second section subjects the party to a penalty. *Reg. v. Crawshaw*, 1 Bell, C. C. 307; *ante*, p. 14.

[4] Exhibiting a being of unnatural and monstrous shape for money is a misdemeanor. *Harring v. Walrond*, 2 Ch. R. 110; 1 Russ. C. 326.

[5] Stage plays, unlicensed booths, and stages for rope-dancers, mountebanks, and the like, are deemed public nuisances.

[6] The furnaces of steam-engines, from being badly constructed or negligently used, may be public nuisances from the quantity of smoke and soot the chimneys emit. And by stat. 1 & 2 Geo. 4, c. 41, after reciting this, and that by law every such nuisance is abatable as such by indictment, enacts that the court in such a case may award costs to the prosecutor of such indictment, to be paid by the party convicted (sect. 1), and may also make an order for remedying the grievance by alteration of the furnace before passing final sentence upon the defendant. (Sect. 2.) But this act is not to extend to furnaces of steam-engines erected solely for the purpose of working mines, or in smelting, or manufacturing ores or minerals, adjoining to the premises where they are raised. (Sect. 3.)

By stat. 16 & 17 Vic. c. 128, further remedy is given for the smoke nuisance from furnaces in the metropolis.

[7] Vehicles standing in thoroughfares to unload for an unreasonable time, may be treated as a common nuisance. *R. v. Russell*, 6 East, 427. See *R. v. Cross*, 3 Camp. 227.

[8] Carrying on an offensive trade, which is an annoyance not merely to a few individuals (*R. v. Lloyd*, 4 Esp. 200) but to the whole neighbourhood, is also a public nuisance, and punishable upon indictment; and therefore a manufactory in which were made certain noisome and offensive liquors, called acid, spirit of sulphur, oil of vitriol, whereby the air was impregnated with very offensive smells, was holden to be a nuisance; and *Lord Mansfield*, *C. J.*, said that to constitute the offence it was not necessary that the smell should be unwholesome: it was sufficient if it rendered the inhabitants in the neighbourhood, and persons passing, uncomfortable, and hindered their enjoying life and property as fully as they otherwise could. *R. v. White*, 1 Burr. 333. But either rendering the air unwholesome, or the houses uncomfortable or untenantable, will make such a trade a public nuisance. *R. v. Davey*, 5 Esp. 217. So, if the smells created by it be offensive to the senses, though not unwholesome, it will be a nuisance. *R. v. Neil*, 2 Car. & P. 485. An acquiescence by the neighbourhood for fifty years to a person's carrying on such a noxious trade has been holden by *Lord Kenyon* to be a good defence to an indictment for continuing it. *R. v. Neville*, Peake, 93. And *Lord Tenterden* held that in such a case, if the party had extended his works, but by reason of an improved mode of working, not thereby added to the nuisance, he could not be indicted, although if he thereby added to it it would be otherwise. *R. v. Watts*, M. & M. 281. It is said to have been decided, that setting up a noxious trade in a neighbourhood where other such trades had long been borne with was not indictable, unless the inconvenience to the public were thereby greatly increased. *R. v. Neville*, Peake, 91. And if a party set up a noxious trade in a place remote from habitations and public highways, and afterwards new houses be built, and new roads made near it, he may lawfully continue the business, although it, in fact, be a nuisance to the persons inhabiting the new houses, or passing along the new roads. *R. v. Cross*, 2 Car. & P. 483. *See* the form of an indictment for this offence, and the evidence necessary to support it. Arch. P. & E. 767.

V. Remedies.

(A) *By Writ of Prohibition from Queen's Bench.*[1]

(D) „ *Indictment.*[2]

(*a*) *Nature and Form of.*[3]

(*b*) *Against Whom it may be preferred, and Proceedings thereon.*[4]

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[1] The court may, by a mandatory writ, prohibit a nuisance, and order that it shall be abated, and the party disobeying such writ, will be subject to an attachment. (*R. v. St. John's College*, Comb. 282; 1 Ld. Raym. 277); but the fact must be found either by matter of record, or by presentment, or by view of the judges. *Hall's case*, 1 Mod. 76.

[2] Although we have just seen that the Queen's Bench may prohibit a public nuisance, the usual course is by indictment, in which the nuisance should be described according to the circumstances, and it should be stated to be continuing if that be the fact. *Rex v. Stead*, 8 T. R. 142.

[3] An indictment for carrying on offensive works may state them to be carried on at a named parish. It is not necessary to state that they were conducted near a town or village. 1 Burr. 333. Stating them to be carried on adjoining a king's highway, and near the dwelling-houses of several persons, to the common nuisance of passengers and of the inhabitants, is sufficient. It need not be alleged how near to the highway or houses they were carried on. (Id.) The offence should be charged to be done *ad commune nocumentum*, "to the common nuisance of all the liege subjects," &c. Vin. Abr. Indictment (Q.), Nuisance, 13. *Prat v. Stearn*, Cro. Jac. 382. *Rex v. Hayward*, Cro. Eliz. 148. *Anon.* 1 Vent. 26; 2 Roll. Abr. 83; 7 Hawk. P. C. c. 75, ss. 3–5, and the authorities there cited. And *see* Bac. Abr. Nuisance (B). In *Rex v. Reynell*, 6 East, 315, there is an indictment for not repairing the fences of a churchyard, "to the nuisance of the inhabitants of the parish."

With regard to the venue, if an act done in one county prove a nuisance to another, the venue may be laid in either county. Stanf. b. 2–91; Arch. C. Pl. 29.

[4] If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. *Rex v. Pedley*, 1 Ad. & E. 822; 3 Nev. & M. 627.

If a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion, he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. *Per Littledale, J.*, id.

If A. employs another to do a lawful act, and he, in doing it, commits a public nuisance, he is not responsible. *Peachey v. Rowland*, 13 C. B. 182; 17 Jur. 764; 22 L. J. C. P. 81, S. P. *Ellis v. Sheffield Gas Consumers' Co.* 2 El. & Bl. 767.

But it is no defence for a master or employer that a nuisance is caused by the acts of his servants, if such acts are done in the course of their employment; for if persons for their own advantage employ servants to construct works, they are answerable for what is done by those servants. *Rex v. Medley*, 6 C. & P. 292: *Lord Denman, C.J.* Nor for the defendant, that the nuisance for which he is indicted has been in existence for a great length of time; as, however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of long standing. *Welch v. Hornby*, 7 East, 199.

It has been held, that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage in the town, leaving sufficient room for passengers, for it is against law to prescribe for a nuisance. *Fowler v. Sanders*, Cro. Jac. 446. And *Lord Ellenborough, C.J.*, said, in one case, "it is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance." The shell-fishery across the river at Carlisle had been established for a vast number of years, but *Mr. Justice Buller* held that it continued unlawful, and gave judgment that it should be abated. *Rex v. Cross*, 3 Camp. 227. But in some cases length of time may concur, with other circumstances, in preventing an obstruction from having the character of a nuisance; as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. *Lord Ellenborough, C. J.*, said, that after twenty years' acquiescence, it appearing to all the world that there was a fair or market kept at the place, he would not hold a man to be a

(*c*) *Particulars of Nuisance, when Granted.*[1]

(*d*) *Judgment.*[2]

(*e*) *Costs.*[3]

NUL tiel Record.[4]

NULLA Curia quæ recordum non habet potest imponere finem neque aliquem mandare carceri. *No court which has not a record can impose a fine, or commit any one to prison.* 8 Co. 61, a: *Beecher's case.*

NULLA impossibilia aut inhonesta sunt præsumenda, vera autem et honesta et possibilia. *No things that are impossible or dishonourable are to be presumed, but things that are true, and honourable, and possible.* Co. Litt. 78, b.

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criminal who came there under the belief that it was such fair or market legally instituted. *Rex v. Smith and others*, 4 Esp. 111. See *Bliss v. Hall*, 4 Bing. N. C. 183.

A bond given by the defendant acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for an offence, in carrying on the same business in another place. *Rex v. Neville*, Peake, 91: *Kenyon.*

[1] If the indictment be so general that it does not convey sufficient information to the defendant to enable him to prepare his defence, the court will order the prosecutor to give the defendant a particular of the several acts of nuisance he intends to prove. *Rex v. Curwood*, 3 Ad. & E. 815. And where the indictment is for the obstruction or non-repair of highways which are described generally, a particular of the several highways obstructed or out of repair may be obtained. *Rex v. Marquis of Downshire*, 4 id. 698. *Rex v. Inhabitants of Pembridge*, June 26th, 1841 (*Pattison, J.*, at chambers); and no affidavit is required, as the necessity for particulars appears on the face of the indictment.

[2] For a nuisance, besides the punishment as for a common-law misdemeanor, the court will give judgment that the nuisance be abated if it appear upon the face of the record that it is still an existing nuisance (*R. v. Stead*, 8 T. R. 142); but not so where the indictment is merely for creating, and not for continuing the nuisance (*R. v. Justices of the West Riding of Yorkshire*, 7 id. 467), or where the court are satisfied before judgment that the nuisance has already been abated. *R. v. Incledon*, 13 East, 164.

If the court give judgment that the nuisance be abated, a writ *de nocumento amovendo* may be sued out, and delivered to the sheriff to be executed. *See* Forms, Arch. C.P. 113.

[3] The 5 Wm. & M. c. 11, s. 3, enacts, that if a defendant prosecuted under a writ of *certiorari* (as mentioned in the act) be convicted of the offence of which he is indicted, the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved, or be a justice, &c. or other civil officer, who shall prosecute for any act that concerned them as officers to prosecute or prevent.

As to costs of nuisances arising from furnaces used for steam-engines, *see* 1 & 2 Geo. 4, c. 41.

[4] The general plea in an action of debt upon a matter of record (or upon a judgment) denying its existence, or the replication to a plea of matter of record. Such an issue can only be tried by the record. Accordingly, where the pleadings deny the existence of a record, the issue joined thereon, and which is called an issue of nul tiel record, concludes with an entry stating that which would anciently have been stated by the court *vivâ voce*, on such an occasion, namely, that a day is assigned for the production of the alleged record, and the judgment of the court thereon on the day named, which must be *in banc*. As the issue is triable only before the court, the record being brought into court is examined with the statement in the pleading which alleges it, and if they correspond the party asserting its existence obtains judgment, otherwise his adversary. On this trial the *onus* of producing the record lies on the party who alleged it; and where it is alleged by the defendant, the plaintiff may give a four-days' notice to him to produce it; otherwise judgment. Where by the plaintiff forty-eight hours' notice of his intention to produce it will suffice, if it be a record of the same court in which the action is pending, it is only necessary to bespeak it at the treasury of the court, from which it will be brought at the proper time, and by the proper officer. But if it be the record of a different court, a writ of *certiorari* must be issued to insure its production. By rule 10 H. T. 1853, the defendant pleading such a plea is to state in the margin of it the date of the judgment; and if it be in a court of record, the number of the roll where it is entered; and if he omits this, or inserts a false statement, the plaintiff is entitled, on producing a certain certificate, to sign judgment as for want of a plea.

Under the C. L. P. Act, 1852, s. 222, an amendment will in general be allowed at the trial, in order to cure any variance between the record and the statement of it in the pleading; as, by inserting the true date

NULLA Pactione effici potest ut dolus præstetur. *By no agreement can it be effected that a fraud shall be practised.* 5 M. & S. 446. Broom's *Max.* 309.

NULLUM Tempus occurrit Regi. *No time bars* [or runs against] *the king.* Otherwise expressed thus: *Nullum tempus nec locus occurrit regi.* 2 Inst. 273; Jenk. Cent. 83, case 62. Lapse of time does not bar the right of the Crown. Bract. fol. 103, 56. The maxim has been largely qualified by statute in modern times, and indeed has always been subject to exceptions. Broom's *Max.* 28. This maxim, under the form *Nullum tempus occurrit reipublicæ*, has been applied in some of the United States to rights of action on the part of the government. *See* 2 Hilliard's *Real Prop.* 173.

NULLUS Commodum capere potest de injuria sua propria. *No man can* (shall) *take advantage of his own wrong.* Co. Litt. 148, b. Broom's *Max.* 209.

NULLUS jus alienum forisfacere potest. *No man can forfeit another's right.* *Fleta*, lib. i. c. 28, s. 11.

NUNC pro tunc.[1]

NUNCUPATIVE Will. A will orally made or declared before witnesses. Verbal wills are abolished by 1 Vic. c. 26, s. 11, except in the case of soldiers in actual service, and mariners at sea. *See post*, Will.

O.

OATH.[2] *See* Abjuration, vol. i. p. 53; Affirmation, id. p. 265.

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of the judgment recovered (*Noble v. Chapman*, 14 C. B. 400), or the true amount recovered. *Hunter v. Emmanuel*, 15 id. 290.

[1] "Now for then." A term applied to such acts (as the entry of a judgment) as are allowed to be done after the time when they should have been performed, and with the same effect as if they had been done at the proper time; the doing of the act now (*nunc*), that is, at the time when it is actually done, being allowed to pass as a substitute and equivalent for (*pro*) doing it then (*tunc*) or before. 1 Stra. 639; 2 Tidd's Pr. 932.

Every judgment had formerly relation back to the first day of the term in which it purported to be signed, except in some cases where the contrary had been provided by statute. *See* stats. 29 Car. 2, c. 3, ss. 14, 15; and 4 & 5 Wm. & M. c. 50, s. 3; Tidd, 9th ed. pp. 938, 939. But now, by r. 56, H. T. 1853, all judgments, whether interlocutory or final, are to be entered of record of the day of the month and year when signed, whether in term or vacation, and shall not have relation to any other day. It is however still competent for the court or a judge, where a judgment is delayed by the act of the court, to order it to be entered *nunc pro tunc; i. e.* to order it to be entered on a later day as of a former day; but this will not be done when it becomes necessary by the laches of the party. *Evans v. Rees*, 12 Ad. & E. 167. *Miles v. Williams*, 9 Q. B. 47. *See* 3 C. B. 970; 2 Mee & W. 535; 4 Ad. & E. 1002.

[2] Lat. *Juramentum jusjurandum sacramentum.* L. Fr. *Serement.* A declaration or promise corroborated or confirmed by an appeal to God, accompanied by some outward manual act or form; usually, that of touching and kissing the Gospels.

An oath, considered with reference to its words, obviously consists of two parts: a declaration of what the party will do, or a declaration in reference to what he has done, and an appeal to the Deity by way of attestation or confirmation of it; the latter being expressed by the concluding clause, "So help you God," or "So help me God." In this appeal the essence and force of the oath consists. Hence an oath is said by Paley to be "the calling upon God to witness, that is, to take notice of what we say, and invoking His vengeance, or renouncing his favour, if what we say be false, or what we promise be not performed." Paley's *Mor. Phil.* b. 3, c. 16. So, in *Rex v. White*, an oath is defined to be "a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he does not speak the truth. 1 Leach, Cr. L. 430. The act or ceremony by which the taking of an oath is accompanied and expressed is now usually (as it has been from the earliest times) that of laying the hand upon, and kissing the Gospels; but in stead

of this the parties are often allowed to swear by lifting up the right hand, and in some cases without any manual act whatever.

By 1 & 2 Vic. c. 105, intituled "An Act to Remove Doubts as to the Validity of certain Oaths," it is declared and enacted, that in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form, and with such ceremonies, as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.

By 17 & 18 Vic. 125, s. 20, if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation in the words following: viz. "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. And by sect. 21, if any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wiful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

The 16 & 17 Vic. c. 71, relates to the appointment of persons to administer oaths in Chancery in lieu of masters extraordinary.

The 17 & 18 Vic. c. 78, appoints persons to administer oaths in the High Court of Admiralty.

The 23 & 24 Vic. prescribes the form of oath to be taken by persons professing the Jewish religion on taking seats in parliament.

In Criminal Proceedings.—By 24 & 25 Vic. c. 66, persons refusing, from conscientious motives, to be sworn in criminal proceedings, are permitted to make a solemn affirmation or declaration. If false, punishable; or for perjury.

By a private tithe-commutation act the tithe-valuer was declared incapable of acting until he had taken and subscribed an oath in the words following: viz. "I, A. B., do swear that I will faithfully execute the powers," &c., "So help me God." A tithe-valuer appointed under the act was duly sworn, but in the oath which he subscribed the words "So help me God" were omitted:—*Held*, that those words were involved in the taking of the oath, and therefore the statute had been substantially complied with. *Lancaster & Carlisle Railway Co. v. Heaton*, 4 Jur. N. S. 707; 27 L. J. Q. B. 195; 8 C. & B. 952.

A private-estate act gives power to a tenant in tail to alien, provided he takes, within six months after attaining eighteen, the oaths appointed to be taken, instead of the oaths of supremacy and allegiance by 1 Wm. & M. sess. 2, c. 2, and also subscribes the declaration in 30 Car. 2, stat. 2, s. 3; and by subsequent enactments the imposition of these oaths and declarations for the purposes of the acts is abolished: still such tenant in tail is not, nor are his issue, entitled to alien, and the effect of the alteration is to nullify the power. *Shrewsbury (Earl) v. Hope-Scott*, 6 C. B. (N. S.) 1; 6 Jur. N. S. 452; 29 L. J. C. P. 34.

By 4 Anne, c. 14 (Irish), the person appointed to a freehold office of weighmaster in a market-town in Ireland is required to take certain oaths provided by the 3 Wm. & M. c. 2. These could not be taken by a Roman Catholic. This office is taken to be included in "all offices and franchises" mentioned in 10 Geo. 4, c. 7, s. 21, and therefore the oath prescribed by that statute is to be taken in substitution for the oaths prescribed by the earlier statutes. But the oath must be administered in reference to the appointment to the office; and the having taken it as a barrister, previous to such appointment, does not relieve the appointee from the necessity of proving that he took it upon entering his office. *M'Mahon v. Lennard*, 6 H. L. Ca. 970.

Unlawful Administering.—To commit treason, *see* 52 Geo. 3, c. 106, s. 1; 1 Vic. c. 91, ss. 1, 2. To engage in any mutinous or seditious purposes, *see* 37 Geo. 3, c. 123, s. 1. This statute is not confined to oaths for a mutinous or seditious object. Where several persons, about to go armed for the purpose of night-poaching, were sworn to secrecy, it was holden to be a case within the act. *R. v. Brodribb*, 6 Car. & P. 571.

Where the oath bound the party not to make buttons under a certain price, and to keep all the secrets of the lodge, it was holden to be within the act. *R. v. Ball*, 6 id. 563. And in all cases where the members of an association are bound by oath to secrecy, they come within the act. (Id.) *R. v. Loveless*, 1 Moo. & R. 349; 6 Car. & P. 596. It is immaterial in what form the oath may be framed (Id.), or whether the party be sworn on the Testament or not, if he believe himself to be bound by the oath administered. *R. v. Brodribb, supra.*

The offence may be tried before a court of oyer and terminer, or gaol delivery, in any

OCCUPANT.[1]

ODIOSA non præsumuntur. *Odious things are not to be presumed.* Burr. Sett. Ca. 190.

OF.[2]

OFFICE[3] and OFFICER.

I. In General, p. 22.

(A) *Relative to Offices*, p. 22.

(*a*) *Of the Qualification*, p. 22.
(*b*) „ *Election*, p. 22.
(*c*) „ *Duration of*, p. 22.
(*d*) „ *Suspension from and Removal of*, p. 22.
(*e*) *What amounts to Vacating of*, p. 23.
(*f*) *Of Fees and Donations*, p. 23.
(*g*) „ *the Sale of, and Contracts and Assignments connected with*, p. 23.
(*h*) *Of the Punishment for Misconduct in*, p. 24.

(B) *Relative to Officers*, p. 24.

(*a*) *Authority of*, p. 24.
(1) *In General*, p. 24.
(2) *In Particular. See* Misdemeanors, vol. v. p. 407; Murder and Manslaughter, id. p. 501.
(*b*) *Privileges of*, p. 24.
(*c*) *Liabilities of*, p. 24.
(*d*) *Of Deputies*, p. 24.
(*e*) *Evidence of being*, p. 24.

(C) *Relative to Remedies connected with.*

(*a*) *As to Actions. See* Money had and received, vol. v. p. 490; and particular heads.
(*b*) *As to Indictments. See* Indictments, vol. v. p. 105; and particular heads.

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county in England, in the same manner as if it were committed there. 37 Geo. 3, c. 123, s. 6.

[1] In a general sense, one who takes possession of a thing of which there is no owner. *Quod ante nullius est id naturali ratione occupanti conceditur:* That which belongs to no one is, by natural reason, given to the occupant. Dig. 41, s. 1–3. One who takes possession of a thing which has been abandoned. *Occupantis fiunt derelicta:* Things abandoned become the property of the [first] occupant. In a special sense, one who takes possession of lands held *pur autre vie* after the death of the tenant, and during the life of the *cestui que vie.* Smith's P. & R. P. 475.

[2] "Of:"—*Held* to be a word of more general description than "at." "My estate of——," than "My estate at ——." *Lord Ellenborough,* 3 M. & S. 171, 172; *see* 3 Taunt. 147.

"Of," though used in the sense of the genitive case, is constantly expressed in the old books by the Latin *de* and *ex. See* 2 Salk. 622. As to "of and concerning," *see* 9 Mee. & W. 296; 12 id. 802; 16 id. 167.

[3] A place of trust. 5 Mod. 431, arg. Cowell defines office to be "a function by virtue whereof a man hath some employment in the affairs of another." Finch describes it "a duty of attendance upon a charge." Webster defines it to be "a duty, charge, or trust." But the idea of an office clearly embraces the ideas of tenure, duration, fees, or emoluments, rights and powers, as well as that of duty. The intrinsic meaning of the word is well expressed by the old English word "Place."

(*c*) *Mandamus.* *See* Mandamus, vol. v. p. 423.

(*d*) *Quo Warranto.* *See post*, Quo Warranto.

II. In Particular. *See*

Army, vol. i. p. 514.
Churchwardens, vol. iii. p. 114.
Constable, id. p. 183.
Corporation, id. p. 263.
Highways, vol. v. p. 33.
Justices of the Peace, id. p. 285.
Navy, id. p. 515.
Overseers, *post*, p. 32.
Poor-Rates.
Prison and Prisoner.
Sheriff.
Weights and Measures.

I. In General.

(A) *Relative to Offices.*

(*a*) *Of the Qualification.*[1]

(*b*) „ *Election.*[2]

(*c*) „ *Duration of.*[3]

(*d*) *Of Suspension from, and Removal of.*[4]

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[1] Where residence is an ingredient in the qualification for an office, it must be *bonâ fide*, and not colourable. *Rex v. Sargent*, 5 T. R. 466. *Rex v. Duke of Richmond*, 6 id. 560.

If a statute is only directory that a county treasurer shall find security, it is not a condition precedent. It seems that such an office and being a magistrate are incompatible. *Rex v. Patteson*, 4 B. & Adol. 9.

[2] Where the common law fixes the time of election, the electors have not the power of narrowing it (*Rex v. Bishop of Winton*, 7 East, 573); and where the presiding officer forms an integral part of the elective assembly, his presence is indispensable until the completion of the election. *Rex v. Buller*, 8 id. 389. So, where the whole corporation are summoned for a particular purpose (*i.e.* to receive the resignation of a common councilman), a select body, who are all present and consenting, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman in the place of the other resigned, the power of election being in such select body, and the charter not requiring any previous summons. *Rex v. Theodorick*, 8 id. 543.

If void votes be given the election cannot be sustained. *Rex v. Mein*, 4 T. R. 480. See *R. v. Hawkins*, 10 East, 210. But the swearing in, being a mere ministerial act, may be in the presence of the majority, &c. wheresoever and howsoever assembled. *Rex v. Courtenay*, 9 id. 246. And *quæry*, Whether, if it be found against a defendant in *quo warranto*, that, though duly elected, he was not duly sworn in, there can be any other judgment against him than of an *ouster* absolute, there being no instance of a judgment of *ouster quousque?* (Id.)

[3] The rule, that an appointment to an office without limitation enures as a nomination for life, does not hold where it would be inconvenient to consider it as a permanent office. *Rex v. St. Nicholas*, 4 M. & S. 324. The office of Paymaster of the Exchequer-bill Office is only during pleasure. *Smyth v. Latham*, 9 Bing. 692; 1 C. & M. 547. *See* Smith's R. & P. P. 169.

[4] Suspension and deprivation are not synonymous. *Phillips v. Bury*, 2 T. R. 351.

A town-clerk who has absconded, to avoid an indictment for forgery, may be removed. *R. v. Harris*, 1 B. & Adol. 936.

The Supreme Court of Calcutta has power by the Charter of Justice to remove or suspend officers of that court on account of misconduct, and this power of removal is not limited to acts done by such officer in his judicial character, but includes transactions distinct from those of his office. *In re Grant*, 7 Moo. P. C. C. 141.

The office of Commissioner of Crown Lands in New South Wales, created by an act of the legislature of that colony, is not a patent office, though made under the great seal of the colony, within the meaning of the 22 Geo. 3, c. 75, but is an office held *durante bene placito;* and there is no right of appeal to the queen in council under that statute from an order of amotion from such office by the governor-general and executive council. *Ex-parte Robertson*, 4 Moo. P. C. C. 288.

The 22 Geo. 3, c. 75, applies only to offices held by patent for life, or for a certain time. (Id.)

An appointment to an office for the life of the appointee is not invalid upon the sole ground that the person making the appointment only holds his own office for life. *Rosslyn (Earl of) v. Aytoun*, 11 Clark & Fin. 742.

(*e*) *What amounts to Vacating of.*[1]

(*f*) *Of Fees and Donations.*[2]

(*g*) „ *the Sale of, and Contracts and Agreements connected with.*[3]

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[1] Accepting an office which is incompatible with one previously held, vacates the latter (*Millward v. Thatcher*, 2 T. R. 81. S. P. *Rex v. Blissel*, Dougl. 398, n); but a valid appointment must be shown. *Rex v. Day*, 9 B. & C. 702.

[2] No action lies by the owner of an office against an intruder for gratuitous donations received, but the rule is otherwise for known and accustomed fees. *Boyter v. Dodsworth*, 6 T. R. 681. *See* "Money had and received." An agreement to resign an office and procure the appointment of another in consideration of receiving a moiety of the fees is illegal. *Waldo v. Martin*, 4 B. & C. 319; 6 D. & R. 364.

[3] The buying or selling of public offices is rendered illegal by the stat. 5 & 6 Edw. 6, c. 16, ss. 2, 3, by which it is declared that all bargains, sales, promises, bonds, agreements, covenants, and assurances for money or other profit, in consideration of or relating to appointments touching the administration of justice, or the collection of the revenue, &c., or for the deputation thereof, shall be void. The provisions of this statute have, by 49 Geo. 3, c. 126, been since extended to Scotland and Ireland, and to all offices in the gift of the Crown (*see* 1 Stark. Rep. 92; 5 & 6 Edw. 6; 3 Lev. 289; Willes, 571; Salk. 468; Freem. 19; 1 H. Black. 322; 8 T. R. 89; 2 B. & C. 672); to all commissions, civil, naval, and military, and all places and employments in the departments and offices there particularly mentioned. The seventh section of the latter act contains a proviso that it shall not extend to any purchase or sale, or agreement for the purchase or sale, of certain offices in the palace, or commissions in the army at the regulated prices, and authorised regimental agents acting without fee; and the statute does not prohibit a deputation to any office where it is lawful to appoint a deputy, or any agreement lawfully made in respect of any allowance, salary, or payment, made or agreed to be made, or to such principal or deputy respectively out of the fees or profits of such office. The eleventh section also contains an exception as to annual payments out of the fees to any person formerly holding the office, provided such reservation and the circumstances under which it was permitted is stated in the instrument of appointment of the person succeeding in the office.

All assignments, trusts, and money bargains, therefore, respecting cadetships, places, and public offices, not within the exception in the statute, are illegal and void. *Lee v. Coleshill*, Cro. Eliz. 529. *Stackpole v. Earle*, 2 Wils. 133. *Garforth v. Fearon*, 1 H. Black. 328. *Palmer v. Bate*, 2 B. & B. 673. *Parker v. Brown*, Cro. Jac. 612. The offices of Sub-distributor of Stamps and Collector of Taxes, are within the statute, both of them being connected with the receipt of the revenue. *Hopkins v. Prescott*, 16 L. J. C. P. 259; 4 C. B. 578. The Surveyor of Baggage of the port of London (*Stackpole v. Earle, supra*; so of the office of clerk of the peace. *Palmer v. Bate, supra*); but the office of clerk to the deputy-registrar in the Prerogative Court of Canterbury is not within the act (*Aston v. Gromnell*, 3 Y. & J. 136); nor the office of clerk to Assessed-Tax Commissioners, or clerk to Commissioners of Sewers (*Sterry v. Clifton*, 9 C. B. 110; 19 L. J. C. P. 237); nor the fellowship of a college. *Feistel v. King's College*, 16 L. J. Ch. 339. The appointment of a deputy to fulfil the duties of a public office at a fixed salary, the deputy paying over the fees and emoluments of the office to the principal, is, of course, perfectly legal where the business of the office can be lawfully transacted by the deputy; but if the deputy takes the fees and emoluments of the office, and pays a fixed sum annually to the principal for the post, the deputation of the office and the contract to pay the money are illegal and void. *Godolphin v. Tudor*, 2 Salk. 468; id. 466; 1 Bro. P. C. 135. *Greville v. Atkins*, 9 B. & C. 462; 4 M. & R. 372; Add. on Contr. 105. So are all contracts to recommend parties to offices of trust for a pecuniary return. *Waldo v. Masters*, 4 B. & C. 319. *See* 1 Bro. C. C. 124; Amb. 435. As to exchange of offices, see *Parsons v. Thompson*, 1 H. Black. 322.

An agreement between a municipal corporation and the clerk of the peace of the borough, on his appointment, that he shall accept a fixed salary in lieu of his fees, and that any surplus of fees above the salary shall be paid into the borough fund, is void on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office. *Liverpool Corporation v. Wright*, 1 Johnson, 359; 5 Jur. N. S. 1156; 28 L. J. Ch. 868.

It is against public policy that the salary of a public servant should be reduced by the application of any part for the payment of debts. *Ex-parte Harnden*, 5 Jur. N. S. 852; 28 L. J. Bank. 18.

The office of woodward or forester of the Crown, is an office of trust incapable of assignment without a license from the Crown founded on the return to a writ of *ad quod damnum*. *Attorney-General v. Mathias*, 4 Kay & J. 579; 4 Jur. N. S. 628.

The half-pay of an officer in the army cannot be assigned; but an assignment of all offices of trust, commissions, &c., which

(*h*) *Of the Punishment for Misconduct in.*[1]

(B) *Relative to Officers.*

(*a*) *Authority of.*[2]

(*b*) *Privileges of.*[3]

(*c*) *Liabilities of.*[4]

(*d*) *Of Deputies.*[5]

(*e*) *Evidence of Being.*[6]

OFFICE Copy. *See* vol. iv. p. 329.

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the assignor may require with a view to indemnify a person who had paid money for him, is good with respect to an office that may be legally assigned; as, for instance, that of private secretary to a nobleman. *Harrington v. Kloprogge*, 2 B. & B. 678. But the act does not extend to prohibit an agreement by a principal to pay his deputy a proportion; as, for instance, half of the profits of the office: for here the profits still belong to the principal, and must be sued for in his name, although a share is to be allowed out of them to the deputy for his trouble. See *Godolphin v. Tudor*, 2 Salk. 468. But the reservation must be to pay out of the profits; and where with a condition to reserve a sum certain, without a contingency, the bond was held void. *See* 1 B. & B. 389; 2 Anst. 533; 3 Ves. 204; 1 Swanst. 79.

An assignment by a retired military officer of his pension for valuable consideration is void under the 47 Geo. 3, c. 25, and the court refused an injunction to restrain the officer from applying for or receiving the pension. *Lloyd v. Cheetham*, 3 Giff. 171; 9 W. R. 924; 4 L. T. (N. S.) 576. In case of bankruptcy, *see* vol. ii. p. 242.

But there are some offices which may be the object of sale, if it be with the consent of those having the power of appointment. *Blachford v. Preston*, 8 T. R. 89. Hence it has been held, that a promise by one of two candidates for the office of undersheriff, in consideration of his opponent desisting from his endeavours to obtain the situation, is binding. *See* Cro. Jac. 612.

It is, however, a general rule that no action lies on a contract for procuring an appointment to or for the sale or relinquishment of a public office. *Garforth v. Fearon*, 1 H. Black. 327.

[1] Non-performance of the duty of a public office is indictable. *Rex v. Hollond*, 5 T. R. 607.

[2] The fact that a party did a particular act (as signing a land-tax assessment) in an official capacity, may be proved not only by showing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards. *Doe d. Hopley v. Young*, 8 Q. B. 63; 9 Jur. 941; 15 L. J. Q. B. 9. S. P. *Doe d. Bowley v. Baines*, 8 Q. B. 1037.

The office of weighmaster in a market-town in Ireland is a freehold office. The appointment ought to be for life. *M'Mahon v. Lennard*, 6 H. L. C. 970. It is not necessary in an action by him for disturbance in his office, to show a formal appointment to it by deed; his having acted in the office for several years is sufficient. (Id.)

A patrol who is not sworn in has not the authority of an officer of the peace. *Cliffe v. Littlemore*, 5 Esp. 39.

[3] To entitle an officer to his privilege, he need not take out a writ of privilege. *Rex v. Warner*, 8 T. R. 375.

The plaintiff having obtained a judgment against T. in an action of assault and false imprisonment, sued out a *ca. sa.*, whereon T. was taken and committed to the Queen's Prison, of which the defendant was the keeper. T. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vic. c. 116, and 7 & 8 Vic. c. 96, and having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by defendant accordingly. The plaintiff having brought an action against the defendant for an escape:—*Held*, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction. *Thomas v. Hudson*, 14 Mee. & W. 353; 2 D. & L. 873; 9 Jur. 627; 14 L. J. Ex. 283.

[4] Where officers are to perform a duty in the aggregate, each is individually liable for a breach thereof. *Rex v. Hollond*, 5 T. R. 607. And if an officer wishes to notify his own mistake, it must be by affidavit, and not certificate. *Rex v. Bollan*, 1 Anst. 79.

[5] Principal and deputy are both responsible for a misfeasance in office, if the latter be a substantive officer. *Rowning v. Goodchild*, 5 Burr. 1721; 3 Wils. 443; 2 Black. 910.

[6] The fact of a person acting in an official capacity is *primâ facie* evidence that he was duly appointed, and had competent authority (*R. v. Verelst*, 3 Campb. 432. *Pritchard v. Walker*, 3 C. & P. 212), even though the actual appointment is in writing (*Berryman v. Wise*, 4 T. R. 366. *Doe v. Hadden*, 3 Doug. 310. *Marshall v. Lamb*, 5 Q. B. 115. *Wotten v. Gavin*, 16 id. 48); as where a constable has been appointed by commissioners under a local act (*Butler v. Ford*, 1 C. & M. 662); and the fact is evidence even in his own favour (Id. *R. v. Howard*, 1 Moo. & R. 187); so of a commissioner to take

OFFICIUM nemini debet esse damnosum. *Office ought not to be an occasion of loss to any one.* A maxim in Scotch law. Bell's *Dict.* By this rule a mandatory is entitled to demand from the mandant all reasonable expenses debursed by him *bonâ fide*, and the damages sustained by him in the execution of the mandate, even though the management should have been a losing concern.

OMISSIO eorum quæ tacite insunt nihil operatur. *The omission of those things which are tacitly implied is of no consequence.* 2 Bulstr. 131.

OMNE magis dignum trahit ad se minus dignum quamvis minus dignum sit antiquius. *Every worthier thing draws to it the less worthy, though the less worthy be the more ancient.* Co. Litt. 355, b. *See* Finch's *Law*, b. i. c. 3, n. 24.

OMNES licentiam habere his quæ pro se indulta sunt renunciare. *It is a rule of the ancient law that all persons shall have liberty to renounce those privileges which have been conferred for their benefit.* Cod. i. 3, 51. Id. ii. 3–29.

OMNIA præsumuntur contra spoliatorem. *All things are presumed against a despoiler or wrongdoer.* A leading maxim in the law of evidence. Best on Evid. 340.

OMNIA præsumuntur legitime facta donec probetur in contrarium. *All things are presumed to be lawfully done until proof be made to the contrary.* Co. Litt. 232, b. Best on Evid. 337, s. 300; Broom's *Max.* 730.

OMNIA præsumuntur rite esse acta. *All things are presumed to be done in due form.*

OMNIA præsumuntur solemniter esse acta. *All things are presumed to be done with due solemnity.* Co. Litt. 6, b.

OMNIS consensus tollit errorem. *Every consent removes error. Consent always removes the effect of error.* 2 Inst. 123.

OMNIS ratihabitio retrotrahitur et mandato [seu licentiæ] priori æquiparatur. *Every ratification is drawn backwards [has a retrospective operation], and is equivalent to a previous command [or permission].* Co. Litt. 207, a, 258, a. Wingate's *Max.* 485; Mas. 124. A subsequent ratification is equivalent to a prior authority. Story on Agency, s. 445. Ratification has retroactive efficacy, and relates back to the inception of the transaction. A leading maxim of maritime and commercial jurisprudence, and applied constantly in the law of principal and agent. Broom's *Max. ub sup.* Story on Agency, ss. 239, 445; Shep. *Touch.* 57; 2 Smith's *Merc. Law*, 60; 2 Kent's *Com.* 616; Steph. *Com.* 119. Applied equally to contracts and torts. Broom's *Max.* 345, 383; 2 Burn. *Dict.* 260.

OMNIUM. *See post*, Stock.

ONUS Probandi. *See* vol. iv. p. 290.

OR.[1]

affidavits (*R. v. Howard*, 1 M. & Rob. 187); or vestry-clerk (*M'Gahey v. Alston*, 2 Mee. & W. 206); or overseer (*Connell v. Curtis*, 2 N. R. 228); or incumbent of a living. *Radford v. M'Intosh*, 3 T. R. 635.

[1] In written instruments is frequently construed to mean, "*and*," where such a construction is necessary to effectuate the intention of the parties: thus, in a deed (*Mallory's case*, 5 Co. 112, a); so in a bond (Cro. Jac. 322. *See* 3 T. R. 470); so in a will, 5 B. & P. 38; 9 East, 366; 16 id. 67. See *White v. Supple*, 2 Dru. & War. 471; 4 Cruise T. 32, c. 19. *Pitt v. Pitt*, 22 Beav. 294); so in applying and interpreting statutes. 2 Dwar. on Statutes, 772.

ORDER, in Council.[1]

Judge's. *See* Judge's Order, vol. v. p. 258.

of Justices. *See* Justices of the Peace, vol. v. p. 288.

„ Forging. *See* vol. iv. p. 518.

of Reference. *See* vol. i. p. 460.

of Removal. *See post,* Poor; Settlement.

ORIGINAL Writ.[2]

OUTLAWRY.[3]

[1] An order in council which is based on an erroneous construction of a statute, cannot impose a new obligation or add a new exemption (*Earl of Auckland*, 30 L. J. Ad. 121); nor can it suspend the operation of an act of parliament. *Wilkinson v. Loudonsack*, 3 M. & S. 117. But disobedience of such an order, made in pursuance of a statutory power, is a misdemeanor at common law. *Rex v. Harris*, 3 T. R. 222.

[2] Anciently it was essential to the due institution of all actions in the superior courts that they should commence by original writ, "*non potest quis sine brevi agere.*" Bract. 413, b; *see* also Gilb. Hist. C. P. 2; 3 Bl. Com. 273. This form of proceeding is, by 3 & 4 Wm. 4, c. 27, abolished. The original writ (*breve originale*) was a mandatory letter issuing out of the Court of Chancery, under the Great Seal, and in the name of the Sovereign, directed to the sheriff of the county where the injury was alleged to have been committed, usually containing a summary statement of the cause of complaint, and requiring him to command the defendant to satisfy the claim; and on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance.

[3] Outlaw is from the Saxon *utlagh*. Lat. *Utlagatus ex lex*—one who is put out of the law; that is, deprived of its benefit. Cowell, Dic. Outl. Practically, the process of outlawry is placing a person beyond the protection of the law, both in regard to his property and, to some extent, as to his person. A proceeding adopted against a party who has absconded, and cannot be found after judgment obtained against him; its ultimate object in civil cases is to obtain effectual access to his property, which becomes forfeited, and may be seized and sold.

In criminal law it is in the nature of a punishment. Its effect in all cases is to disable the party so outlawed from enforcing any of his legal or equitable rights in a court of justice. 4 Steph. Com. 387, 388.

Thus, outlawry is, in theory, a judgment pronounced for contumacy in not being amenable to proceedings in the superior courts; and when obtained for non-appearance in an action was called outlawry on mesne process. It was founded upon forms supposed to give ample notice to the defendant of the pendency of the action, some of which were exigents and proclamations at the county court, at the general quarter sessions, and the door of the parish church.

When judgment of outlawry was obtained, his person was liable to be taken, and his property seized for the king's use, by inquisition returnable into the Court of Exchequer, because the seizure of the outlaw's property into the hands of the king made a revenue matter of it, and all revenue matters must be transacted in the Court of Exchequer. Out of the Exchequer processes issued for the purpose of realising the outlaw's property, writs of *venditioni exponas* to sell his goods, of *scire facias* to collect his debts, and of *levari facias* to levy the profits of his lands; and when this had been done, the court would order the proceeds to be paid to the plaintiff in satisfaction of his claim, and the Treasury would, on application, grant him a lease of the lands.

Whatever may have been the effect of the proceedings in outlawry in their original institution, in modern practice they were not calculated to give the defendant any personal notice whatever, except so far as the publication in the newspapers of the various proclamations of outlawry, by way of news, might indirectly apprise him of what was being done. Moreover, the rule of practice adopted by the courts was not to allow a distringas to issue for the purpose of outlawry, unless the defendant was out of the kingdom, while the rule of law was that no man should be outlawed who was not within the kingdom at the time of the exigent awarded, so that the proceeding could only be instituted in cases where the result was sure to be erroneous. Accordingly, a defendant could, in general, at any time, set aside the proceedings on motion to the court, or reverse the proceedings by bringing a writ of error: in the former case, in general, on payment of the costs, and entering an appearance; in the latter, as a general rule, without doing either one or the other.

The practice of outlawry upon mesne process, has been well characterised "as the most cumbersome and expensive method of effecting a simple end that the wit of man could perhaps have devised," was practically abolished by the C. L. P. Act, 1852, s. 24, and, in lieu of it, the third form of the writ of summons has been adopted. *See post,* Summons, Writ of; Smith's *Suit at Law*, 63, 7th ed.

An English (*Taylor v. Lord Stuart De Rothsay*, 2 Dowl. P. C. N. S. 121; 4 Man. & G. 388), or Irish (*Hay v. Lord Charleville*, 13 L. J. Q. B. 201; 2 D. & L. 16) peer, or M.P. (*Cassidy v. Stewart*, 10 L. J. C. P. 57; 9 Dowl. P. C. 366), cannot be outlawed.

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I. In Civil Proceedings.

(A) *Can only be after final Judgment.*[1]

(B) *Provisions in* 2 *Wm.* 4, *c.* 39.[2]

(C) *Procedure on.*

(*a*) *Capias ad Satisfaciendum.*[3]

[1] Proceedings to outlawry on mesne process, although not expressly abrogated by the 15 & 16 Vic. c. 76, seem to be so in effect, for the 24th section abolishes the distringas, which was the process for proceeding to outlawry, and establishes nothing in its stead; but inasmuch as much greater facilities in proceeding with the action, where the defendant cannot be personally served with the writ of summons, than formerly existed, are by the act given to the plaintiff, the necessity for outlawry on mesne process no longer exists, and, no doubt, the legislature intended to abolish it. It is, therefore, only where the defendant cannot be found after final judgment that proceeding to outlawry can now be adopted.

[2] Prior to the C. L. P. Act, 1852, proceedings to outlawry were chiefly employed on mesne process, as a means by which the plaintiff might satisfy his claim out of the defendant's property, if, by evading service of the writ of summons, he prevented the action from proceeding in its ordinary course.

The 2 Wm. 4, c. 39, substituted a simple and more economical method of obtaining the same end, viz. by obtaining a judge's order for leave to proceed in the action, without personal service of the writ of summons under the provisions of that act, according as the writ of summons is specially indorsed, or otherwise (*see* 15 & 16 Vic. c. 76, ss. 24, 26, 28; and *post*, Summons, Writ of); and now the only occasion for resorting to an outlawry is where a judgment debtor wilfully evades the process of the court by withdrawing his person from a *capias ad satisfaciendum*. And it was provided by the Act for the Uniformity of Process (2 Wm. 4, c. 39), that, after judgment given, any action commenced by writ of summons, proceeding to outlawry or waiver, might be had and taken, and judgment of outlawry or waiver given in such manner, and in such cases, as might before that act be lawfully done after judgment in an action commenced by original writ: Provided always, that every outlawry or waiver had under authority of that act should or might be vacated or set aside by writ of error or motion, in like manner as outlawry or waiver founded on an original writ might then be vacated or set aside.

[3] After final judgment, the plaintiff must issue a writ of *capias ad satisfaciendum*, which

(*b*) *Exigi Facias.*[1]

(*c*) *Proclamations.*[2]

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must be returnable on some day in term, and must have eight days between the teste and return. Reg. Gen. H. T. 1853 (Pr.), r. 74. It should be issued and tested in term. *Braham v. Hunter*, 6 D. & L. 129; Lush, Pr. 577, 2d ed. See *Kemp v. Hyslop*, 1 Mee. & W. 58.

The writ must be lodged with the sheriff, and, when returnable, that officer will return it *Non est inventus*.

A *ca. sa.* to proceed to outlawry was tested on the 12th of March, 1847, returnable on the 15th of April then next. The writ of *exigi facias* was tested on the 15th of April, 1847, returnable on the 12th of June then next: — *Held*, on motion to set aside the proceedings, that both writs were wrong. The *ca. sa.* in being tested in vacation, and the *exigi facias* in not being tested on the *quarto die post* of the return of the *capias*, and in not being made returnable either on the third day exclusive before the commencement of term, or between that day and the third day exclusive before the last day of term, according to the 1 Wm. 4, c. 3, s. 2, but that the defects amounted only to an irregularity which might be waived. *Braham v. Hunter*, 6 D. & L. 129: *Coleridge*.

Proceedings to outlawry on final process cannot be grounded on a *ca. sa.* made returnable immediately after execution, under 3 & 4 Wm. 4, c. 67, s. 2, although returned *Non est inventus*, because such writ can only be executed by arresting the defendant. *Lewis v. Holmes*, 10 Q. B. 896; 11 Jur. 945; 16 L. J. Q. B. 430. S. P. *Levy v. Hamer*, 5 Ex. 518; 1 Prac. Rep. 477; 19 L. J. Ex. 304.

[1] A judicial writ commanding the sheriff to demand the defendant (or cause him to be demanded *exigi faciat*), from county court to county court until he be outlawed; or if he appear, then to take and have him before the court on a day certain in term, to answer to the plaintiff's action. 1 Tidd's Pr. 132; 3 Bl. Com. 283, 284; Arch. Prac. 485.

The officer of exigenter, whose duty it was to make out the exigents and proclamations, was abolished by stats. 7 Wm. 4 and 1 Vic. c. 30.

On the return of the *ca. sa.*, writs of exigent and proclamation are then issued and lodged with the sheriff. Under this writ the sheriff is bound to exact or demand the defendant at five consecutive county courts, if so many occur, during the time the writ is in force (see *Taylor v. Waters*, 2 B. & C. 353); and the writ must be actually in his hands at the time the defendant is demanded. *Volet v. Waters*, 3 D. & R. 55. But if five county courts do not occur pending the writ, the sheriff must exact the defendant the remaining times under the *allocatur exigent* and the *quinto exactus* must be at least one month after the third proclamation, as hereinafter mentioned, otherwise the outlawry will be altogether void. *Taylor v. Waters*, *supra*.

If the defendant, or one of them (if more than one), appear before the five exactions, he may sue out a *supersedeas*, and deliver it to the sheriff, which has the effect of superseding further proceedings in outlawry as against him.

To a writ of *allocatur exigent* the sheriff returned, that at his county court, held at, &c., A. W. was the fifth time demanded, and did not appear, and that "because her majesty's coroners of the county were, and each of them was, absent on the fifth demand so made as aforesaid, judgment of outlawry against A. W. could not be pronounced," &c.: — *Held*, that the return was bad. *M'Taggart v. Wedderburn*, 2 D. & L. 576: *Patteson*.

[2] A writ of proclamation must issue at the same time as the exigent, whereby, after reciting the writ of exigent, the sheriff is commanded to proclaim the defendant on three several days, according to the form of the statute, that he may render himself, &c. And by the statute 31 Eliz. c. 3, s. 1, one of these proclamations must be at the county court or hustings, one at the general quarter sessions, and one other of these proclamations shall be one month at least before the *quinto exactus*, on a Sunday, by affixing the same in writing ["on or near the doors of all the churches and chapels," 1 Vic. c. 45, s. 2] of the parish where the defendant was dwelling at the time of the awarding of the exigent. Although in strictness, therefore, the writ of proclamations should be directed to the sheriff of the county where the defendant was then residing, and if not done so it is a nullity (*Rayer v. Cooke*, 3 B. & C. 529); yet in practice it is usually directed to the same sheriff to whom the exigent is directed, who then executes and returns both. It is tested and returnable in the same manner as the exigent. See *supra*, and 31 Eliz. c. 3, s. 1. If there be not a month between the third proclamation and the *quinto exactus*, as above mentioned, the outlawry will be void, and the court will set it aside. *Taylor v. Waters*, 2 B. & C. 353; and see *Volet v. Waters*, 3 D. & R. 55. *Lewis v. Davison*, 3 Dowl. 272.

Upon the writ of exigent and proclamation being returnable, the sheriff, upon application, will return the exigent (*R. v. Almon*, 5 T. R. 202), together with the judgment of outlawry, and will also return the writ of proclamations. See *M'Taggart v. Wedderburn*, 2 D. & L. 576. Take the latter writ and return and file them with the proper officer, and take the exigent and return to the clerk appointed by the master for the purpose of outlawries (see *Reynolds v. Adams*, 3 T. R. 578), and he will thereupon make out the writ of *capias utlagatum*. At any time before the return of the exigent, however, the defendant may enter an appearance with the

(*d*) *Judgment of.*[1]

(*e*) *Capias Utlagatum.*[2]

(*f*) *Venditione Exponas.*[3]

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clerk of the outlawries, and he will give him a *supersedeas* to the sheriff, who will thereupon cease to proceed to outlawry.

Where, in proceeding to outlawry, the writ of proclamations commanded the sheriff to proclaim the defendant on three several days according to the form of the statutes for such purpose, made in the thirty-first year of the reign of Elizabeth, and the first and second years of the reign of her majesty Queen Victoria, one of such proclamations to be made at or near the most usual church door of the parish, &c., and the sheriff returned that he had proclaimed the defendant at the most usual door of the church of the parish of, &c.:—*Held*, that the court would not set aside these proceedings for irregularity where the defendant had obtained a previous rule for the same purpose, which had been discharged, although the objections taken were different, but left him to his writ of error. *Stultz v. Wyatt*, 2 D. & L. 560; 9 Jur. 131; 14 L. J. Q. B. 55.

[1] The return of the exigent concludes with an averment: "Therefore, by the judgment of ——, Esq., and ——, Esq., coroners of our Sovereign Lady the Queen for the county aforesaid, the said A. B. is, according to the law and custom of England, outlawed." The exigent being, with the return thereto, filed in the master's office of the court in which the action is pending, the outlawry is complete, and the plaintiff may at once sue out a writ of *capias utlagatum*.

The sheriff's return that, by the judgment of the coroner the defendant was outlawed, is not until entered on the roll a sufficient record of the outlawry. *Attorney-General v. Rickards*, 8 Beav. 380; 9 Jur. 634; 14 L. J. Ch. 363.

It is questionable whether judgment of outlawry can be pronounced by a court of bankruptcy. *Winthrop v. Ellerton*, 15 Jur. 1028: *Kindersley, V. C.*

[2] Lat. *You take the outlaw.* By this writ the sheriff is commanded to take the party and keep him in custody until the day of the return, and then present him to the court, there to be dealt with for his contempt. 3 Bl. Com. 284; 3 Steph. 569.

This writ is either general or special: the general writ is against the person only; the special writ against both the person and property of the defendant. As to the issuing of a *capias utlagatum* after the death of the plaintiff, see *Rees v. Longwell*, 8 L. J. Q. B. 128.

Upon the party being taken on the *capias utlagatum* the sheriff will discharge him upon an attorney undertaking to appear for him, and reverse the outlawry. 4 & 5 Wm. & M. c. 18, s. 4. And this undertaking may be given either before or after the return of the writ. (Id. s. 5.)

Where a prisoner was discharged under the Insolvent Debtors' Act as to a debt, with respect to which a *capias utlagatum* had been sued out, the court refused to allow him to be charged in custody upon the latter writ, although the outlawry had been completed before he had rendered to prison. *Adcock v. Fiske*, 9 L. J. 17, C. P.

Where the plaintiff caused the defendant to be arrested on an attachment out of Chancery, and then lodged a *capias utlagatum* against him with the sheriff, in whose custody he was, the attachment being afterwards set aside for irregularity, and the defendant discharged as to that, the court of common law ordered him to be discharged also as to the *capias utlagatum*. *Hall v. Hawkins*, 4 Mee. & W. 590. If the defendant be taken upon a special *capias utlagatum*, he is discharged in like manner; but if he be not taken, or if, when taken, he do not give the undertaking above-mentioned, the sheriff then proceeds to execute the other part of the writ—to inquire, by inquisition, as to the party's lands and goods within his bailiwick, and to extend and appraise the same; he then seizes them for the Crown, and returns the special *capias utlagatum* accordingly.

The return to a writ of *capias utlagatum* was quashed in the first instance, as being insufficient, on the application of the sheriff and the judgment-creditor. *Engler v. Annersley*, 1 Dowl. N. S. 186, C. P.

A plaintiff, having obtained judgment, proceeded to outlawry against the defendant, who was arrested upon a *capias utlagatum*. The plaintiff then died, leaving two infant children, but no personal representative; an application for the discharge of the defendant upon the ground of the plaintiff's death was opposed by the late plaintiff's attorney, who had advanced money upon the security of the judgment, and who intended to take out administration:—*Held*, that he was not entitled to be discharged. *Cox v. Pritchard*, 2 Prac. Rep. 298; 15 Jur. 427: *Coleridge, C. P.*

[3] The Court of Exchequer will, upon the application of the creditor, award a *venditioni exponas* to sell the outlaw's goods; a *levari facias* to collect the issues and profits of his lands; and a *scire facias* to collect the debts due to him (see *Grant v. Bryant*, 6 M. & S. 347): out of the produce of these the creditor may obtain payment of his debt and costs by motion in the Exchequer, if the amount do not exceed fifty pounds, and the court will thereupon order the sheriff to pay it (see *R. v. Buchanan*, 1 Cr. & M. 195. *Re Manners*, 8 L. J. Ex. 256; 5 Mee. & W. 278); or, if it exceeds fifty pounds, then by petition to the Treasury.

Where, upon a special *capias utlagatum* against a beneficed clergyman, the sheriff

(D) *Reversal.*

(*a*) *Proceedings on, and Grounds for.*

(1) *By Motion.*[1]

returned that the defendant had not lay fee, but that he was rector of a rectory, the Court of Exchequer, upon application, awarded a sequestration to the bishop. *R. v. Hind*, 1 C. & J. 389; 1 Tyr. 347; S. C. nom. *R. v. Hind*, 1 Dowl. 286, S. P. *R. v. Armstrong*, 2 C., M. & R. 205. And see *R. v. Powell*, 1 Mee. & W. 321.

[1] It is entirely in the discretion of the courts whether they will reverse an outlawry upon motion or not. They will in general do so, for the same errors in fact as would enable the party to reverse it by writ of error (*Beauchamp v. Tomkins*, 3 Taunt. 141. *Hesse v. Wood*, id. 691), if he will submit to such equitable terms as they may impose. If the defendant were beyond seas at the time of the awarding of the exigent, and did not go abroad for the purpose of avoiding the process, the court will reverse the outlawry on motion. *Graham v. Henry*, 1 B. & A. 131. *Levy v. Claggett*, 1 Mee. & W. 547. *Hunter v. Whitfield*, 3 Bing. N. C. 878. *Porter v. O'Meara*, 5 id. 626. But they have refused to reverse it merely on the ground that he had constantly appeared in public during the proceedings against him, and there could have been no difficulty in finding him (*Johnson v. Driver*, 1 Dowl. 127); or that the defendant has been discharged as to the debt by the insolvent court. *Dickson v. Baker*, 3 Nev. & M. 775; but see *Nicholson v. Nichols*, 3 Dowl. 326. *Dixon v. Baker*, 2 Dowl. 517. *Adcock v. Fiske*, 9 L. J. C. P. 17. Nor will they reverse it, upon the motion of any third party, in any collateral proceedings. *Symonds v. Parmiter*, 1 W. Black. 20. Nor will they reverse it, even upon the defendant's own motion, unless he will submit to such terms as they impose upon him (*Solly v. Forbes*, 8 Taunt. 516; and see *Summervil v. Watkins*, 14 East, 536); except where it appears that the plaintiff's proceeding to outlawry was, under the circumstances, an abuse of the process of the court, in which case the court will reverse the outlawry without any terms, and even make the plaintiff pay the costs. *Pigou v. Drummond*, 1 Bing. N. C. 354; and *see* 2 Salk. 495. The usual terms imposed in the case of outlawry upon mesne process were, appearance, and payment of costs (*Graham v. Grill*, 1 M. & S. 409; and see *Bank of England v. Reid*, 7 Mee. & W. 159; 10 L. J. Ex. 62. *Smith v. Bromley*, 29 L. J. Q. B. 91), which appearance is the same as in ordinary cases; and in the case of outlawry upon final process, payment of the debt and costs, the costs of the outlawry, &c. *Solomon v. Graham*, 24 L. J. Q. B. 332. See *Ibbotson et al. v. Fenton*, 6 Ad. & E. 772. The court, however, by their rule, will not limit any time for the payment of the costs. *Bennett v. Gardiner*, 2 Dowl. N. S. 50.

The motion must be made promptly after the party is first apprised of the proceeding to outlawry; otherwise the court will not relieve him on motion. *Anderson v. Earl Stirling*, 2 Dowl. 267; and see *Lewis v. Davison*, 3 id. 272. And it must appear from the affidavits that it is made at the instance and by the authority of the party outlawed. *Houlditch v. Swinfen*, 2 Bing. N. C. 712; 5 Dowl. 36. *Plunkett v. Buchanan*, 3 B.& C.736.

Recently an outlawry was reversed in the Queen's Bench after the lapse of one hundred and sixteen years. 7 Ad. & E. N. S. 216.

A rule for judgment of reversal of outlawry upon a verdict finding error in fact was obtained on the 28th of May; application to set it aside for irregularity on the 10th of June:—*Held*, not too late. *Commerell v. Beauclerk*, 1 B., C. C. 1; 16 Jur. 65; 21 L. J. Q. B. 137: *Earle.*

A party may appear by attorney to reverse an outlawry for error in fact. *Craig v. Levy*, 1 Ex. 570. *Smith v. Bromley*, *supra.* But it must be shown that he is authorised by the outlaw. *Skinner v. Carter*, 15 C. B. 472. It is no ground for setting aside a writ of error *coram nobis*, to reverse an outlawry, that the attorney has not made an affidavit; that he has the authority of the outlaw to issue such a writ; nor that the outlaw has not entered an appearance. *Cornewall v. Ives*, 5 D. & L. 392; 2 B. C. Rep. 195; 12 Jur. 1003; 17 L. J. Q. B. 103: *Earle.*

On making a rule absolute for setting aside an outlawry on payment of costs, the court, we have seen, will not limit the period within which those costs shall be paid. *Bennett v. Gardener*, 2 Dowl. N. S. 50; 7 Jur. 129: *Wightman.*

A rule to set aside an outlawry for irregularity was discharged with costs, on the ground that the affidavit did not purport to be made by an attorney authorised by the defendant. The irregularity being admitted, the defendant, although he had not paid the costs, was allowed to make a second application for the same purpose, but only on payment of the costs of the second motion. *Skinner v. Carter*, 16 C. B. 548.

A rule for judgment to reverse an outlawry where the defendant has not pleaded to the assignment of errors within the proper time, is a rule *nisi;* but the court will make the rule absolute without imposing any terms upon the plaintiff in error, if the defendant in error, on showing cause, has no answer to the facts alleged. *Howard v. Kershaw*, 6 Ex. 541; 20 Prac. Rep. 360; 20 L. J. Ex. 237; S. P. *Greville v. Cooper*, 9 Jur. 255: *Williams.*

After motion to reverse an outlawry has been discharged, the court will not reverse it on a new motion founded upon affidavits

(2) *By Writ of Error.*[1]

(E) *Consequences of Outlawry.*[2]

not stating any fact subsequent to the first application, but will put the defendant to his writ of error. *Stultz v. Wyatt*, 6 Q. B. 666.

[1] The party outlawed may proced to reverse the outlawry by writ of error *coram nobis* or *coram vobis*, either for error appearing on the face of the proceedings or for error in fact, such as the fact of the party being beyond sea at the time of awarding the exigent (see *Richardson v. Robinson*, 5 Taunt. 309. *Serocold v. Hampsey*, 12 East, 625, n. *Bryan v. Waystaffe*, 5 B. & C. 314; 8 D. & R. 208. *Hesse v. Wood*, 4 Taunt. 691), or the like.

Bail is required where the want of proclamations is to be assigned for error; in which case the recognisance must be to pay, and not merely to pay or render. 31 Eliz. c. 3, s. 3.

This mode of reversing an outlawry by writ of error, however, is never resorted to in practice, where the party can have relief on motion.

In a writ of error brought to reverse a judgment of waiver against a woman, the judgment was called a judgment of outlawry: — *Held*, upon plea of *nul tiel record*, a fatal variance, and that the defendant in error was entitled to judgment. *Burnett v. Phillips*, 2 Prac. Rep. 444; 20 L. J. Ex. 337.

In error to reverse an outlawry, the error assigned being, that at the time of issuing the *exigi facias* the plaintiff in error was beyond the seas, the defendant pleaded that the plaintiff left the realm before awarding the *exigi facias*, and voluntarily remained absent, and that he had notice that he was about to be demanded at the county courts, and might have returned before they were holden: — *Held*, a non-issuable plea. *Beauclerk v. Hook*, 20 L. J. Q. B. 485.

Upon error *coram nobis* to reverse an outlawry, a verdict having been found for the plaintiff in error upon the assignment of errors, and the time for moving for a new trial having passed, he is entitled to a rule absolute to reverse the outlawry upon production of the record and postea. *Beavan v. Cox*, 9 C. B. 579; 19 L. J. C. P. 304.

[2] The consequences of outlawry, as before stated (*ante*, p. 26) are, that the outlaw cannot afterwards sue in any action (*see* vol. i. p. 17), or take any other proceeding at law or in equity for his advantage. Hence the objection that a plaintiff is an outlaw may be taken upon an interlocutory motion by him. *Knowles v. Rhydedefid Colliery Co.* 1 Johns. 514; 6 Jur. N. L. 291; 8 W. R. 159. *Walker v. Thelluson*, 1 Dowl. P. C. (N. S.) 277; 11 L. J. Q. B. 14. And the court will not entertain his application to compel the delivery of an attorney's bill, or to refer to taxation a bill of costs already delivered (*In re Ford*, 1 B. C. Rep. 88; 10 Jur. 757; 6 Q. B. 867); nor can an outlaw enforce payment of damages recovered in an action of libel by *scire facias* on the recognisance to the Crown under the 60 Geo. 3, c. 9, ss. 8, and 11 Geo. 4, and 1 Wm. 4, c. 73, s. 3; and therefore, where notice of a rule to stay proceedings on the ground of his outlawry was served on the Attorney-General, and he did not appear, the court made the rule absolute. *Rey. v. Lowe*, 8 Ex. 697; 22 L. J. Ex. 262.

If a judgment of outlawry stand in the way of a claim to a barony in abeyance, although it is clearly erroneous, a committee of privileges cannot overlook it, or reverse it, but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the committee. *Wharton Peerage*, 12 Clark & Fin. 295. Effect of outlawry is a forfeiture of outlaw's interest, see *Macrae v. Hyndman*, 6 id. 212; 1 Rob. 571. But an outlaw may claim the protection of the court to set aside wrongful or irregular proceedings which have been taken against him, although he cannot put the law in motion for his benefit without first reversing his outlawry. *Davis v. Trevanion*, 2 D. & L. 743; 9 Jur. 492; 14 L. J. Q. B. 138. The court will therefore set aside a judgment on a warrant of attorney, and a *scire facias* to revive that judgment, on the ground that the warrant of attorney has not been duly attested, although the defendant be an outlaw (Id.); and he may be heard whenever he comes to the court in matters purely defensive. *Walker v. Thelluson*, 1 Dowl. N. S. 578; 6 Jur. 345, B. C. Therefore he may apply to set aside proceedings, on the ground that a previous *sci. fa.* and judgment thereon have not been recited in a second *sci. fa.* (Id.) So, if brought before a judge on summons, he is entitled to be heard. *In re Pyne*, 5 C. B. 409.

An outlawry in progress only, but not perfected, cannot prevent a party from being heard in a proceeding actually instituted; therefore, where an outlawry had not been perfected till after a rule *nisi* had been obtained by the outlaw to set aside the irregular proceedings (though the proceedings to outlawry were completed before the rule had been made absolute), such outlaw is entitled to be heard to make his rule to set the proceedings aside absolute, and the court will, in such a case, refuse the plaintiff costs of opposing the rule. *Byrne v. Manning*, 2 Dowl. N. S. 403; 7 Jur. 88; 12 L. J. Q. B. 4: *Patteson.*

Defendant having obtained a rule *nisi* to set aside a warrant of attorney to secure an annuity, and judgment thereon, on the ground of a defect in the memorial before outlawry on the judgment was perfected against him, it was held he might, after the outlawry was completed, proceed to make his rule absolute. The Court of Common Pleas allowed a defendant, who had been outlawed, to oppose his being charged in execution upon a judg-

II. In Criminal Proceedings.

(A) *In what cases.*[1]

(B) *Process of.*[2]

(C) *Judgment.*[3]

(D) *Effect of.*[4]

OVERSEERS. *See* also Churchwardens, vol. iii. p. 114; *post*, Poor.

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ment, in respect to which he had been discharged by the Insolvent Debtors' Court. *Abthorpe v. Fiske*, 8 Dowl. 66.

As to whether a trader, against whom judgment of outlawry is in force, can file a petition of adjudication of bankruptcy against himself, see *Adams* (*Ex-parte*), 4 Jur. N. S. 1082; 27 L. J. 37, Bank.

[1] Outlawry lies on all indictments for treason and felony, and in all cases of indictable misdemeanors where a *capias* lies (*see* 2 Hawk. c. 27, s. 109); and on informations *ex officio* (*R. v. Wilkes*, 4 Bing. 2527, 2555); but no person shall be outlawed as accessory before or after the fact to a felony before the principal has been attainted. Stat. of Westm. 1, c. 14; 2 Hawk. c. 27, s. 129. So, in a criminal information, if the defendant absconds before an appearance is entered for him, and he cannot be taken upon an attachment, he may be proceeded against to outlawry.

[2] The first process to be issued is a *venire* to the sheriff, commanding him to summon the defendant to appear, returnable on the first day of the ensuing term; and upon the return of the writ *non est inventus*, a *capias*, tested on the return of the *venire*, and returnable on the first day of the following term; and upon that writ being returned *non est inventus*, an *alias capias*, tested on the return of the first *capias*, and returnable on the first day of the following term; and upon that writ being returned *non est inventus*, a *pluries capias*, tested on the return of the *alias capias*, and returnable on the first day of the following term; and upon that writ being returned *non est inventus*, writs of *capias cum proclamatione* and *exigent* must be issued; and between the teste and return of those writs (which need not be returnable in the following term) there must be five county courts, or if in London, five hustings of pleas of land, at which the defendant must be exacted from time to time; and proclamation must also be made for the defendant according to the statutes 31 Eliz. c. 3, s. 4, and 5 Wm. & M. c. 22, s. 4; and *see* 7 Wm. 4 and 1 Vic. c. 45. Upon the return of the *capias cum proclamatione* and *exigent* the outlawry is complete.

[3] When the outlawry is perfected the prosecutors enter up judgment thereon, and prepare a draft of the proceedings for enrolment (*see* the form in Gude, 524, 599. *Rex v. Yandall*, 4 T. R. 521), which is sometimes settled by counsel, as it is necessary to be scrupulously exact and strict in the whole of the proceedings, otherwise the outlawry may be reversed upon a writ of error. *Rex v. Barrington*, 3 T. R. 499. *Rex v. Yandall, supra. Rex v. Almon*, 5 id. 202.

[4] In misdemeanors, outlawry is generally a more severe punishment than would be inflicted for the crime of which the outlaw stands accused or convicted. It is a forfeiture of his goods and chattels and all the profits of his real estate, and perpetual imprisonment, with many incapacities. If it is erroneous it cannot be reversed without a writ of error. *Per Lord Mansfield, C. J.*, in *Rex v. Wilkes*, 4 Burr. 2549. A writ of error cannot be granted without the fiat of the Attorney-General, who will not grant it unless the defendant be in custody, though an apparently sufficient ground of error be specified to him (Id.); and in criminal cases the court will not reverse an outlawry, even by consent of the Attorney-General, for matter of error in law, unless satisfied that there really is such error; but it is otherwise where the Attorney-General confesses an error in fact. (Id.)

Judgment of outlawry for not appearing to answer an indictment for high treason was reversed after the lapse of a hundred and sixteen years, on writ of error sued out by a co-heir of the outlaw, because it did not appear by the record that proclamations had been made, or a writ of proclamation issued. *Tynte v. Reg.* (in error), 7 Q. B. 216.

A debt upon a promissory-note is forfeited to the Crown by the outlawry of the payee, upon an indictment for misdemeanor. *M'Dowell v. Bergin*, 12 Ir. Com. L. Rep. 391, Ex.

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I. Of the Appointment of.

(A) *For what Places Overseers and Assistant may be Appointed.*[1]

[1] By the 43 Eliz. c. 2, a parish was the only district bound or entitled to the separate maintenance of its poor; but by stat. 13 & 14 Car. 2, c. 21, after reciting that the inhabitants of various counties, by reason of the largeness of the parishes within the same, cannot reap the benefit of the act of the 43 Eliz., it is enacted, that all and every the poor, needy, impotent and lame person and persons within every township or village within the several counties aforesaid shall, from and after the passing of this act, be maintained, kept, provided for, and set on work, within the several and respective township and village wherein he, she, or they shall inhabit, according to the intent of the act, and there shall be chosen and appointed two or more overseers within every of the said township or village, in manner as is by the said act of Elizabeth directed, and liable to the same duties, and pains, and penalties for non-performance thereof.

It was at one time supposed, that parishes which were in a condition to receive the benefit of 43 Eliz. at the time of 13 & 14 Car. 2, ought not to be divided by reason of anything which may happen since. *Rex v. Justices of Middlesex*, 1 Bott, 39. See *per Dunning*, *arguendo*, *Rex v. Uttoxeter*, 1 Doug. 348; and see *Lord Kenyon* in *Rex v. Leigh*, 3 T. R. 746. But it is now determined that the latter statute did not oblige districts then immediately to adopt a mode of maintenance for their poor, from which they should not afterwards be at liberty to depart; and that therefore, if, from increase of population or other cause, a parish which at the time of 13 & 14 Car. 2, enjoyed the benefit of 43 Eliz. as a parish, has since become incapable of conveniently reaping that benefit, distinct appointments may be made for its component townships (*per Buller, J.*, and *Ashurst, J.*, in *Rex v. Leigh*, 3 T. R. 748; and *see per Buller, J.*, in *Rex v. Sir Watts Horton*, 1 T. R. 376, 377. *See* also *Peart v. Westgarth*, 3 Burr. 1610); and the principle of this determination has been followed in stat. 59 Geo. c. 95, respecting towns corporate or franchises; which, after reciting in its preamble that various such towns situate within one or more parish or parishes, and not co-extensive therewith, have, for a long time past, been separately assessed from the parish or parishes in which they are situate, and overseers of the poor for such town or franchise have been appointed, distinct and apart from the overseers of the poor appointed for such parish or parishes, which have, in many cases, been made without sufficient authority, and yet, by reason of the long continuance of the said separation, the towns corporate, or franchise, cannot now be reunited to the parish or parishes in which they are situate, without manifest inconvenience and hardship, enacts, "that, after the passing of this act, all such separation of towns corporate, or franchise, from the parish or parishes in which they are situate, together with the separate and distinct appointment of the overseers of the poor, shall be deemed and taken to be lawful to all intents and purposes whatsoever, in the same manner as if the said separation or division had taken place under the authority of an act made in the 43d year of the reign of Queen Elizabeth, intituled 'An Act for the Relief of the Poor.' Provided always, nevertheless, that nothing in this act contained shall ren-

(B) *Exemptions from Serving the Office.*[1]

der legal, or confirm, any separation of a town corporate, or franchise, situate, in respect to the maintenance of the poor or the appointment of the overseers of the poor, in any case where it shall appear that such separation has commenced within sixty years before the passing of this act."

A parish, in strictness, seems to be that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein. Bl. Com. 111. But the 43d Eliz. is deemed to be satisfied, although the district be not, in this precise sense, a parish, so that it were at the time of passing that act, and have been ever since, a parish by reputation. *Nichols v. Walker*, Cro. Car. 394; 1 Bott, 33. It is indispensable that this separation shall not have commenced subsequently to that time, the statute relating only to parishes then *in esse*. *Hilton v. Pawle*, Cro. Car. 92; 1 Bott, 32.

A district which had not at the time of the passing of the stat. of Eliz. the entire separate maintenance of its own poor, cannot be deemed a reputed parish. *Reg. v. Clayton*, 13 Q. B. 354.

The parish to which there can be overseers should have existed before the 43d Eliz. *Rudd v. Foster*, 4 Mod. 157. Vills, townships (*Rex v. Showler*, 3 Burr. 1391), or hamlets (*Rex v. Morris*, 4 T. R. 550), though extra-parochial (*Rex v. Rufford*, 1 Stra. 512), are entitled to overseers, but a precinct is not. *Rex v. Severn*, 1 Bott, 4.

Where a parish, consisting of several townships, is not entitled under stat. 43 Eliz. to have its poor maintained by the whole collectively, each township has a right separately to maintain its own poor, and appoint its own overseer. *Rex v. Sir Watts Horton*, 1 T. R. 374. See *R. v. Marriott*, 12 Ad. & E. 35. *R. v. Worcestershire*, 3 Nev. & P. 434.

Where a parish, consisting of several townships, is entitled to have more than four overseers, the number allowed under stat. 43 Eliz., as where, from its extent and populousness, four are not sufficient, it cannot claim the benefit of that act, namely, to have its poor maintained, and overseers appointed, jointly by the whole parish. So, if one or more townships in the same parish are already separated, and provide for their own poor separately, it proves decisively that the parish cannot maintain their poor as a parish. *Rex v. Horton*, *supra*. Another material ingredient to establish this point, although it is not so decisive a criterion, is the customary appointment of more than four overseers. *Rex v. Newell*, 4 T. R. 266, 267. Though it should appear that a parish had enjoyed the benefit of the stat. 43 Eliz. c. 8, yet if they cannot now conveniently maintain their own poor jointly, they will be allowed to divide themselves, provided there are such legal divisions in the parish as are capable of supporting their own poor separately, under the stats. 13 & 14 Car. 2, c. 12. *Rex v. the Inhabitants of Leigh*, 3 T. R. 746. If it appear, without any evidence to the contrary, that a township has for a length of time maintained its own poor separately, this is proof that the parish at some former period could not have the benefit of the stat. 43 Eliz. c. 2, which is sufficient to continue the same privilege to the township, notwithstanding, from a change of circumstances, it may not now be inconvenient for the parish to maintain its own poor collectively. (Id.) See *Price v. Quarrell*, 12 Ad. & E. 784.

That a parish consisting of several townships should be entitled, under stat. 43 Eliz. to have its poor maintained by the whole collectively, and thus have overseers appointed jointly for the whole, it is necessary that the right of compelling the entire parish to join should exist; which cannot be the case where any one township is entitled to maintain its own poor, and appoint its own overseer, separately from the rest. A parish can only act as such where all its parts are united. *Rex v. Sir Watts Horton*, *supra*. See *Rex v. Newell*, 4 T. R. 268. *Reg. v. Clayton*, 13 Q. B. 354; 12 L. J. M. C. 129.

In order that a parish may be divided into districts, it is essential — 1st, that it should consist of two or more vills or townships; and, 2dly, that the parish cannot otherwise conveniently enjoy the benefit of the 43d Eliz. *Peart v. Westgarth*, 3 Burr. 1610. *Rex v. Newell*, *supra*. See *Rex v. Walsall*, 2 B. & A. 157. *Rex v. Inhabitants of Leigh*, 3 T. R. 748. Orders of the Poor-Law Commissioners, treating the parish and district as separate, do not tend to make them so. *R. v. Clayton*, *supra*.

Where several districts of a parish being in several counties by agreement unite in appointing overseers for upwards of thirty years, a rate made by the whole is valid, as having substantially the benefit of the statute. *Lane v. Cobham*, 3 Smith, 1; 7 East, 1. *See* 43 Eliz. c. 2.

By 7 & 8 Vic. c. 101, s. 22, it is no longer lawful to appoint separate overseers for any township, village, or other place for which, before the passing of that act, separate overseers had not been lawfully appointed.

A district having no church cannot appoint overseers (*Reg. v. Worcestershire*, 3 Nev. & P. 434); but hamlets are entitled to appoint separate overseers. *Reg. v. Worcestershire*, 3 Per. & D. 465.

[1] The following persons are exempt from serving the office of overseer:—Clergymen (*Anon.* 1 Bott, 9; Gibs. Codes, 215); Dissenting ministers (1 Wm. & M. c. 18. *Kenward v. Knowles*, Will. 463; 1 Gibs. Codex, 215); Members of Parliament (*Rex v. Abdy*, Cro. Car. 585; 1 Bott, 8); Aldermen of London and justices of the peace (*Rex v. Gayer*, 1 Burr. 245; 1 Bott, 9; *Lord Kenyon, C. J.*, in *Rex v. Pateman*, 2 T. R. 779); Practising barristers and attornies (*Rex v.*

(C) *Who Qualified, and by whom, how, and where Overseers are Appointed.*[1]

Prouse, Cro. Car. 389; 1 Bott, 7; 1 Nol. P. L. 47; and *see* 8 T. R. 379); Physicians (stat. 32 Hen. 8, c. 40; *see* 1 Bott, 13); Freemen of the Corporation of Surgeons in London (18 Geo. 2, c. 15, s. 10); Apothecaries (6 & 7 Wm. 3, c. 4, ss. 2, 3); Non-commissioned officers, &c., of the militia (42 Geo. 3, c. 90, s. 174); Captains in the guards, yeomen in ordinary, officers in the army (*Rex v. Gayer*, 1 Bott, 9; *Rex v. Warner*, 8 T. R. 375; 1 Bott, 11); Persons apprehending felons (stat. 10 & 11 Wm. 3, c. 23, s. 2; 58 Geo. 3, 70, s. 2.

Commissioners and officers of Excise or Customs are exempt. 3 & 4 Wm. 4, c. 51, s. 12.

A churchwarden cannot be chosen overseer (*Rex v. All Saints*, 13 East, 143), as he is one *virtute officii*. 43 Eliz. c. 2, s. 1. A clerk of the treasury of the Court of Common Pleas was held to be privileged. *Ex parte Jefferies*, 6 Bing. 195; 3 M. & P. 450.

[1] By the 39 Eliz. c. 13, the churchwardens of every parish, and four substantial householders there, being subsidy-men, or, for want of subsidy-men, four other substantial householders, are to be nominated yearly in Easter week by two justices, and to be called overseers of the poor of the said parish. And so it continues, with some small variation, by the stat. 43 Eliz. c. 2.

By 59 Geo. 3, c. 12, s. 6, "it shall be lawful for his majesty's justices of the peace, in their respective special sessions for the appointment of overseers of the poor, upon the nomination and at the request of the inhabitants of any parish in vestry assembled, to appoint any person who shall be assessed to the relief of the poor thereof, and shall be a householder resident within two miles from the church or chapel of such parish; or where there shall be no church or chapel, shall be resident within one mile from the boundary of such parish, to be an overseer of the poor thereof, although the person so to be appointed shall not be an householder within the parish of which he shall be so appointed an overseer of the poor; and it shall be sufficient in every such appointment to describe the person appointed by his name and residence: Provided that no person shall be appointed to, or be compellable to serve the office of overseer of the poor of any parish or place in which he shall not be a householder, unless he shall have consented to such appointment." Sect. 7 enacts, "that it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be overseer or overseers of the poor of such parish, and to determine and specify the duties to be by them executed and performed, and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant-overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor, at such times and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons so to be appointed; and every person so to be appointed assistant-overseer shall be, and he is hereby authorised and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor; and every person or persons so appointed shall continue to be an assistant-overseer of the poor till he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of an assistant-overseer or overseers, to require and take security for the faithful execution of his or their office by bond, with or without surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwardens and overseers of the poor, and may, on any breach of condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry for the benefit of the parish, in the manner hereinafter provided."

The justices of the peace have authority under the 43 Eliz. c. 41, independently of the nomination of the vestry, to appoint substantial householders to be overseers of the poor. *Reg. v. Justices of Lancashire*, 8 W. R. 588; 36 L. T. 472. *R. v. Harrison*, 9 Q. B. 794; 16 L. J. M. C. 33.

In corporate towns and cities the appointment is made by the justices having jurisdiction therein, whether they be justices of the city, or borough, or of the county in which it is situate. 12 & 13 Vic. c. 8, s. 1; 15 & 16 Vic. c. 38. See *R. v. Preston*, 12 Q. B. 891; 18 L. J. M. C. 10. *Mayor of Birmingham v. Wright*, 16 Q. B. 63; 20 L. J. Q. B. 214.

Neither personal residence nor payment of rent or taxes is essential. Every partner in a business carried on in a dwelling-house, though only a servant reside there, is a householder for this purpose. *R. v. Poynder*, 1 B. & C. 178.

The offices of overseer and assistant-overseer are not, it seems, necessarily incompatible, so as to make an acceptance of the former office a vacating of the latter. *Worth v. Newton*, 10 Ex. 247. But no assistant-overseer can be a guardian of the poor. 5 & 6 Vic. c. 57, s. 14.

An assistant-overseer derives his authority from the vestry, and not as servant or

(D) *What the Appointment must contain.*[1]

agent to the overseers. *Reg. v. Watts*, 7 Ad. & E. 461. *Points v. Attwood*, 6 C. B. 38. See *Skingley v. Surridge*, 11 Mee. & W. 503; 12 L. J. M. C. 122; and 18 L. J. C. P. 19.

Formerly, the overseers were nominated early in Easter week; but by the 54 Geo. 3, c. 91, the appointment of overseers of the poor, so directed by the said act of Queen Elizabeth, shall, in every year, be made on the 25th day of March, or within fourteen days next after the 25th day of March, in all and every the same manner as directed by the said act to be made in Easter week. The act is directory only, and an appointment on the 14th of April, at a meeting held by adjournment of a special sessions holden on the 31st of March, has been held valid. *R. v. Sneyd*, 9 Dowl. 1001. See *Rex v. Justices of Denbighshire*, 4 East, 142. *Rex v. Mayor of Rochester*, 27 L. J. Q. B. 45; Ex. Ch. 434.

[1] By 43 Eliz. c. 2, the appointment is to be under the hand and seal of two or more justices of the peace in the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie. They cannot seal or sign the appointment separately. *Rex v. Forrest*, 3 T. R. 38. Where once legally made the justices are *functi officio*. *Rex v. Great Marlow*, 2 East, 244.

An appointment contrary to the mode described by the 43 Eliz. is void. See *Rex v. Farrant, supra.*

The name of the county or district should be set forth in the appointment (*Rex v. Chilvers Coton*, 8 T. R. 178. *Rex v. Severn*, Say. 278), and the justices who nominate be described as such (*Walton v. Chesterfield*, 5 Mod. 322), as acting within their jurisdiction or liberty (*Rex v. Dobbyn*, 2 Salk. 474); but it need not describe them as dwelling in or near the parish. *Rex v. Sparrow*, 2 Sess. Ca. 140. The appointment of two overseers may be by separate instruments. *Rex v. Morris*, 4 T. R. 550.

The appointment should describe the persons as substantial householders. *Rex v. Sheringbrook*, 2 Ld. Raym. 1394. See *Rex v. Carle*, 1 Bott, 5. *Rex v. Weobly*, 2 Stra. 1261; 1 Bott, 4. The description of the appointees must be in the body of the appointment, and will not be sufficient if inserted only in the direction at the foot of it. *Rex v. Weobly, supra.* If the place be a parish it must be called a parish, and if a township it must be called a township or a village, those being the terms used by statute; or which, in the common acceptation, is synonymous to a hamlet or vill. *Rex v. Morris*, 4 T. R. 550; 1 Bott, 23. Those descriptions cannot be supplied by intendment, and are so strictly required, that the order will be void if the township be designated as such only under an *alias*, as "the precinct of the Tower, otherwise called the parish of St. Peter's ad Vincula." *Rex v. Severn and Arnold*, Say. 278; 1 Bott, 4. When the appointment is for a township, it is not sufficient that the overseer appointed be a householder in the parish of which that township is a district; he must also, unless where the appointment is under 59 Geo. 3, c. 12, be a householder in that particular township; but if he be described in the appointment merely as a householder in the parish, he shall be intended a householder in the vill for which he is appointed. *Rex v. Morris*, 4 T. R. 550; 1 Bott, 6. The words "in the said county," are necessary to show that the parish is in the same county for which the justices have previously stated that they are acting. *Rex v. Houlditch*, 1 Bott, 68. The appointment should also state them to be overseers of the poor of the said parish or township (*see* 1 Bott, P. L. 4), together with the churchwardens thereof. (Id. 3.)

The appointment should be for the present year (*Rex v. Helling*, 3 Burr. 1905); or one next ensuing the date hereof. *Rex v. Stubbs*, 2 T. R. 395. The justices must also sign the appointment; and it has been generally considered requisite, not only that the justices sign and seal, but that their signing and sealing be in each other's presence: for the function is not ministerial merely, like the allowance of a rate, but judicial; and it is fit, therefore, that the magistrates confer, and that the result of their conference be the ground of their determination. Indeed, it is a general rule that, where the statute requires the concurrence of two magistrates, they should both act together. *Rex v. Arnold*, 1 Stra. 101; 1 Bott, 16. *Rex v. Great Marlow*, 2 East, 246; 1 Bott, 18. *Rex v. Forrest*, 3 T. R. 38; 1 Bott, 17.

If a private act of parliament direct that overseers shall be appointed "for the term of three years then next ensuing," *semble*, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad. *Bristol, Governors of Poor, v. Wait*, 6 C. & P. 591. A local act provided, that the ratepayers of a parish should, "in vestry assembled, or the major part of them then present, nominate" persons to serve the office of overseers of the poor, from whom the county justices were to select the overseers: — *Held*, that the nomination was not confined to the ratepayers only who were present at the vestry meeting, but that a poll might be granted at which all the ratepayers might vote. *Reg. v. Hedger*, 4 Per. & D. 61.

The nomination must not be on a Sunday. *Rex v. Bridgewater*, Cowp. 139. See *R. v. Butler*, 1 W. Bl. 650. If several appointments are made on the same day, that made first prevails, and the subsequent appointments are void. *Rex v. Serle*, 1 Nol. 50; Bott, 24.

The number of overseers of any parish, exclusively of the churchwardens, must not be more than four nor fewer than two, except where it is subdivided into townships, in which case each township may have four, three, or two overseers; or, where a greater

(E) *Validity of Appointment, how Questioned.*[1]

(F) *Indictment for Refusal to Serve.*[2]

III. Duties of Overseers.

(A) *Connected with the Relief of the Poor, and other Matters in General.*[3]

latitude is given by some special statute; and no usage for a greater or smaller number than the stat. 43 Eliz. prescribes will avail against the strong and express terms of the enactment. See *Rex v. Inhabitants of All Saints*, 13 East, 142.

[1] Persons aggrieved by the appointment, whether the appointee or the parishioners at large, may appeal to the next quarter sessions. 43 Eliz. c. 2, s. 6. *R. v. St. Albans*, 3 B. & C. 698. *Rex v. Forrest*, 3 T. R. 38.

Although no notice of appeal is required, it seems that reasonable notice must be given. See *Re Blues*, 5 E. & B. 291.

The appointee may also question the validity of the appointment by removing it into the Queen's Bench by *certiorari*, and moving that it be quashed; either upon an objection apparent on the face of it, or disclosed by affidavits. *Rex v. Inhabitants of Standard Hill*, 4 M. & S. 378. *Rex v. Great Marlow*, 2 East, 244.

A *mandamus* to an overseer to produce his appointment to a rated inhabitant, on a surmise that it was bad, was refused, the alleged defect being the subject of an appeal. *Reg. v. Harrison*, 9 Q. B. 794.

The overseers' appointment cannot be questioned in a collateral proceeding. *Pinney v. Slade*, 5 Bing. N. S. 319.

Secondary evidence may be given of the appointment where the instrument of appointment cannot be found. *Rex v. Witherley*, 4 M. & R. 724.

[2] An indictment lies against an overseer for refusing to take upon him the office. *Rex v. Jones*, 2 Stra. 1146; 2 Sess. Ca. 187. It would be probably necessary on such an indictment to prove that he had received notice of his appointment, for such notice is requisite even to warrant a conviction before two justices in penalties under 43 Eliz. for neglect of his office, where the notice seems the less important, inasmuch as such a conviction must allege the defendant to have accepted the office, which implies that he must have had notice. *Rex v. Harman*, 1 Bott, 335.

An invalidity in the appointment is a good answer to the indictment. *Rex v. Burder*, 4 T. R. 778. *Rex v. Pardy*, 1 Bott, 339.

[3] By stat. 17 Geo. 3, c. 38, s. 15, overseers of the poor within every township or place, where there are no churchwardens, shall from time to time do, perform, and execute, all and every the acts, powers, and authorities, concerning the relief of, and other matters and things relating to the poor, as churchwardens and overseers of the poor may do.

The stat. 2 & 3 Anne, c. 6, s. 3, respecting apprentices to the sea-service, has also given to the overseers of townships all the powers which it entrusted to churchwardens or overseers of a parish, and the stats. 51 Geo. 3, c. 80, and 54 id. c. 107, legalise instances where the execution would otherwise have been defective in respect of the number or authority of the officers executing it.

The general duties and powers of overseers are declared by stat. 43 Eliz. c. 2, ss. 1, 2, which enacts "that the churchwardens and overseers, or the greater part of them, shall take orders from time to time, by and with the consent of two or more such justices of the peace as is aforesaid, for setting to work the children of all such whose parents shall not, by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons, married or unmarried, having no means to maintain them, and no ordinary and daily trade of life to get their living by; and also to raise weekly or otherwise, by taxation of every inhabitant, parson, vicar, and others, and of every occupier of lands, houses, tithes impropriate, impropriations of tithes, coal-mines, or saleable underwoods, in the said parish, in such competent sum and sums of money as they shall think fit, a convenient stock of flax, wool, thread, iron, and other necessary wares and stuff to set the poor on work; and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the same parish, and to do and execute all other things, as well for the disposing of the said stock as otherwise concerning the premises, as to them shall seem convenient."

By 43 Eliz. c. 2, s. 2, overseers shall meet together at the least every month in the church of the said parish, upon the Sunday, in the afternoon after divine service, there to consider of some good course to be taken, and of some meet order to set down in the premise.

The duty of administering relief in parishes which are under guardians or a select vestry, or form part of a union, are now transferred to the guardians or select vestry, and it is not lawful for any overseer to give any further or other relief or allowance from the poor-rate than such as is ordered by the guardians or select vestry, except in cases of sudden necessity. 4 & 5 Wm. 4, c. 76, s. 54.

In parishes not in unions, or under guardians or a select vestry, the duties as to relief must still be performed by the overseers. In such parishes, also, the provisions of the Vaccination Act (3 & 4 Vic. c. 29), are to be carried into effect by the overseers.

They have also duties to perform in connexion with the election of guardians (*see*

(B) *To allow Inspection of Rates.*[1]
(C) *Connected with the Keeping and Rendering of Accounts.*[2]

Poor-law Order of April 22, 1842, art. 4), and the assessing of the poor-rate. Id. March 17, 1847. *See* Steer's *Parish Law*, 534. They furnish a certificate of residency and occupancy, &c., to applicants for beer licenses. *See* 3 & 4 Vic. c. 61, s. 2. *Thompson v. Harvey*, 4 H. & N. 254. *Reg. v. Kensington*, 12 Q. B. 654. And the 6 Vic. c. 18, imposes various duties on overseers as to publishing notices and lists of voters, and of claims and objections, in counties and boroughs.

It is the duty of all the overseers to sign the burgess list. *King v. Burrell*, 4 Per. & D. 207. The mere omission, whether wilful or not, to sign the burgess-list, under 5 & 6 Wm. 4, c. 76, s. 15, subjects an overseer to the penalty under s. 48. (Id.)

[1] The 17 Geo. 3, c. 23, s. 2, enacts, that the overseers of the poor shall permit inhabitants of the parish to inspect rates at all reasonable times; and shall upon demand (see *Parker v. Edwards*, 7 B. & C. 594) forthwith give copies of the same to any inhabitant of the parish. And by s. 3, "if any overseer shall not permit an inhabitant to inspect the rate, or shall neglect to give copies thereof as aforesaid, such overseer, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l.*"

The court held, first, that in order to entitle a party to sue for the penalty under the statute, he must show that he has sustained an injury by the act of the overseer; and, secondly, that there must be a demand to inspect the rate made at a reasonable time and place. *Spenceley v. Robinson*, 3 B. & C. 658.

In debt for penalties against an assistant-overseer for refusing inspection of rates, his appointment must be shown, and that it was his duty to allow inspection. *Bennett v. Edwards*, 7 B. & C. 586; 1 M. & R. 482. The declaration will be sufficient after verdict if it states that the defendant was overseer, and had such rate in his possession. *Bennett v. Edwards*, 8 B. & C. 702. The plaintiff need not describe himself as a rated inhabitant. *Batchelor v. Hodges*, 6 Nev. & M. 75.

[2] Under various statutes, overseers are required to account to justices, guardians, and others, at stated times; but these provisions have become practically inoperative since the 7 & 8 Vic. c. 101, which provides for the appointment of district auditors, and determines the powers of justices and all other persons to examine, audit, allow, or disallow accounts in any district for which such an auditor is appointed. *See post*, Poor.

By an order of the Poor-law Commissioners of 22d April, 1842, art. 5, the overseers are, within forty days after Lady-day, Michaelmas-day, and Christmas-day, to submit to the auditor a distinct account and balance-sheet, exhibiting the amount collected and disbursed by them during the last quarter, with proper vouchers for the same.

By 11 & 12 Vic. c. 91, s. 1, if the overseers lawfully, by virtue of their office, contract a debt on account of the parish within three months prior to the termination of their year of office, and the same has not been discharged by them before their year of office is determined, such debt is payable by and recoverable from the succeeding overseers, and chargeable upon the poor-rate. If the debt is contracted during the year of office, but more than three months prior to its termination, it may be paid by the immediate successors if the vestry and the Poor-law Board consent. See *Chambers v. Jones*, 5 Ex. 229.

The overseers must pay the balance over to their successors (*Rex v. Justices of Somersetshire*, 2 Stra. 992; 1 Bott, 311) within fourteen days after the end of the year. *Rex v. Egginton*, 1 T. R. 369. And two justices may enforce payment of the balance after appeal, though the sessions do not make any order for payment. *Rex v. Carter*, 4 id. 246; 1 Bott, 314.

Overseers may take credit for all sums properly expended, but not for disbursements to which the rate is not by law applicable. *R. v. Seville*, 5 B. & Ald. 180. *See* 2 E. & B. 182; 22 L. J. Q. B. 324.

Overseers cannot charge the parish with money paid in making or collecting the rates. *Rex v. Gwyer*, 2 Ad. & E. 216; 4 Nev. & M. 158.

Where overseers have acted *bonâ fide*, and not improvidently, in contesting an appeal against a poor-rate, which they afterwards refused to support, the costs of so doing ought not to be disallowed because they acted without first obtaining the sanction of the vestry. *Reg. v. Street*, 18 Q. B. 682. See *Reg. v. Great Western Railway Co.* 13 id. 327. *Reg. v. Touch*, 2 id. 308.

Bills of costs for proceeding in a court of law on behalf of the parish regarding any matter affecting the poor-rates, need not be paid before the termination of the proceedings; but, in any case, the bill, when taxed, if otherwise chargeable against the parish, is to be payable out of the poor-rates within one year next after the termination of the proceedings, and not otherwise, unless the Poor-law Board, by their order, authorise the payment of the costs of such proceedings by annual instalments, not to exceed five, commencing from such termination. 11 & 12 Vic. c. 91, s. 2. *See* 2 Q. B. 308.

Advances made by officers or others on behalf of a parish, without legal authority, may, with the consent of the guardians or vestry, be reimbursed by a single payment, or not more than five equal annual instalments. (Id. s. 3.)

As to the payment of a parish debt by the overseers out of the poor-rates upon the order of the Poor-law Commissioners, *see* 5 & 6 Vic. c. 18, ss. 5, 6, 7.

If an overseer has advanced his own money for the maintenance of the poor, &c., he may repay himself during his year of

III. Liabilities of Overseer.

(A) *In respect of Contracts.*[1]

(B) *For Neglect or Misconduct in his Office.*[2]

(C) *Must not be concerned in Contract for Supplying the Workhouse or Poor.*[3]

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office, and the succeeding overseers may levy such sums as remained due to him at the expiration of his office, and reimburse him out of the amount. 17 Geo. 2, c. 3, s. 11. And by 41 Geo. 3, c. 23, it is lawful to reimburse all sums which the preceding officers may have advanced during a time when no rate has been made, or where an appeal has been depending, by which the whole rate might be affected. So that, unless the non-payment of the rate have arisen from the remissness of the officers themselves (which, being no neglect or refusal of the party rated, comes not within 17 Geo. 2, c. 38, s. 11); or unless the officers, having made and collected the rate, have been imprudent enough to assess it too low, in which event the relief given by 41 Geo. 3, c. 23, s. 9, would not be applicable; the proper advances made by parish officers seem now secured to them, notwithstanding any accident by which they may have been prevented from repaying themselves during their year. *See* 17 Geo. 2, c. 38, s. 11. *Rex v. Wavell*, 1 Dougl. 116.

[1] The contract of a majority of the overseers for provisioning the poor binds the rest. *Rex v. Beeston*, 3 T. R. 592. Although churchwardens and overseers may be a corporation, yet, having no common seal, they cannot bind their successors by covenant. *Turnval v. Coombs*, 6 Scott, N. R. 522; 12 L. J. C. P. 265.

Overseers are liable on their joint order, though one be an assistant overseer. *Kirby v. Bannister*, 3 Nev. & M. 119.

Whether one overseer is liable jointly for goods ordered by another, is a question for the jury. *Eaden v. Titchmarsh*, 1 Ad. & E. 491; 3 Nev. & M. 712.

The 11 & 12 Vic. 91, ss. 1, 2, does not transfer the personal liability of overseers for legal proceedings to their successors in office. *Chambers v. Jones*, 5 Ex. 229; 19 L. J. Ex. 239.

In action against all the overseers for money lent to one as such: — *Held*, that it being contrary to the duty of an overseer to borrow money for parochial purposes, the others, in the absence of any express promise, were not liable. *Massey v. Knowles*, 3 Stark. 65.

[2] By 4 & 5 Wm. 4, c. 76, s. 95, if any overseer, assistant-overseer, master of a workhouse, or other officer of any parish or union, wilfully disobeys the legal and reasonable orders of the justices or guardians in carrying the rules of the commissioners or the provisions of the act into execution, he is liable, on conviction before two justices, to pay a sum not exceeding 5*l*. *See* also sect. 96.

By 7 & 8 Vic. c. 101, s. 63, if the overseers wilfully neglect to make or collect sufficient rates for the relief of the poor, or to pay such money to the guardians as they require; and if, by reason of such neglect, any relief directed by the guardians to be given be delayed or withheld for seven days, every such overseer is, upon conviction thereof, to forfeit a sum not exceeding 20*l*.

By 2 & 3 Vic. c. 84, s. 1, and 12 & 13 Vic. c. 103, s. 7, if the contribution to be made by the overseers to the board of guardians is in arrear, two justices may, on an application signed by the chairman of the board, summon any of the overseers, and order the amount to be levied by distress and sale of his goods. An unlawful removal of a pauper, with intent to cause him to become chargeable to another parish to which he is not chargeable, subjects the overseer so acting to a penalty. 9 & 10 Vic. c. 66, s. 6; 14 & 15 Vic. c. 105, s. 11.

An overseer or assistant-overseer purloining, embezzling, wilfully wasting (see *Carpenter v. Mason*, 12 Ad. & E. 629), or misapplying any of the monies, goods, or chattels belonging to any parish or union, is (in addition to such other penalties as he may be liable to) to forfeit, upon conviction before two justices, a sum not exceeding 20*l*., and also treble the amount or value of the goods, and is rendered incapable of serving any office under any act for the relief of the poor.

An attachment lies against an overseer for disobeying a Crown-office subpœna to produce rate-books before justices, on an inquiry as to a pauper's settlement. *Reg. v. Greenaway*, 7 Q. B. 126.

If an overseer do not provide for the poor, he is indictable; and if he relieve the poor when there is no necessity for it, it is a misdemeanor. *Tourney's case*, 16 Vin. Abr. Poor, 415; 1 Bott, 333; 2 Nol. P. L. 372.

[3] The 55 Geo. 3, c. 137, s. 6, enacts, "that no churchwarden or overseer of the poor, or other person or persons, in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control, or direction of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, shall or may be placed jointly with, or independently of, such churchwardens and overseers, or any of them, or by virtue of any act or acts of parliament, shall, either in his own name, or in the name of any other person or persons, provide, furnish, or supply for his or their own profit, any goods, materials, or provisions for the use of any workhouse or workhouses,

IV. Duration of Office, and Appointment of Successors.[1]

or otherwise for the support and maintenance of the poor in any parish or parishes, township or townships, hamlet or hamlets, place or places, for which he or they shall be appointed as such during the time which he or they shall retain such appointment; nor shall be concerned, directly or indirectly, in furnishing or supplying the same; or in any contract or contracts relating thereto, under pain of forfeiting the sum of 100*l.*, with full costs of suit, to any person or persons who shall sue for the same by action of debt, or on the case, in any of his majesty's courts of record at Westminster; in which action or actions no essoign, protection, wager of law, or more than one imparlance, shall be allowed: Provided nevertheless, that if it shall happen in any parish or parishes, township or townships, hamlet or hamlets, place or places, that a person or persons competent and willing to undertake the supply of any of the articles or things required for such workhouse or workhouses, or for the use of the poor there, cannot be found within a convenient distance therefrom, other than and except some or one of the churchwardens and overseers of the poor, or other person or persons having the ordering, managing, control, or direction of the poor in such parish or parishes, township or townships, hamlet or hamlets, place or places, then and in every such case it shall and may be lawful to and for any two or more neighbouring justices of the peace (proof thereof having been first duly made before them upon oath, and which oath such justices, or any one of them, are and is hereby authorised and empowered to administer), by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens and overseers, or other such person or persons as aforesaid, to contract and agree for the furnishing and supplying of any articles or things which may be required for such workhouse or workhouses, or otherwise, for the use of the poor."

This provision is, by the 4 & 5 Wm. 4, c. 76, s. 51, extended to all officers appointed under that act. Sect. 77 also enacts a like prohibition under a penalty of 5*l.* in the case of all persons employed in the administration of the poor-laws in a parish. See *Henderson v. Sherborne*, 2 Mee. & W. 236.

An overseer, by supplying the workhouse or the poor of the parish generally from his own shop, is liable to the above penalty. *West v. Andrews*, 5 B. & A. 328. But where an overseer, having received an order for the relief of a pauper, paid her part in money, and at her request gave her the remainder in goods from his shop, it was held that he was not liable to the penalty. *Proctor v. Manwaring*, 3 id. 145.

The prohibition against supplying goods does not apply to repairs of a workhouse. *Barber v. Waite*, 3 Nev. & M. 611.

The 4 & 5 Wm. 4, c. 76, prohibiting a parish-officer from supplying goods by way of relief to *any* person in the parish, repeals the penalty under the former act, 55 Geo. 3, c. 137, s. 6: therefore, that an action cannot be maintained under the latter act against an officer for a supply to an individual pauper. *Henderson v. Sherborne*, 2 Mee. & W. 237. *Proctor v. Manwaring*, *supra*. Therefore, an overseer who supplies, on his own account, an individual pauper with a coat, is not liable to the penalty imposed by 55 Geo. 3, c. 157, s. 6. *Henderson v. Sherborne*, *supra*.

Fairness of price is no answer (*Pope v. Backhouse*, 8 Taunt. 239); but if an overseer buys provisions, and lets the poor have them at the same price, or is concerned in a contract out of which he makes no profit, he will not be within the act. *Skinner v. Buckee*, 3 B. & C. 6.

[1] The 17 Geo. 2, c. 38, s. 3, enacts, "that if any overseer shall die, or remove from the place for which he was appointed, or become insolvent, before the expiration of his office, on oath thereof made, it shall be lawful for two justices of the peace to appoint another overseer in his stead, who shall continue in office until new overseers are appointed; and if any overseer shall remove as aforesaid, he shall, before such removal, deliver over to some churchwarden, or other overseer of the same place, his accounts verified as aforesaid, with all rates, assessments, books, papers, sums of money, and other things concerning his office, under the like penalties as are inflicted by this act on an overseer refusing to do the same after the expiration of his office; and if any overseer shall die as aforesaid, his executors or administrators shall, within forty days after his decease, deliver over all things concerning his office to some churchwarden or other overseer of the same place, and shall pay out of the assets left by such overseer all sums of money remaining due, which he received by virtue of his said office, before any of his other debts are paid and satisfied."

When the full number has not been appointed by the first instrument, it seems competent to the justices to add the rest by one or more supplementary appointments. *Rex v. Besland*, 1 Bott, 21. *Rex v. Morris*, 4 T. R. 550; 1 Bott, 23. And see *per Lawrence, J.*, *Rex v. Clifton*, 2 East, 177. Lastly, every overseer who continues living, solvent and resident, will remain in office until the expiration of the period limited for the appointment of the next year's overseers (*Rex v. Sparrow*, 1 Bott, 25; 1 Nol. P. L. 50), but not longer, even though no successors be appointed; nor, as it seems, does the authority even of the churchwardens, as overseers of the poor, continue beyond the expiration of the overseers' term, though liable to be revived by the appointment of new overseers, if the churchwardens continue in office beyond the over-

V. Liability of Surety of Assistant-Overseer.[1]

VI. Protection of Overseers when Sued.[2]

OYER.[3]

OYER and Terminer.[4]

P.

PANEL. *See* Jury and Jurors, vol. v. p. 277.

PAPER Book. *See* Demurrer, vol. iv. p. 43; Error, id. p. 252; Issue, vol. v. p. 235.

PARCENERS.[5] *See ante*, vol. iii. p. 222; Distress, vol. iv. p. 91; Gavelkind, id. p. 603; *post*, Partition, p. 63.

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seers' regular year. *See* 1 Nol. P. L. c. 2, part 2. *Per Lord Ellenborough, C. J., Rex v. St. Margaret's, Leicester*, 8 East, 333.

Succeeding overseers cannot maintain an ejectment on the title of their predecessors. *Doe d. Grundy v. Clarke*, 14 East, 488.

[1] An overseer's surety is liable only for acts done within the scope of the duties of his principal. Upon this ground it was held, that as borrowing money formed no part of the duty of an overseer, although applied to parochial purposes, the surety was not liable for money lent to the overseer and his co-overseer. *Leigh v. Taylor*, 7 B. & C. 491.

The bond cannot be enforced if the principal was not appointed to the office of overseer pursuant to the resolution under which the bond was given. *Holland v. Lea*, 9 Ex. 430. And where an assistant-overseer was re-appointed by justices at a different salary, it was held that the sureties were not liable for a default after such re-appointment *Bamford v. Iles*, 3 Ex. 380; but see *Frank v. Edwards*, 8 Ex. 214. See *post*, Principal and Surety.

[2] The 43 Eliz. c. 2, s. 19, enables an overseer to plead the general issue to an action brought for anything done by him under the authority of that act. *Butterton v. Furber*, 1 B. & B. 517. See *Skingley v. Surridge*, 11 Mee. & W. 503.

By 21 Jac. 1, c. 12, s. 5, in all actions against overseers for anything done concerning their office, the venue must be laid in the county where the fact was committed; and by sect. 3 the defendant may plead the general issue, and give the special matter in evidence.

[3] The old practice of profert and oyer is abolished by the 55th sect. of the C. L. P. Act, 1852. As to oyer the rule was, that whenever any party, in his pleadings, stated a deed which operated at common law, or letters of administration, he was bound to make profert, as it was called; that is, he was obliged to say that he brought the instrument into court, being a translation of the words *profert in curiam*, used by the ancient pleaders. By sect. 55 it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made, it shall not entitle the opposite party to cause oyer of, or set out upon oyer, such deed or other document. By sect. 56 a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole, or such part thereof as may be material; and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

[4] A half-French phrase applied to the assizes, which are so called from the commission of oyer and terminer directed to the judges, empowering them to "inquire, hear, and determine" all treasons, felonies, and misdemeanors. 4 Bl. Com. 267, 270; 4 Steph. Com. 333. This commission is now issued regularly, but was formerly used only on particular occasions, as upon sudden outrage or insurrection in any place. Stat. of Westm. 2, c. 29; F. N. B. fol. 110: *Cowell, B.*

[5] An estate in coparcenary arises where a person seised of lands and tenements in fee-simple or in tail dies, leaving only daughters, sisters, aunts, or other female heirs, in which case the estate descends to all such daughters, sisters, &c., jointly, when they are called coparceners, and are said to hold in coparceny, and to make but one heir to their ancestor. An estate in coparceny also frequently arises in consequence of gavelkind and other customary descents to all the male children, in which they are coparceners; hence *Littleton* says that co-

PARDON. *See post*, Queen's Evidence.

I. Pardons in General, p. 42.

II. When Grantable, p. 43.

III. Manner of Pardoning, p. 43.

IV. Effect of Pardon, p. 44.

V. How Pleaded, p. 44.

I. Pardons in General.[1]

parceners may be either by the common law, or by custom. Coparceny is intermediate in its nature between joint-tenancy and tenancy in common. There is a unity of title, but no benefit of survivorship, for the share of a coparcener dying seised descends to her heir, who holds it also as coparcener. A joint-tenant cannot convey his share to his companion by feoffment, because each is supposed to be equally seised of the whole, but he may convey it by release. Tenants in common, on the contrary, may convey it to one another by feoffment, but not by mere release. But coparceners may adopt either mode. And as this kind of companionship in estate is created by the common law, without any contract of the parties, the same law provides for its dissolution; for either one or more of the coparceners may compel the rest by a writ *de partitione facienda* to make partition; or, if they all agree, they may do so voluntarily, and the mutual allotment of their shares in severalty will be valid and binding without any conveyance, though, perhaps, by the Statute of Frauds, a writing may now be requisite. To these partitions the law has also annexed the incidents of an implied warranty and condition; a warranty by which, if a real action be brought against one of the coparceners by a stranger who claims the lands allotted to her, she is enabled to vouch or call upon the rest to join in defending her right; or, if she shall be evicted, to contribute from their own allotments to her compensations, and a condition, by virtue of which, if lawfully evicted, she may enter on the other allotments, and thus annulling the partition, be restored to her old and undivided share in the remaining tenements. If, however, one of the coparceners, after partition, alien her allotment, the feoffee or grantee cannot take advantage of this implied warranty or condition, though it may be enforced against him by the other coparceners. If, without partition, a coparcener alien her undivided share, the feoffee or grantee is tenant in common with the rest. When, however, the inheritance would go to coparceners, a devise to them in fee as tenants in common is good, because this, from the beginning, alters the quality, though not the quantity, of their estate. So, if the whole be devised to one of them, she takes it entirely by virtue of the will, and no part by descent; for here is no devise to the heir, because one of them is not heir without the other. When an advowson descends to coparceners, the elder sister is entitled to present alone upon the first vacancy; and it is evident, that the only mode in which partitions of such an hereditament can be effected between them is to assign to each her turn of presentation, which thenceforward constitutes in her a separate inheritance.

It is a general principle that parceners must join in all actions concerning their estate: and if one of them die pending a real action it will abate, though the rule is otherwise in mere personal actions (Vin. Abr. Parceners, T. Rep. Temp. Hard. 398); and before partitions, they should be jointly sued, even when they are entitled to the estate by different descents. Vin. Abr. Actions, Joinder; Rep. Temp. Hard. 398. One parcener cannot sue the other, unless for an actual disseisin. Co. Litt. 200 b; 2 Inst. 403.

Where parceners join in a lease they ought all to join in an action for rent. 3 Mod. 109.

Where one of two coparceners alienated her moiety to a stranger in fee, and a deed of partition was executed, and the remaining coparcener conveyed to a stranger, to the use, as to one moiety, of the coparcener in fee, the court held that she did not take the moiety as purchaser under the conveyance, so as to let in the heir *ex parte paternâ* on her death. *Doe d. Crossthwaite v. Dixon*, 1 Nev. & P. 255. One coparcener cannot sue separately for his portion of rents accruing to him and his fellows. An action will not lie, at the suit of one of three coparceners, to recover his proportion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. *Semble*, that money had and received was not the proper form of action in which to raise the question. *Decharms v. Harwood*, 4 M. & Scott, 400; S. C. 10 Bing. 526. *See* also, as to the effect of a fine being levied by one coparcener, *Read v. Taylor*, 2 Nev. & M. 508; 5 B. & Adol. 575.

[1] The power of pardoning all offences is incident to the Crown and royal power. *R.*

II. When Grantable.[1]
III. Manner of Pardoning.[2]

v. Parsons, 1 Show. 284; Holt. 519; 2 Salk. 499. *R. v. Greenvelt*, 12 Mod. 119; Ld. Raym. 214; 3 Salk. 265.

It seems that anciently the right of pardoning offences within certain districts was claimed by the lords of marches, and others who possessed *jura regalia*. *See* Co. Litt. 114. But the stat. 27 Hen. 8, c. 24, s. 1, vests the sole right of pardoning in the king; this right, or rather prerogative, belongs to the king *de facto*, and not to the king *de jure*, during the usurpation of the former. It is an incommunicable prerogative (*see* Jenk. 171; Hob. 155, 183), except perhaps in the colonies, where, by grant from the Crown, it may be exercised by the governor, &c. And by stat. 30 Geo. 3, c. 47, the king may, by commission under the great seal, authorise the governor, &c., of New South Wales, &c., to remit the whole or any part of the term for which offenders may have been transported. *See* 2 B. & A. 258.

[1] The queen's right to pardon and remit the consequences of a violation of the law is confined to cases in which the prosecution is carried on in her majesty's name for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which her majesty is entitled, *non potest rex gratiam facere cum injuria et damno aliorum*. Hence, the queen's pardon cannot be considered a legal discharge of an attachment for non-payment of costs or non-performance of an award, &c. (*see* 4 Bl. Com. 285); for, though such attachment be carried on in the shape of a criminal process for a contempt of court, yet it is in effect and substantially a civil remedy or execution for a private injury: so, where any legal right or benefit is vested in a subject, the queen cannot affect it, and consequently, where a statute gives a right of action to a party grieved by the commission of an offence, though it be of a public description, her majesty has no power by law to prevent the party aggrieved from bringing his action, even by pardoning the offender before it commenced; nor can her majesty discharge a recognisance to keep the peace towards an individual before it is forfeited, private security being the object of the instrument; and though the Crown may legally pardon an offence against a statute, which gives a right of action to a common informer before the action is begun, and may consequently defeat it, yet, where the informer has commenced the action, his right to the penalty is *ipso facto* irreversibly vested in him, if he succeed, and the queen cannot deprive him of it. *See* 4 Bl. Com. 398, 399; 2 Stra. 1272.

It is generally laid down in the books that the Crown cannot pardon a common nuisance while it remains unredressed and is continuing, so as to prevent an abatement of it, or a prosecution against the offender; though her majesty might afterwards remit the fine. *See* 12 Co. 30; 2 Hawk. b. 2, c. 37, s. 33; 4 Bl. Com. 398. As the continuation of a nuisance is of itself a fresh offence in point of law (*see* Ld. Raym. 370, 713), this doctrine may be supported on the ground that the queen cannot dispense with the laws by any previous license: besides, a prosecution for a nuisance, though technically criminal, is, in substance and effect, a civil remedy; and the queen cannot subject the public to inconvenience by bestowing a favour on an individual or a few persons. There seems, however, to be some reason for the assertion (*see* 3 Inst. 237; Vaughan, 333; 5 Bac. Abr. 286) that the pardon will save the party from any fine to the time when such pardon was granted; in this case, the objection that the queen cannot by previous license dispense or suspend the operation of the laws does not apply. The Crown may pardon *mala praxis*. *See* Ld. Raym. 214.

The queen cannot, by pardoning, discharge any suit in a spiritual or other court, in which the plaintiff seeks to recover any property, or in which an interest is vested in him, as in the case of a suit for tithes or legacies. *See* 5 Co. Rep. 51; Cro. Car. 46, 47; Latch. 100. The queen's right to pardon is also taken from her by statute in certain cases in favour of public liberty: thus, to commit a subject to prison beyond the realm is, by the Habeas Corpus Act, made a *præmunire*, which the queen cannot pardon. So, the queen's pardon under the great seal is not pleadable in bar of an impeachment by the House of Commons. *See* 12 & 13 Wm. & M. c. 2, s. 3.

[2] Formerly a pardon could only be effectually granted either by act of parliament or under the great seal. It is settled, that in pleading a pardon it must be averred that it was granted under the great seal, if it be not granted by statute; and that a coronation pardon, as it is termed, cannot be taken advantage of unless it be under that seal (*see* Keble, 707), though the queen's sign manual or privy seal, declaring her majesty's intention to pardon the prisoner, is a sufficient authority to the judges to discharge him (*see* 1 Bl. Rep. 479; 7 & 8 Geo. 4, c. 28, s. 13; 6 Geo. 4, c. 25, s. 1; 9 Geo. 4, c. 32, s. 3. *R. v. Harrod*, 2 C. & Kir. 294), yet such sign manual is revocable, and does not amount to a pardon in legal contemplation. *See* 4 Bl. Com. 400.

The mode of pardoning at the assizes or at the Central Criminal Court, if the judge think the conviction improper, is by respiting the execution of the sentence, and sending a memorial or certificate to the queen, directed to the secretary of state's office, stating that from favourable circumstances appearing on the trial he is

IV. Effect of Pardon.[1]

V. How Pleaded.[2]

PARENT and Child. *See* Affiliation, vol. i. p. 257; Bastard, vol. ii. p. 384; Infant, vol. v. p. 135; Marriage, id. p. 443; Master and Servant, id. p. 461; *post*, Seduction.

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induced to recommend the prisoner to mercy. *See* Dick. Sess. 432, 433. If the queen agree to the propriety of the suggestion, as is usual, a sign manual issues, signifying her intention to grant either an absolute or a conditional pardon, and directing the justices of gaol delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly, taking his recognisance to perform the conditions of the pardon, if any are annexed to the indulgence. *See* 1 Bl. Rep. 479; 1 Leach, 74; 15 East, 468.

The queen may pardon murder by general words. *Rex v. Coney*, 3 Mod. 37; 2 Show. 334; Skin. 157. *Rex v. Davies*, Comb. 39. But a pardon for killing and felony, &c., is no pardon of murder. *Johnson v. Samwerth*, Raym. 13.

Solicitations of chastity were held to be excepted out of a pardon, under the words, "adultery and other enormous crimes." *Oswald v. Evrard*, 1 Ld. Raym. 637.

[1] Where an offence is pardoned, all its incidents and consequences are discharged. *R. v. Greenvelt*, 12 Mod. 119. *Thomas v. Sorrell*, Vaugh. 333. *R. v. Crosby*, Skin. 578. *Toombs v. Ethrington*, 1 Lev. 121.

The queen's pardon, if general in its purport, and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence, and frees him from all the penalties and forfeitures to which the law had subjected his person and property. *See* 4 Bl. Com. 402.

Though a pardon cannot wash away those doubts with which the evidence of one who has committed a serious offence will be received, yet, in point of law, a legal pardon implicitly removes the stigma, and restores a man to credit, so as to enable him to be a witness (*see* 1 Vent. 349; Hale, P. C. 278, 682. *Gulley's case*, 1 Leach, C. L. 115); and it so far makes him a new man as to entitle him, according to some of our old books, to bring an action against any one who scandalises him in respect of the crime pardoned.

When the offender's property and civil rights have once vested in the queen, they cannot be restored to the offender, nor are they diverted from her majesty by a mere pardon, without a clause of restitution. *See* 1 Saund. 362, 363; 1 Lev. 120; 2 Mod. 53; 3 id. 104. But where nothing vests before office found, a pardon before the inquisition extinguishes all forfeitures. 2 Mod. 54.

An exception in a pardon ought to be taken as largely as the pardon itself. *Rex v. Johnston*, 3 id. 342.

A convict sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in the penal colony: — *Held*, that such pardon did not alter the effect of the attainder in vesting his property in the Crown. *In re Church's Will*, 16 Jur. 517.

It seems that a clause of release of all judgments and executions in a general pardon extends to debts due to the queen by forfeiture, and extinguishes or merges the debt in the hands of the debtor. *See* 1 Saund. 362, 368; 1 Lev. 120. But a pardon does not restore the blood to its former purity (Plow. 558), nor discharge penalties in which the Crown has no interest. *Howel v. James*, 2 Stra. 1272.

Nor does a pardon discharge offences against the statutes of a college. *Bentley v. Bishop of Ely*, 2 Stra. 912. And an offence pardoned by an act of grace may be a ground for articles of the peace. *Rex v. Mendez*, 1 Stra. 473.

A pardon under 6 Geo. 4, c. 25, restores the felon to his competency to hold lands. *Doe d. Evans v. Evans*, 5 B. & C. 584; 8 D. & R. 399.

A. was, at the spring assizes of 1846, indicted for stealing a horse on the 26th day of February, 1841. He had, in 1842, been convicted of felony, and sent to the hulks, from which he was discharged in 1846. He produced a certificate of his discharge, which stated that "J. H., who was convicted at Worcester on the 22d June, 1842, is this day discharged in consequence of having received a free pardon:"— *Held*, that if this pardon had been regularly proved it would have been no bar to the charge of horse-stealing, as the pardon was expressly confined to another felony. *Reg. v. Harrod*, 2 C. & Kir. 294.

[2] A queen's pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. But if defendant do not plead at the first opportunity he has of doing so, he will be taken to have waived the benefit of it. *R. v. Norris*, 1 Roll. Abr. 197; 2 Keb. 25.

If there be any variance in the description of the offence or party between the pardon and the indictment, it may be made good in the plea by averments of identity, in the same manner as in the plea of *autrefois acquit*. Arch. C. P. 91.

A promise of pardon is no bar to an indictment. *R. v. Gasside*, 4 Nev. & M. 33.

I. Liability of Parent for Son's Debts. *See* Infant, vol. v. p. 140; and *Moore v. Towers*, 8 C. B. (N. S.) 611.

II. Consent of Parents to Marriage of Child. *See* Marriage, vol. v. p. 450.

III. Right to Custody of Child, p. 45.

(A) *At Common Law*, p. 45.

(B) *By* 2 *&* 3 *Vic. c.* 54, p. 45.

(C) „ 20 *&* 21 *Vic. c.* 85, p. 45.

IV. Right to the Property of, p. 47.

III. Right to Custody of Child.

(A) *At Common Law.*[1]

(B) *By* 2 *&* 3 *Vic. c.* 54.[2]

(C) „ 20 *&* 21 *Vic. c.* 85.[3]

[1] The father is in general entitled to the custody of his legitimate offspring, unless he has forfeited by his immoral conduct his natural and legal right. *See* 2 Dougl. 542. And *semble*, that a court of common law has no jurisdiction, under any circumstance, to deprive him of that right. *In re Hakewell*, 12 C. B. 223. *See* 29 L. J. Ch. 458; 31 L. J. & M. 85.

If a father consents to his child remaining with another person, he may at any time revoke such consent, and recover possession of his child by writ of *habeas corpus*, although such consent was given in consideration of an agreement by such third person to take charge of the child, and although the father had contracted to pay such third person for the maintenance of the child. *Reg. v. Smith*, 17 Jur. 24; 24 L. J. Q. B. 116.

The court will interfere with paternal rights only in cases of very great misconduct. Comparative destitution is not a sufficient ground. *In re Pulbrook*, 11 Jur. 185.

On the application of a parent residing in India, the court refused to grant a *habeas corpus* for the removal of a child from the custody of persons here, to whose care it had for a long time been committed, the child having been sent to this country to be educated, under the superintendence of a relative, who dying, appointed by will three persons as guardians of the child, and their custody of the child having been acquiesced in by the parent. *Ex-parte Preston*, 5 D. & L. 233; 2 B. C. Rep. 169; 11 Jur. 1039; 17 L. J. Q. B. 21. *Ex-parte Burford*, 9 W. R. 99; 30 L. J. M. C. 47. But a different rule obtains as to illegitimate children; for it may be collected from a modern decision, that it is true, even as an unqualified proposition, that the mother is entitled to the custody of her illegitimate child, in preference to the father, notwithstanding the latter may be more competent to educate and provide for it; and in *Rex v. Soper*, 5 T. R. 278, where the possession of the child was obtained by fraud from the mother, the court ordered it to be restored to her, *See* 7 East, 579. *See* also Bastard, vol. ii. p. 386.

An infant at the age of ten years being brought up from a school on *habeas corpus*, at the instance of the mother, who was guardian for nurture, the father being dead, and there being no testamentary guardian, although it was deposed that the child was of intelligence, and wished, on religious grounds, to remain in the school, the court refused to examine the child and ascertain its intelligence, holding that a guardian for nurture has a legal right to the custody of the ward, irrespective of the wishes of the ward, unless it be shown that the custody is sought for improper objects, or that the application is not *bonâ fide*, or that the guardian making the application is grossly immoral. And where no more appearing than that the father had been a Protestant and that the mother was a Roman Catholic, and intended to educate the child in her own persuasion, the court ordered the child to be given to its mother. *Reg. v. Clarke*, 7 El. & Bl. 186; 3 Jur. N. S. 355; 26 L. J. Q. B. 169. See *Hill v. Hill*, 31 L. J. Ch. 505.

[2] By 2 & 3 Vic. c. 54, judges in equity may make order, on petition, for access of mothers to their infant children; and if such children be within the age of seven years, for the delivery of them to their custody until attaining such age. *In re Fynn*, 2 De Gex & S. 457; 12 Jur. 713; 13 id. 483. *In re Tomlinson*, 3 De Gex & S. 371. *Thomas v. Roberts*, id. 758; 14 Jur. 639; 19 L. J. Ch. 506. *Warde v. Warde*, 2 Ph. 786. *Shillito v. Collett*, 8 W. R. 683; affirmed 9 id. 696. *Halliday, In re*, 17 Jur. 56.

[3] By 20 & 21 Vic. c. 85, s. 35, "in any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such pro-

vision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

In dealing with the custody of children, the court will consider the interests of the parents and of the children.

A wife having obtained a decree of judicial separation, on the ground of cruelty, the court being satisfied that the children of the marriage would not be brought up as carefully and morally by their father as by their mother, as an act of justice to her, and for the advantage of the children, ordered that she should have the custody of them until they should attain fourteen, with provision for their father having access to them. *Suggate v. Suggate*, 31 L.J.P.& M. 167.

In making an interim order under the above section as to the custody of the children, the court will adhere to, or depart from, the common-law rule according to its discretion. *Spratt v. Spratt*, 1 S. & T. 215. See *Curtis v. Curtis*, 1 S. & T. 75; 27 L. J. P. & M. 16. But the father being entitled at common law to the custody of the child at its mother's breast, the court, in making an order as to the custody *pendente lite*, will not, unless some good cause is shown, take away his right. *Cartledge v. Cartledge*, 31 L. J. P. & M. 131. And in dealing with the custody of children under the above section the court has a discretionary power, exceeding that possessed by courts of common law and equity, and should, in exercising it, make such orders as are just and proper with reference to the circumstances affecting the suit, taking into consideration the interests of both the children and parents. *Marsh v. Marsh*, 28 L. J. P. & M. 13.

When the petition in a matrimonial suit prays the court in its final decree to make provision as to the custody, &c. of the children, under sect. 35 of the Divorce Act, the court, at the hearing, will confine the inquiry to the conduct of the husband and wife, and will not extend it to matters affecting solely the interests of the children; and if during the hearing enough should transpire to enable the court to give directions as to the custody, &c. of the children, it will require further evidence to be given on that question before making its final decree. The petition on such a case should not contain statements of matters affecting solely the interests of the children, such as charges of general misconduct by the respondent towards them. *Suggate v. Suggate*, 28 L. J. P. & M. 46.

Guardianship for nurture continues until a child attains the age of fourteen. Until that age a child cannot exercise his own choice as to quitting or remaining with his father. The court in its decree for a judicial separation, on the ground of the adultery of the husband, on proof that the husband continued to live in adultery, and that the child of the marriage, a boy aged thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to it. *Hyde v. Hyde*, 29 L. J. P. & M. 150.

The court in its decree for a judicial separation, on the ground of the husband's adultery, ordered that the wife should have the custody of the children under fourteen until they should attain that age, on proof that the husband continued the adulterous intercourse. The application of the wife for the custody of the children was opposed, on the ground that she was not of sound mind. The evidence of medical men adduced by the parties conflicting, and it appearing that they were not much conversant with affections of the brain, the court directed a personal examination of the wife by an eminent physician, and upon his certificate gave her the custody of the children. *Duggan v. Duggan*, 29 L. J. P. & M. 159.

Pending a suit for divorce, the wife, in an improper manner, obtained possession of an infant child of the marriage, then living with the husband. On the husband again taking the child from her, she endeavoured, by violence, to get it from him, but failing, applied to the court for an order that it might be restored to her. The court rejected the application on account of the impropriety of her conduct, and condemned her in the costs of the motion. *Allen v. Allen*, id. 166.

Upon an application by a husband for the custody of a child *pendente lite*, the wife asked for time to answer the affidavit upon which the application was founded. The court granted time, upon an undertaking being given by the wife that the child should not be removed out of the jurisdiction of the court until further order. *Carter v. Carter*, id. 167.

Where the children, with regard to whom an order for custody was applied for, were a girl aged twenty, and two boys aged respectively eighteen and sixteen, the court held that the 35th section of the Divorce Act, 1857, gave no jurisdiction; and that where the parent would have no power of control, the court had none. *Ryder v. Ryder*, 30 L. J. P. & M. 44.

In the interval between a decree *nisi* for dissolution of marriage being pronounced, and its being made absolute, the only order the court can make as to the custody of the children is an interim order, under sect. 35 of 20 & 21 Vic. c. 85. *Cubley v. Cubley*, 30 L. J. P. & M. 161.

The court will not, at the hearing of a suit, order that the petitioner have the custody of the children of the marriage, unless the petition prays for such custody. *Boddy v. Boddy*, id. 163.

When a marriage is dissolved on the ground of the wife's adultery, the court will not order that she have the custody of, or access to, the children of the marriage. *Bent v. Bent*, id. 175. *Clout v. Clout*, id. 176.

IV. Right to the Property of.[1]

PARISH.[2]

PARISH Books.[3] *See* Evidence, vol. iv. p. 339; Marriage, vol. v. p. 443.[3]

After a decree of judicial separation has been pronounced, the court will not order that the wife have access to children of the marriage, unless application be made by petition. *Anthony v. Anthony*, id. 208.

Where a petition for dissolution of marriage is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage. *Seddon v. Seddon*, id. 12.

The court has jurisdiction, *pendente lite*, to order that one of the parties to the suit shall have access merely to the children of the marriage. *Thompson v. Thompson*, 31 L. J. P. & M. 213.

By 22 & 23 Vic. c. 61, s. 4, "the court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders in case the proceedings for obtaining such a decree were still pending; and all orders under this enactment may be made by the judge ordinary alone, or with one or more of the other judges of the court."

The court is not in a position to deal with a petition for custody of children brought under this section until both parties are brought before the court. *Stacey v. Stacey*, 29 L. J. P. & M. 63.

[1] The father has no interest in the estate of a child otherwise than as his guardian; for though he may receive the profits during the child's minority, yet he must account for the proceeds when he comes of age. Neither can the father as a guardian receive a legacy given to his child. *See* 1 P. Wms. 285. Where executors had paid a legacy under such circumstances, they were compelled again to pay it to the legatee on his coming of age; and if the father obtain a deed or other property by undue influence, a court of equity will set the conveyance aside.

The parents or father has an interest in the profits of the childrens' labour while they are under age, if they live with him and are maintained by him.

[2] Parishes are either ancient or original parishes; or statutory parishes, *i. e.* parishes formed either under a special act of parliament, or under general acts, as the Church-Building Acts and the New Parishes Acts. Those formed under special acts are generally made parishes for civil as well as ecclesiastical purposes; those under the general acts, for ecclesiastical purposes only. Each class, however, is governed by the general law, except only so far as it may be varied or controlled by the provisions of the act or acts under which it was formed. Under the 1 & 2 Vic. c. 106; the 13 & 14 Vic. c. 98, and the 18 & 19 Vic. c. 127, two or more benefices may be united together by the bishop of the diocese for ecclesiastical purposes, where he thinks it may prove to the advantage of the interest of religion. Certain consents and formalities are necessary. And in like manner united benefices may be again subsequently disunited.

Parishes have in the present century been subdivided for ecclesiastical purposes into district and separate ecclesiastical parishes: "district" parishes, district chapelries, consolidated chapelries, particular or patronage districts, Peel districts, Peel parishes, new parishes for ecclesiastical purposes (an enlargement of Peel parishes), separate benefices, chapelries.

The boundaries of a parish may be proved by reputation. *Nicolls v. Parker*, 14 East, 331. *Plaxton v. Dare*, 10 B. C. 19.

[3] Parish registers, although not originally intended for the purposes of evidence, are generally admissible in support of the facts to which they relate, for they are made by persons in an official situation, whose duty it is to make the entries accurately of the facts immediately within their knowledge. These are the registers kept in churches of births, marriages, and burials. *See* Sid. 71; Godb. 145; Bull. N. P. 247. *Doe v. Bray*, 8 B. & C. 813; Steer's *Parish Law*, 181. Although the entries are first made in a day-book, such day-book is not evidence when the entry has been made in the register; and therefore where, in the day-book, the letters B. B. were added, which were explained to mean "base-born," but were not added in the subsequent entry in the register, the court held that the entry in the register could not be corrected or altered by the entry in the day-book, for there could not be two registers in the same parish. *May v. May*, 2 Stra. 1073. *Lee v. Meccock*, 5 Esp. 177. If the entry in the day-book, which represented the plaintiff to be illegitimate, had been made under the direction of his reputed father and mother, the evidence would, it seems, have been admissible, as the declaration of a deceased parent. In the absence of such evidence, it appeared to be nothing more than a private memorandum, made for the purpose of assisting the clerk to make the register. *See* Phil. Ev. 415. The copy of a register of a foreign chapel is not admissible here to prove a marriage abroad (*see* 1 Esp. 353); neither is the copy of a register of baptism in Guernsey. *Huer v. Le Mesurier*, 1 Cox, Cas. 175. The general registration of all marriages, births, and deaths, is now regulated by 6 & 7 Wm. 4, c. 86 (passed 17th August, 1836), which provides that

PARISH Clerk. *See* Ecclesiastical Persons, vol. iv. p. 165.

Officer. *See* Churchwarden, vol. iii. p. 114; *ante*, Overseers, p. 32.

PARK. *See* Game, vol. iv. p. 575.

PARLIAMENT.

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(A) *Its Judicial Capacity and Privileges*, p. 52.

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certified copies of entries, purporting to be sealed with the seal of the Registrar-general's office, shall be evidence of the birth, death, or marriage, to which it relates, without other proof of such entry. (Sect. 38.) It should seem that, under the same act, the entries of other registrars besides the Registrar-general may be evidence under certain limitations. (Sects. 22, 23, 28.) Thus the district registrar's certificate is evidence of death. *Traill v. Kibblewhite*, 10 Jur. 107. The identity of the party must, of course, be proved. *Parkinson v. Francis*, 15 Sim. 160. The registrars, as also all rectors, curates, &c., are bound to give certified copies (sect. 35); but it is not expressly provided that these latter certificates shall be evidence without further verification (*see* 14 & 15 Vic. c. 99, s. 14), under which act it has been held that certified copies of parish registers, purporting to be signed by A. B. "incumbent," or "rector," or "vicar," or "curate," without specifying the parish over against the name, or adding, "of the above parish," are admissible without verification; for it will be intended that the incumbent, &c., is incumbent of the parish named in the certificate, and is the officer entrusted with the custody of the original register. *Re Hull's Estate*, cor. Lords Justices, 22 L. J. Ch. 177. An entry in a register, like any other public document, may be proved by means of an examined copy, and it is, of course, unnecessary to give any proof by means of subscribing witnesses, or to prove their handwriting. The register is no proof of the identity of the parties. *Birt v. Barlow*, 1 Dougl. 170. An entry in a parish register of baptism of the time of a child's birth is not evidence of its age or birth-place, the clergyman having no authority to make it. *Wihen v. Law*, 3 Stark. 63. *R. v. North Petherton*, 5 B. & C. 508. But it may, if it can be shown on whose information it was made, be admissible as a declaration (*Wihen v. Law, supra*); and in the ecclesiastical courts it is "adminicular" evidence of minority. *Agg v. Davies*, 2 Phill. Rep. 345. It seems, however, that if the age of the child baptized can be shown to correspond with the date of the entry, so as to prove baptism immediately after birth, this is some evidence of birth in that parish. *R. v. St. Katharine*, 5 B. & Adol. 970; and see *R. v. Lubbenham*, id. 968. Where a register of baptism stated that the child was illegitimate, *Alderson, J.*, admitted it as some, though slight, proof of that fact, observing that similar evidence had been admitted in another case. *Cope v. Cope*, 1 M. & Rob. 269. A register of marriage is evidence of the time of the marriage. *Doe v. Barnes*, id. 386. An entry by the minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact made by the clerk, who was present at the baptism. *Doe v. Bray*, B. & C. 813. But see *Doe v. Andrews*, 15 Q. B. 756.

(B) *As to Members of.* *See* Election, vol. iv. p. 189.
(C) *Disability of Member to be Bail*, p. 52.

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I. The Queen.

(A) *In General.*[1]
(B) *Right to Exempt Persons from Serving in.*[2]
(C) „ *Increase Number of Members.*[3]
(D) „ *call a Parliament.*[4]

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[1] The queen is a constituent part of parliament, in which capacity she possesses the means of preserving inviolate her rights and prerogatives as supreme executive magistrate, by withholding her assent at pleasure, and without stating any reason, to the enactment of provisions tending to their prejudice. It is, however, only for the purpose of protecting the regal executive and authority that the constitution has assigned to the queen a share in legislation: this purpose is sufficiently insured by placing in the Crown the negative power of rejecting suggested laws. The royal legislative right is not of the initiative kind; the Crown has no power to propound laws: though the Crown is said to be *caput principium et finis* of parliament, the queen is but a part of it, and *per se* possesses no legislative power. Though her majesty alone can call parliament together, and dissolve its authority, these rights are purely of an executive character. In a constitutional point of view, however, the legislative power is lodged in the queen, subject to the assent of the houses of parliament. Laws are said to be enacted "by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled." *See* Staundf. Pres.; Chitty, Pres.; May on Parliaments; Dwarris on Stats.

[2] The queen cannot exempt a person from his liability to be elected a member of and to serve in parliament (see *Morris v. Burdett*, 2 M. & S. 214), because his attendance is for the service of the whole realm.

[3] It is in the power of the Crown to add any number of members to the House of Peers, by raising individuals to the English peerage (*see* 1 Bl. Com. 157); but not to increase the number of the members in the lower house of parliament, by empowering an unrepresented town to elect and send members to parliament.

[4] The queen alone is entitled by the constitution to summon a parliament; nor can this power be vested in any other department of the state with equal propriety, because, to borrow the words of Sir W. Blackstone (*see* 1 Com. 150; 1 Chalmer's Coll. Op. 233, 337), the king is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of legislature that has a separate existence, and is capable of performing any act at the time when no parliament is in being. On a parliament being called together, every lord, spiritual or temporal, is entitled *ex debito justitiæ* to a writ of summons: this writ issues out of Chancery, and each member should have a distinct one sent to him. The writ of summons, both in the case of peers and members of the House of Commons, ought to be under the great seal (*see* 1 Chalmers' Op. 234, 236; May on Parliaments, 40), and should be issued forty days at least before the sittings of parliament: this

II. House of Lords.

(A) *Its Judicial Capacity.*[1]

(B) „ *Individual Capacity.*[2]

(C) *Practice of.*[3]

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is a provision of the Magna Charta of King John, *faciemus summoneri*, &c. *ad certum diem, scilicit ad terminum quadraginta dierum ad minus et ad certum locum.* It is enforced by 7 & 8 Wm. 3, c. 25, which enacts, that there shall be forty days between the *teste* and the return of the writ of summons; and this time is, by the uniform practice since the Union, extended to fifty days. *See* 2 Hale, 235. This practice was introduced by the 22d article of the Act of Union, which required that time between the *teste* and the return of the writ of summons for the first parliament of Great Britain. The members of each house being thus duly assembled, the parliament, of which the Crown has been termed the *caput principium et finis*, cannot in point of law commence but by the presence of her majesty, either in person or by representation, which representation may be either by a guardian of England, by letters patent under the great seal, when the queen is *in remotis*, out of the realm, or by commission under the great seal of England to certain lords of parliament, representing the person of the queen, she being within the realm, in respect of some infirmity, or her being engaged in other urgent affairs.

[1] The House of Lords may fine and imprison for a breach of privilege. *Rex v. Flowers*, 8 T. R. 314. At common law a writ of error lay to the House of Lords immediately from the Queen's Bench, in actions commenced by original writ; and now, by 11 Geo. 4, and 1 Wm. 4, c. 70, error from the Exchequer Chamber lies to the House of Lords: also from the Exchequer in Scotland, and from the Queen's Bench and Exchequer Chamber in Ireland. 1 Vent. 334; T. Raym. 330; T. Jones, 91. The House of Lords is also the ultimate court of appeal from the Courts of Chancery. *See* Error to the House of Lords, vol. iii. p. 258.

[2] A peer, by license obtained from the queen, may make another lord of parliament his proxy to vote for him in his absence (Seld's *Baronage*, p. 1, c. 1); a privilege which a member of the other house can by no means have, as he is himself a proxy or representative of other persons. 4 Inst. 12. The license had long ceased in Ireland; but the proxies in the House of Lords are still entered in Latin, *ex licentia regis.* This created a doubt in November 1788, whether the proxies in that parliament were legal, on account of the king's illness (1 Ld. Mountm. 342); but it seems now to be so much a mere form that the license may be presumed, though instances are on record where they have been denied by the king particularly An. c. 6, 27 & 39; E. 3. Proxies cannot be used in a committee (Ch. 106); a proxy cannot sign a protest in England, but he could in Ireland. 2 Ld. Mountm. 191. The order that no lord should have more than two proxies, *i. e.* be a proxy for more than two absent lords, was made 2 Car. 1, because the Duke of Buckingham had no less than fourteen. 1 Rush. 269. There is an instance in Wight, 50, where a proxy is called *litera attornatus ad parliamentum*, which it is in effect. The peer who has the proxy is always called in Latin *procurator;* if a peer, after appointing a proxy, appears personally in parliament, his proxy is revoked and annulled. 4 Inst. 13. By the orders of the house, no proxy shall vote upon a question of "guilty or not guilty;" and a spiritual lord shall only be proxy for a spiritual lord, and a temporal lord for a temporal. Two or more peers may be proxies for one absent peer; but Coke is of opinion that they cannot vote unless they all concur. 4 Inst. 12; 1 Wood, 41. Each peer has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the House, with the reasons for such dissent, which is usually styled his protest. 1 Com. c. 2. Lord Clarendon relates that the first instances of protests, with reasons, in England, were in 1641, before which time they usually only set down their names as dissentient to the vote. The first regular protest in Ireland was in 1662. 1 Ld. Mountm. 402. All bills, likewise, that may in their consequences any way affect the right of the peerage, are, by the custom of parliament, to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons. A peer is ineligible as bail. *Burton v. Atherton*, 2 Marsh. 232.

[3] A court of appeal will not entertain an appeal for costs alone. *Home v. Pringle*, 8 Clark & Fin. 264. Where a party who is ordered to pay costs absents himself, to avoid personal demand and service of the certificate of the costs, the house will order substituted service on his agents in the appeal. *Carter v. Palmer*, id. 708. The house will, as a general rule, make the costs of an appeal follow the affirmance of a judgment of the court below. *Stewart v. Menzies*, id. 309. And where the judgment of the court below was affirmed:—*Held*, that the judgment ought to be affirmed with costs, they being a legal consequence, not a result necessarily affected by the conduct of the parties. *Clarke v. Hart*, 6 H. L. Ca. 633; 5 Jur. N. S. 447. Where the decree of the court below

(D) *Effect of Decisions of.*[1]

(E) *May command Attendance of the Judges.*[2]

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was correct, but only as to a small extent, not the material subject of the appeal, the appellant must pay the costs of the appeal. *Savery v. King*, 5 H. L. Ca. 627; 2 Jur. N. S. 503; 21 L. J. Ch. 482. Where part of the decree of the court below was sustained, and part reversed, no costs of the appeal to the house was allowed. *Toore v. Browne*, 5 H. L. Ca. 555. As to how far, when a judgment is affirmed, the question being one of admitted difficulty, costs are to be disallowed as against the appellant, see *Kippen v. Darnley*, 3 Macq. H. L. Ca. 203. Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side. *Sherburne v. Middleton*, 9 Clark & Fin. 72.

Where a party is served with the certificate of costs, and personal demand is made, and he does not pay them, the house will, on petition of the party entitled, order the recognisances to be estreated, for the purpose of enforcing payment of them, with costs of the petition. *Callaghan v. Callaghan*, 8 id. 709.

In a writ of error, where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the court below was then affirmed, with costs. *Jones v. Cannock*, 3 H. L. Ca. 700.

Where the Crown, by any of its officers, is a party respondent in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply after the reply for the appellant. *Lord Advocate v. Douglas* (*Lord*), 9 Clark & Fin. 174.

The Lord Advocate of Scotland, or other officer of the Crown suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted. (Id.) Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs. (Id.) And the Lord Advocate, or other officer of the Crown bringing the appeal, is not required to enter into recognisances to answer the costs of the appeal. (Id.) *See* 18 & 19 Vic. c. 90. *Attorney-General v. Corporation of London*, 19 L. J. Ch. 315.

Where no appellant appears to support an appeal, the only order the house can make will be to dismiss the appeal for want of prosecution, with costs. *Scanlan v. Usher*, 8 Clark & Fin. 561.

If a party should make default on the day appointed for the hearing of his cause, he must pay the opposite party, not in default, the costs of the day, and if it should appear that he has not instructed counsel for that day (not intending to appear in person), his cause may be struck out of the list. *Flight v. Thomas*, id. 231.

Where respondents have different defences, the house will hear two counsel for one on the whole case, and two for the other on the points wherein their defences differ. *Home v. Pringle*, id. 265. The house will not permit parties on appeal to raise objections which they did not raise in the court below. *Kay v. Marshall*, id. 245. But a respondent was allowed to object to a part of the decree, though he had not brought any cross-appeal. *Vernon v. Wright*, 7 H. L. Ca. 35. And a party is not prevented from appealing against a decree because he did not except to the master's report on which it is founded. *Torre v. Browne*, 5 id. 555. The house strongly condemned the custom of each party printing an appendix to his case, and desired that in future a joint appendix might alone be printed. *Piers v. Piers*, 2 id. 331; 13 Jur. 569. *Semble*, also, that decrees and orders which have not been enrolled may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled. *Tommey v. White*, 3 H. L. Ca. 49.

[1] How far other tribunals are bound by the reasons given by the House of Lords for their decisions, see *Paul v. Joel* or *Jewell*, 3 H. & N. 455; 4 Jur. N. S. 1086; 27 L. J. Ex. 380. The House of Lords will not reconsider a question which it has once determined. *Thelluson v. Rendlesham*, 7 H. L. Ca. 429. *Beamish v. Beamish*, id. 274. The decisions of the House of Lords are conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals, and can only be altered by act of parliament. *Attorney-General v. Windsor* (*Dean and Canons*), 6 Jur. N. S. 833. *Bright v. Hutton*, 3 H. L. Ca. 341; 16 Jur. 695. As to an equal division, id.

[2] The House of Lords has a right to require the judges to answer abstract questions of existing law (*Macnaghten's case*, 10 Clark & Fin. 200), and this without regard to the form of an appeal, or the points raised upon it. *Bright v. Hutton*, *supra*. The Lords allowed the opinion of a judge who had been present at the hearing of the cause, but who was unable to attend when the judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. *Stephenson v. Higginson*, 3 H. L. Ca. 638. The judges were required to answer a question put by the house. One of them differed from the rest. The opinions of the majority were stated by one of their number, and in the statement, the principle on which the dissentient judge formed his opinion was set forth to his satisfaction. The house did not require him to state his reasons at length. *Salmon v. Webb*, id. 510. The judges were summoned to answer questions of law; they differed in opinion on these questions. Most of the

III. House of Commons. *See* vol. iii. p. 154; Election, vol. iv. p. 189.

(A) *Its Judicial Capacity and Privileges.*[1]

(B) *Disability of Member to be Bail.*[2]

IV. Mode of Transacting the Business, and of the Royal Assent.[3]

judges being on circuit, two attended on a day fixed by the house for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The house adjourned the matter till the majority of the judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was intimated that the permission to dispense with the attendance of any of the judges to whom questions have been put, and who differ in their answers, ought not be drawn into a precedent. *Egerton v. Brownlow (Earl)*, 4 H. L. Ca. 1.

[1] The House of Commons have authority to commit as for a breach of privilege, and to execute the Speaker's warrant. After demand, the outer door may be broken open; and on justifying a commitment for a breach of privilege under the Speaker's warrant, pursuant to a resolution of the house, the facts upon which the resolution professes to proceed need not be averred (*Burdett v. Abbot*, 14 East, 1; 4 Taunt. 401); but the officers have no right, in case they do not find the person named in the warrant, to remain there to await his return; and if they stay for several hours in the house for that purpose, they are trespassers *ab initio*. *Howard v. Gossett*, Car. & M. 380. And if the Speaker's warrant cannot be executed by the civil power, the military may be called in aid thereof. *Burdett v. Colman*, 14 East, 163. A member of the House of Commons committed for a breach of privilege cannot be discharged by *habeas corpus* during the session. *Brass Crosby's case*, 2 Black. 754; 3 Wils. 188. *Hobhouse's case*, 3 B. & A. 420; May on Parliaments, 60.

In an action of trespass against the serjeant-at-arms of the House of Commons. First plea, that certain matters came out to be discussed in the House of Commons; that it was considered by the house to be necessary that the plaintiff should be examined touching these matters; that an order of the house was made that he should attend forthwith, of which order he had no notice; that he wilfully and contemptuously refused to obey; and thereupon, to compel the attendance of the plaintiff at the bar of the house to be questioned on these matters, it was ordered by the house that the plaintiff should be brought before the house in the custody of the serjeant-at-arms, and that the Speaker should issue his warrant accordingly; that the Speaker issued his warrant accordingly, by which, after reciting that the House of Commons had ordered that plaintiff should be sent for in the custody of the serjeant-at-arms, he required and authorised the serjeant-at-arms to take plaintiff into custody; justifying the trespasses, including the detaining of the plaintiff, until he could bring him before the house. Third plea, that it was ordered by the house that plaintiff should attend the house to answer a charge against him of a breach and contempt of privilege, of which order he had notice; that he did not attend, but wilfully and contemptuously, and without reasonable cause, disregarded the order, and thereupon an order and warrant (as in the first plea), were made. Fourth plea stated an order to attend, without assigning the cause of the order, and a wilful disobedience of the order and the warrant, as in the first plea:—*Held*, first, by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the house had power to order the attendance of witnesses, and, in case of disobedience, to bring them in custody to the bar for the purpose of examination; also, that it had power, in case of a charge of contempt and breach of privilege, and wilful disobedience of an order on the person charged to attend and answer it, to cause the person to be taken into custody and brought to the bar to answer the charge; and, further, that the house alone was the proper judge when these powers were to be exercised (*Gossett v. Howard*, in error, 10 Q. B. 359; 11 Jur. 750; 16 L. J. Q. B. 345, Ex. Ch.) in the court below. 9 Jur. 842; 14 L. J. Q. B. 369. *Held*, secondly, that a warrant of the house was to be construed as a mandate or writ of a superior court, acting according to the course of the common law, and not as the warrant of a justice of the peace, or of a court acting under a special statutory authority, in which case it would have been bad. (Id.) *Held*, thirdly, that, so construing it, the warrant stated in the pleas was valid. (Id.) *Held*, fourthly, that connecting the mandatory part of the warrant with the recital, it justified the detaining and bringing of plaintiff to the bar. (Id.) May, 69.

[2] A member of the House of Commons is ineligible as bail. *Graham v. Sturt*, 4 Taunt. 249. *Dunn v. Hill*, 1 D. & R. 208.

[3] The method of doing business is much the same in both houses of parliament. Each house has its Speaker. The Speaker of the Lords is the Lord Chancellor; the Speaker of the Commons is chosen by the house, but must be approved by the queen. He cannot give his opinion on any subject before the house; but the Speaker of the Lords, if a lord of parliament, may. In both houses a majority binds the whole, and this majority is given publicly and openly. When an act of parliament of a private nature is wished for, a petition is presented by a member, which is either referred to a committee to examine the matter, or on the petition itself, if not opposed, leave is given to bring in a bill. If

V. Houses of Lords and Commons as an Aggregate Body.[1]
VI. Adjournment, Prorogation, and Dissolution of.[2]

the matter is of a public nature, the bill is admitted without a petition on the motion of a member. The bill is drawn out on paper, with a number of blanks and spaces for insertions and alterations. It is read a first time, and some little time after, a second. After such reading, the Speaker explains the substance of the bill, and puts the question, whether it shall proceed any further. After the second reading it is committed, that is, referred to a committee, either private or of the whole house. A committee of the whole house is composed of every member, and to form it the Speaker quits the chair (another new member, appointed every new parliament for the office, being chairman), and may give his opinion as a private member. In the committee the bill is discussed clause by clause, amendments made, blanks filled up, and sometimes the bill entirely new modelled. When the opinion of the house has been taken on each clause and amendment, the bill is ordered to be engrossed; this done, it is read a third time, when, if a new clause be added, it is done by tacking a separate piece of parchment to the bill, which is called a rider. The Speaker then again opens the contents, and holding it up in his hands, puts the question, whether it shall pass? If agreed to, it is carried to the Lords by their concurrence, where it passes through similar forms; and if agreed to by them, it waits the royal assent; if rejected, no notice is taken to prevent alteration. If the Lords make any amendment to it, it is sent down again to the Commons for their concurrence; should the Commons object to the amendment, a conference is held between members deputed by each house to adjust the difference. Where both parties remain inflexible, the bill is dropped. Similar forms are observed where a bill begins in the House of Lords. In the Commons, the Speaker has a casting-vote in case of equality of votes; but in the Lords, the Speaker's vote is counted with the rest of the house; and in case of an equality of votes, the non-contents or negatives are considered the majority. The royal assent is either given in person or by commission. Where a bill has received the royal assent in either of these ways, it becomes a statute, or act of parliament. May, 165. By a legal fiction the whole session of parliament is considered as one day; and, therefore, an act of parliament was held to operate from the day in which parliament assembled, at whatever period of the session it passed: but this was remedied by the 33 Geo. 3, c. 13, by which all acts are directed to commence from the date of the royal assent, unless some other period is expressly mentioned in the act.

[1] The privileges of parliament are very large and indefinite; and therefore, when, in 31 Hen. 6, the House of Lords propounded a question to the judges concerning them, the Chief Justice, Sir John Fortesque, in the name of his brethren, declared that they ought not to make answer to that question, for it hath not been used aforetime that the justices should, in anywise, determine the privileges of the High Court of Parliament, for it is so high and mighty in its nature that it may make law, and that which is law they make no law, and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices. Seld. Bar. p. 1, c. iv. Privilege of parliament was principally established in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown. If, therefore, all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what is so defined and determined, it were easy for the executive power to devise some new case not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of parliament. The dignity and independence of the two houses are, therefore, in a great measure, preserved by keeping the privileges indefinite. But, in answer to these observations, it has been justly remarked, that clearness and certainty are essentially necessary to the liberty of Englishmen, and that rights and privileges cannot well be claimed unless they are ascertained and defined. There are, however, privileges of the members of either house, which are sufficiently certain and notorious. These are, privileges of speech and of person. May, 165. The *lex et consuetudo parliamenti* apply exclusively to the House of Lords and House of Commons in England, and are not conferred upon a supreme legislative assembly of a colony or settlement, by the introduction of the common law of England into the colony. *Fenton v. Hampton*, 11 Moore, P. C. C. 347.

[2] An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies, and this is done by the authority of each house separately every day, sometimes for a fortnight or month together, as at Christmas or Easter, or upon other particular occasions; but the adjournment of one house is no adjournment of the other. 4 Inst. 28. It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly. Com. Journ. *passim*. After an adjournment, all things continue in the same state as at the time of the adjournment made, and may proceed on without any fresh commencement. May, 45, 46.

A prorogation is the continuance of the parliament from one session to another, as

an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the Lord Chancellor in her majesty's presence, or by commission from the Crown, or frequently by proclamation. May, 43.

At the beginning of a new parliament, when it is not intended that the parliament should meet for despatch of business, the practice is to prorogue it by a writ of prorogation. On the day upon which the writ of summons is returnable, the members of the House of Commons who attend do not enter their own house, or wait for a message from the Lords, but go immediately up to the House of Lords, where the Chancellor reads the writ of prorogation; and when it is intended that they should meet, upon the day to which the parliament is prorogued for despatch of business, notice is given by proclamation. May, 207.

Both houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of the parliament. The session is never understood to be at an end until a prorogation, though, unless some act passed, or some judgment given, in parliament, it is in truth no session at all. 4 Inst. 28; Hale, Parl. 38; Hutt. 61. And formerly the usage was for the king to give the royal assent to all such bills as he approved at the end of every session, and then to prorogue the parliament, though sometimes only for a day or two, after which all business then depending in the houses was to be begun again; which custom obtained so strongly, that it once became a question, whether giving the royal assent to a single bill did not, of course, put an end to the session; and though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. 1, c. 7, was passed to declare that the king's assent to that and some other acts should not put an end to the session; and even so late as the reign of Charles the Second we find a proviso frequently tacked to a bill, that his majesty's assent thereto should not determine the session of parliament. Stat. 12 Car. 2, c. 1; 22 & 23 id. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.

A dissolution is the civil death of the parliament; this may be effected three ways: 1st, by the king's will, expressed either in person or by representation; for as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. A parliament, it has been said, ought not to be dissolved as long as any bill remains undiscussed; and proclamation must be made in the parliament, that if any person have any petition he shall come in and be heard, and if no answer be given, it is intended the public are satisfied. Secondly, a parliament might formerly be dissolved by the demise of the Crown. This dissolution happened immediately upon the death of the reigning sovereign; for he being considered in law as the head of the parliament, that failing, the whole body was held to be extinct. But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and danger being apprehended from having no parliament in being, in case of a disputed succession, it was enacted by stat. 7 & 8 Wm. 3, c. 15, that the parliament in being should, if sitting, continue for six months after the demise of the Crown, unless sooner dissolved, &c., by the successor; or if not sitting, should meet on the day of prorogation; and that in case no parliament was in being, the last preceding parliament should convene and sit. By statute 6 Anne, c. 7, s. 4, it is more explicitly enacted, that parliament shall not be determined or dissolved by demise of the Crown, but shall continue; and if sitting at the time of such demise, immediately proceed to act for six months and no longer, unless sooner prorogued or dissolved by the successor; and if prorogued, shall meet on the day of the prorogation, and sit for the remainder of the said six months, unless sooner dissolved, &c. By sect. 5 it is provided, that if there be a parliament in being at the time of the demise of the Crown, but the same happens to be then separated by adjournment or prorogation, such parliament shall immediately after such demise meet, convene, and sit, and shall act notwithstanding such demise for six months, unless sooner dissolved, &c. By s. 36 (repealed by 37 Geo. 3, c. 127) it was provided that, in case at the time of such demise there were no parliament in being that had met and sat, the last preceding parliament should immediately convene. The said act (37 Geo. 3, c. 127), enacts, that in case of the demise of the Crown subsequent to the dissolution or expiration of a parliament, and before the day appointed by the writs of summons for assembling a new parliament, in such case the last preceding parliament shall immediately convene and sit in Westminster, and be a parliament for six months and no longer, as if the said parliament had not been dissolved or expired, subject to be dissolved or prorogued by the successor. By sect. 4, the proviso is extended to the case of the demise of a successor to the Crown within six months after his succession, without his having dissolved the parliament, or after it shall have been dissolved, and before a new one shall have met. By sect. 5 it is enacted, that in case of the demise of the Crown on or after the day appointed by the writs of summons for assembling a new parliament, and before such new parliament shall have actually met, such new parliament shall, immediately after such demise, convene and sit at Westminster, and be a parliament for six months, and no longer, subject to be dissolved. Lastly, a parliament may be dissolved or expire by effluxion of time; for if either the legislative body were perpetual or last for the life of the prince who convened them

VII. Proceedings against Peers and Members of the House of Commons.

(A) *Description of in Writ of Summons.*[1]

(B) *Proceedings against.*[2]

(C) *Process against.*[3]

(D) *Cannot be Outlawed.*[4]

(E) *Attachment against.*[5]

(F) *Subject to Bankruptcy Law.*[6]

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formerly, and were so to be supplied by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly, also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others), will think themselves bound in interest, as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed by statute 6 Wm. & M. c. 8, was three years, after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by 1 Geo. 1, s. 2, c. 38 (in order professedly to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereon, and for the peace and security of the government then just recovering from the then late rebellion), this term was prolonged to seven years; and what alone is an instance of the vast authority of parliament, the very same house that was chosen for three years enacted its own continuance for seven. So that as our constitution now stands, the parliament must expire or die a natural death at the end of every seventh year, if not sooner dissolved by the royal prerogative, as it generally is in the course of five or six years. The Septennial Act has been termed an unconstitutional exertion of the authority of parliament: and the reason alleged is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this, says Mr. Christian, appears to be a fallacious mode of considering the subject. Before the Triennial Act, 6 Wm. & M. c. 2, the duration of parliament was only limited by the pleasure or death of the king; and it never can be supposed that the next, or any succeeding parliament, had not the power of repealing the Triennial Act; and if that had been done, then, as before, they might have sat seventeen or seventy years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the Septennial Act. 1 Comm. c. 2, *ad fin.* in n. To this may be added an observation which seems unaccountably to have been passed over in silence by the defenders, and, therefore, no wonder by the accusers, of the Septennial Act; namely, that it is not true in fact, as the argument is usually put, that a parliament chosen for three years continued themselves for seven; since it was only one part of the parliament, the House of Commons, which was chosen for any limited time, and the Septennial Act was the act of the whole legislature. May, 45.

[1] A peer should be described by his name of dignity; but it is unnecessary to describe him as having privilege of peerage. *Cantwell v. Earl of Stirling*, 1 M. & Scott, 297; 8 Bing. 174. *Wills v. Lord Suffield*, 4 C. B. 750.

[2] The process to enforce the appearance of a peer, or of a person having the privilege of parliament, is by writ of summons, the same as in ordinary cases. The other proceedings in the cause are also the same as in ordinary cases, except that no *ca. sa.* can be issued.

[3] Peers and peeresses, and members of the House of Commons, cannot be held to bail (*see* vol. ii. p. 85); nor taken under a *ca. sa* (*see* vol. iii. p. 25). And an unprivileged person in custody, who becomes a peer or member of parliament, will be immediately discharged on motion. *Phillips v. Wellesley*, 1 Dowl. 9. *Ex-parte Barton*, id. 14.

[4] Peers and members of the House of of Commons cannot be outlawed. *Cassidy v. Stewart*, 9 Dowl. 366; 2 Man. & G. 437. *See ante*, Outlawry, p. 26.

[5] *See* Attachment, vol. i. p. 575, 576.

[6] A peer may be a bankrupt. *See* Bankruptcy, vol. ii. p. 169. And by 12 & 13 Vic. c. 106, s. 66, "if any such trader having privilege of parliament shall commit any act of bankruptcy, he may be dealt with under this act, in like manner as any other trader; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by this act." The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vic. c. 60, s. 91), contains a similar provision. *See* 6 Geo. 4, c. 16, s. 9. *Ex-parte Griffiths*, 3 De Gex, M. & G. 174; 1 id. Bank. App. C. 170. A peer or member of the House of Commons has long been subject to bankruptcy by trading, although some particular powers of the Commissioners could not be exercised against them. *Ex-parte Meymot*, 1 Atk. 201. *Ex-parte Harcourt*, 2 Rose, 203. *Read v. Phillips*, 16 Ves. 437.

PAROL Demurrer.[1]

PAROL Evidence.

I. When Admissible in General. *See* vol. iv. p. 299.

II. When Admissible to Explain Ambiguity in Written Instruments in General, p. 56.

III. When Admissible to Explain Ambiguity in Written Instruments in Particular. *See* Bills and Notes, vol. ii. p. 400; Bond, id. p. 504; Charter-Party, vol. iii. p. 79; Contracts, id. p. 193; Custom, id. p. 532; Deeds, vol. iv. p. 1; Frauds, Statute of, id. p. 535; *post*, Will.

IV. When Admissible to Contradict, Vary, or Control a Written Instrument in General, p. 57.

V. When Admissible to Contradict, Vary, or Control a Written Instrument in Particular. *See* under Div. III., *supra.*

I. When Admissible in General. *See* vol. iv. p. 299, n. [3].

II. When Admissible to Explain Ambiguity in Written Instruments in General.[2]

And by 12 & 13 Vic. c. 106, s. 77, "if any creditor or creditors of any such trader, having privilege in parliament, to an amount hereinafter declared to be requisite to support a petition for adjudication of bankruptcy, shall file an affidavit in any court of record at Westminster that such debt is justly due to him, and that such debtor, as he verily believes, is such trader, and shall sue out of the same court a writ of summons, in the form contained in schedule E. to this act annexed, against such trader, and serve him with a copy of such summons, if such trader shall not, within one month after personal service of such summons pay, secure, or compound for such debt, to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the term of the service of such summons."

And by 52 Geo. 3, c. 144, ss. 1 & 2, "all members of the House of Commons found and declared bankrupt are rendered incapable of sitting or voting in the house for twelve months from the issuing of the commission, unless in the meantime the commission be superseded, or the creditors be paid the full amount of their debts; and if the commission be not superseded, or the debts fully satisfied within the twelve months, the Commissioners are then to certify the same to the Speaker, and thereupon the election is declared void, and the Speaker, during the next recess, shall cause notice thereof to be inserted in the *Gazette*, and in fourteen days after shall issue his warrant to the Clerk of the Crown to make out a new writ for the election of another member in the room of the member whose seat is thus vacated."

[1] Formerly, if the defendant were under age at the time of the action, instead of pleading, he might pray that the parol might demur until he should be of full age. Rast. Ent. 360, b. 362. But the practice is now abolished by 11 Geo. 4 and 1 Wm. 4, c. 47.

[2] An ambiguity apparent on reading an instrument, we have seen (vol. i. p. 320), is termed *ambiguitas patens;* that which arises merely upon its application, *ambiguitas latens.* The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, *Ambiguitas veterum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.* On the other hand, it is a settled rule that such evidence is not admissible to explain an ambiguity apparent on the face of the instrument. This distinction is an immediate result from the general principles already specified. If an instrument, which is in itself wholly devoid of meaning according to the usual and ordinary rules of legal construction, or which is indefinite and ambiguous, and equally capable of several different constructions and applications, may have one particular definite meaning annexed to

PAROL EVIDENCE—*Continued.*

IV. When Admissible to Contradict, Vary, or Control a Written Instrument in General.[1]

PARTICULARS of Demand.

I. Special Indorsement of on Writ. *See post*, Summons, Writ of.
II. When to be Deliverad, with Declaration, p. 57.
III. Where the Declaration is Special, p. 58.
IV. As to giving Credit in Particulars, p. 58.
V. Effect of Particulars on the Pleadings, p. 58.
VI. „ on the Evidence, p. 59.
VII. Time for Pleading after Order for Particulars, p. 59.
VIII. At what time Particulars Obtained, p. 59.
IX. Form of Particulars, p. 59.
X. In Actions for Infringements of Patents. *See post*, Patent.
XI. „ Actions under Lord Campbell's Act. *See* vol. v. p. 532, n.

II. When to be Delivered, with Declaration.[2]

it by means of extrinsic oral evidence, it is plain that the oral evidence, and not the writing, would produce the definite effect. On the contrary, where the terms of the written instrument are clear, and oral evidence is used to point the application to this or that subject-matter, the oral evidence does not usurp the authority of the written instrument; it is the instrument which operates. The oral evidence does no more than assist its operation by pointing out and connecting it with the proper subject-matter; it acts in aid and assistance of the written instrument, and performs that duty which, on every application of a written instrument, must be accomplished by means of extrinsic evidence: that is, it points out the precise object to which the instrument is applicable. According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts. See *Doe v. Westlake*, 4 B. & A. 57. Thus, upon a devise to one of the sons of J. S., who has several, evidence is not admissible to show that one in particular was meant (*see* 2 Vern. 624, 625; 6 Co. 68, b; 2 P. Wms. 137); and the devise is void for uncertainty. But if a man devise or convey his manor of Dale, and he have two manors of that name, parol evidence is admissible to show which manor he meant. 2 Roll. Abr. 676, pl. 11; Gilb. Ev. 38; 4 Dowl. 65: *per Gibbs, C. J.*

Where a document produced in evidence is ambiguous on the face of it, the ambiguity is to be explained by the judge. *Smith v. Thompson*, 8 C. B. 44; 18 L. J. C. P. 314. But where an expression in the document produced becomes ambiguous by reason of extrinsic evidence, it is for the jury to construe such ambiguity. (Id.)

[1] Parol evidence is not admissible to contradict, vary, or enlarge written instruments *inter partes*. *Meres v. Ansell*, 3 Wils. 275. *Rawson v. Walker*, 1 Stark. 361); nor is it to alter the legal construction of a written document. *Greaves v. Ashlin*, 3 Camp. 426. *Haliby v. Nicholson*, 1 Price, 404. *Ford v. Gates*, 2 Man. & G. 549. But in order to exclude parol proof of a contract, the writing must purport to be a *complete contract*. Therefore, where a written order for goods was *per se* no contract, but only evidence of some of the terms of a contract, parol evidence as to the agreed time for payment is allowed. *Lockett v. Nicklin*, 2 Ex. 93. The defendant may, however, show that the agreement was in the nature of an escrow, and signed on the condition that a third party approved. *Pym v. Camp*, 6 E. & B. 370. *Wallis v. Littell*, 31 L. J. C. P. 100.

[2] By r. 19, H. T. 1853, "with every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th sect. of the Common-Law Procedure Act, 1852) delivered or filed, containing causes of action, such as those set forth in schedule B. of that act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios." "And if any such declaration shall be delivered or filed without such particulars or such

III. Where the Declaration is Special.[1]

IV. As to giving Credit in Particulars.[2]

V. Effect of Particulars on the Pleadings.[3]

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statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of demand shall be annexed by the plaintiff's attorney to every record, at the time it is entered, with the proper officer."

The following are the causes of action above referred to in schedule B. of the C. L. P. Act, 1852:—

1. Goods bargained and sold by the plaintiff to the defendant.

2. Work done and materials provided by the plaintiff for the defendant, at his request.

3. Money lent by the plaintiff to the defendant.

4. Money paid by the plaintiff for the defendant, at his request.

5. Money received by the defendant for the use of the plaintiff.

6. Money found to be due from the defendant to the plaintiff, on accounts stated between them.

7. A messuage and lands sold and conveyed by the plaintiff to the defendant.

8. The goodwill of a business of the plaintiff, sold and given up by the plaintiff to the defendant.

9. The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff.

10. The defendant's use, by the plaintiff's permission, of a fishery of the plaintiff.

11. Fines payable by the defendant as tenant of customary tenements of the manor of ——, to the plaintiff as lord of the said manor, for the admission of the defendant into the said customary tenements.

12. The hire of (as the case may be), by the plaintiff, let to hire to the defendant.

13. Freight for the conveyance, by the plaintiff for the defendant, at his request, of goods in ships.

14. The demurrage of a ship of the plaintiff kept on demurrage by the defendant.

This rule, it will be seen, only extends to the case of an *indebitatus* count. The plaintiff may sign judgment at the usual time, although no particulars have been delivered. *Jones v. Fowler*, 4 Dowl. 432.

[1] The courts have, at common law, a general jurisdiction to order particulars of demand in an action, or of defence to be given, where it appears necessary for the purposes of justice that the party applying should have the specific information asked for. *Bulnois v. M'Kensie*, 4 Bing. N. C. 127. *Luck v. Handley*, 4 Ex. 486. Thus, particulars of the breaches complained of will be ordered in an action on a covenant. *Sowter v. Hitchcock*, 5 Dowl. 724. *Jones v. Lee*, 25 L. J. Ex. 241. And as to the general principle, *see* also *Collett v. Thompson*, 3 B. & P. 246. *Roberts v. Rowlands*, 3 Mee. & W. 543. Of course, if it appear that further particulars are unnecessary, the application will be refused. *Retallick v. Hawkes*, 1 Mee. & W. 573. *Stannard v. Ullithorne*, 3 Bing. N. C. 326. And in an action on a warranty of a horse particulars of the unsoundness have been refused (*Pylie v. Stephens*, 6 Mee. & W. 813); and the power extends even to actions of tort, though in such cases particulars will not be granted unless abundant cause be shown. *Wicks v. Macnamara*, 27 L. J. Ex. 419; 3 H. & N. 568. *Horlock v. Lediard*, 10 Mee. & W. 677. *Stannard v. Ullithorne*, *supra*.

[2] By P. R. 13, T. T. 1853, "in any case in which the plaintiff, in order to avoid the expense of the plea of payment or set-off, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set off."

Where credits are given in the particulars, the plaintiff is considered as suing only for the balance claimed (*Russell v. Bell*, 10 Mee. & W. 352); so that, if he proves no balance beyond what is credited, the defendant is entitled to a verdict. *Smethurst v. Taylor*, 12 Mee. & W. 545. The plea of payment or set-off is taken with reference to the balance claimed in the particulars. *Eastwick v. Harman*, 6 id. 13. The proof under it must be of items other than those credited. The items proved would be *primâ facie* applicable to the balance; and it lies upon the plaintiff to show that they are identical with those already credited. *Townson v. Jackson*, 10 id. 374. *Lamb v. Micklethwait*, 1 Q. B. 409.

It is optional with the plaintiff to give credits for payments or matters of set-off in his particulars. *Randall v. Ikey*, 4 Dowl. 682. *Penprase v. Crease*, 1 Mee. & W. 36. *Luck v. Handley*, 19 L. J. Ex. 29. *Fussell v. Gordon*, 13 C. B. 847. And if he does give such credits, he is not compellable to give the items. *Myatt v. Green*, 13 Mee. & W. 377.

[3] The particulars are not to be considered as incorporated in the declaration (*Booth v. Howard*, 5 Dowl. 438. *Ferguson v. Mahon*,

VI. Effect of Particulars on the Evidence.[1]

VII. Time for Pleading after Order for Particulars.[2]

VIII. At what time Particulars Obtained.[3]

IX. Form of Particulars.[4]

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9 Ad. & E. 245; 1 Per. & D. 194. *Kingham v. Robins*, 5 Mee. & W. 94; 7 Dowl. 352); nor do they form any part of, nor can they have the effect of a pleading, except in the case of a payment or set-off when credited in them, as presently mentioned (*Staples v. Holdsworth*, 4 Bing. N. S. 717); nor can they be looked at with a view to construe the pleadings. *Kilner v. Bailey*, 5 Mee. & W. 382. *Dempster v. Purnell*, 4 Scott, N. R. 30; 3 Man. & G. 375. The plaintiff may apply them to any count of the declaration to which they are applicable. *Russell v. Rell*, 10 Mee. & W. 340. But a plea of payment of a smaller sum in satisfaction of a larger debt claimed in the declaration, though bad *per se*, was held good upon a motion for judgment *non obstante veredicto*, on the ground that the particulars might, by giving credit, have restricted the debt appearing upon the record. *Turner v. Collins*, 2 L. M. & P. 99; 20 L. J. Q. B. 259.

[1] The effect of the particulars is to limit the plaintiff's demand, both as to the amount and to the items stated in his particulars. *Kenyon v. Wakes*, 2 Mee. & W. 767, *Rennie v. Beresford*, 15 id. 83. *Holland v. Hopkins*, 2 B. & P. 243. *Hedley v. Bainbridge*, 3 Q. B. 316. *Roberts v. Elsworth*, 2 Dowl. N. S. 456. But if the matter of the transaction is stated at large, the plaintiff may recover upon any cause of action arising out of it, which is alleged in the declaration. *Brown v. Hodgson*, 4 Taunt. 189. *Gould v. Coombs*, 1 C. B. 543. *Simmons v. Wood*, 5 Q. B. 170.

Under a particular specifying a promissory note, plaintiff might recover upon the note as upon an account stated. *Gould v. Coombs, supra.*

[2] By P. R. 21, H. T. 1853, "a defendant shall be allowed the same time for pleading, after the delivery of particulars, under a judge's order, which he had at the return of the summons, unless otherwise provided for in such order." *See* also *Mowbray v. Schuberth*, 13 East, 508.

Where an order for particulars is made, and the particulars are delivered in pursuance, the time for pleading having then expired, the defendant has the rest of the day to deliver his plea. *Glen v. Lewis*, 20 L. J. Ex. 71, 81.

When the defendant's time to plead expires during the pendency of a summons for particulars, if the summons is dismissed, he has only the rest of the day to deliver his plea, and is not entitled to the same time which he had when the summons was returnable. *Mengens v. Perry*, 15 Mee. & W. 537. *Evans v. Senior*, 19 L. J. Ex. 159. *Glover v. Watmore*, 5 B. C. 769.

When an order is made for further time to plead, and it is intended that such time should not begin to run until after the delivery of particulars, it should be clearly so expressed in the order. *Adams v. Drummond*, 1 Dowl. 99.

[3] By P. R. 20, H. T. 1853, "a summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of an affidavit."

The order for delivery generally directs a stay of proceedings; and in such case the plaintiff, after service of the order, cannot take any proceedings till they are delivered. *Wilson v. Hunt*, 1 Ch. R. 647. *St. Hanlaire v. Byam*, 4 B. & C. 970.

The defendant may, if he chooses, waive the delivering under the order, and plead or demur to the declaration. *Maunder v. Collett*, 3 C. B. 554. *Johns v. Saunders*, 2 id. 79. *Harder v. Harbourn*, 7 Dowl. 546. But if the plaintiff do not deliver he cannot sign judgment of *non pros.* (*Burgess v. Swayne*, 7 B. & C. 485. *Somers v. King*, 7 D. & R. 125. *Sutton v. Clarke*, 8 Bing. 165. *Dumsday v. Hughes*, 2 Scott, 377); nor is the neglect of the plaintiff to comply with the order any ground for discharging the defendant out of custody. *Graff v. Willis*, 5 Dowl. 715. *Anon.* 1 id. 59.

[4] The particulars should be entitled in the court and cause, and signed in the name of the plaintiff's attorney. They should be explicit and specify items, dates, and amounts as nearly as possible, and should convey reasonable information as to the matters against which the defendant is called on to defend himself. *Rennie v. Beresford*, 15 L. J. Ex. 78; 15 Mee. & W. 78. *Bayntron v. Satchell*, 17 C. B. 383. *Pritchard v. Nelson*, 16 Mee. & W. 772.

If the actions be for a balance of account they should state what that balance is. *Mitchell v. Wright*, 1 Esp. 279.

As to when the court will order further and better particulars, see *Berkley v. De Vere*, 4 D. & L. 97. *Webster v. Jones*, 7 D. & R. 774.

In covenant by the assignees of lessor against the lessee for not repairing, the particulars merely stated the covenants alleged to have been broken; the court considered, that as the defendant had been in possession from a period anterior to the assignment, he must know better than the plaintiff what the breaches were, and therefore

PARTICULARS of Payments.[1]

Residence and Names. *See post*, Residence.

Set-Off.[2]

Statutes. *See* Not Guilty by Statute, vol. v. p. 566; *post*, Pleadings.

PARSON.[3]

PARSONAGE.[4]

PARTIES to Actions.

I. In General, p. 62.

(A) *As to Plaintiffs in*, p. 62.

(*a*) *In Actions* ex Contractu, p. 62.

(*b*) „ ex Delicto, p. 62.

(B) *As to Defendants*, p. 62.

(*a*) *In Actions* ex Contractu, p. 62.

(*b*) „ ex Delicto, p. 63.

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refused better particulars. *Sawter v. Hitchcock*, 5 Dowl. 728.

Less particularity is required in a particular delivered in pursuance of r. 19, H. T. 1853, where a full particular cannot be comprised in three folios. *See* the forms, Chit. Forms.

The plaintiff, will not, in general, be compelled to give any part of the credit side of the account. *Penprase v. Crease*, 1 Mee. & W. 36. *Randall v. Ikey*, 4 Dowl. 682. *Smith v. Eldridge*, 4 Ad. & E. 64; 5 Nev. & P. 408. *Beechey v. Hamner*, 9 Jur. 640, B. C. *Fussey v. Gordon*, 13 C. B. 847. And if he do give the credit side of the account, or credit for payments, the court will not compel him to give the items of the credit side, or payments, for which such credit has been given. *Myatt v. Green*, 12 Mee. & W. 377. *Luck v. Handley*, 19 L. J. Ex. 29.

[1] Where defendant pleads payment, or pays money into court, it is not the practice to make him give particulars of such payment. *Phipps v. Sothern*, 8 Dowl. 208. *The Thames Iron Works Co. v. Mail Steam Co.* 9 W. R. 577. But see *Ireland v. Thompson*, 4 Bing. N. C. 716.

[2] By P. R. 12, H. T. 1853, "with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And if any plea of set-off be delivered without such particulars, and a judge shall afterwards order a delivery of particulars, the defendant shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver."

A judge's order for particulars generally provides, that in default of delivering the particulars as required by the order, the defendant shall not be allowed to give evidence of the set-off at the trial. 2 Chit. Pr. 11th ed. 1450. *Young v. Geiger*, 18 L. J. C. P. 43. *Ibbett v. Leaver*, 16 Mee. & W. 770.

[3] Parson (*persona*), properly signifies the rector of a parish church, because, during the time of his incumbency, he represents the church, and in the eye of the law sustains the person thereof, as well in suing as being sued, in any action touching the same. God. 185; *see* Co. Litt. 300; Ecclesiastical Persons, vol. iv. p. 161; Churches and Chapels, vol. iii. p. 105.

Parson imparsonee (*persona impersonata*) is he that, as lawful incumbent, is in actual possession of a parish church, and with whom the church is full, whether it be presentative or impropriate. 1 Inst. 300.

[4] A parsonage or rectory consists of glebe, tithes, and oblations, established for the maintenance of a parson or rector to have cure of souls in the same parish. There need be no more glebe than the soil of the church or churchyard, but there ought to be some land, for if tithes only are proved it is not a rectory. 3 Salk. 377; 1 Sid. 91; 1 Mod. 12.

II. In Particular.

(A) *Subject-Matter of Action.* See

Account, Action of
Agreement
Animals
Annuity
Apprentice
Arbitration and Award
Assault and Battery
Attorney
Bail
Bailment
Bank of England
Bastard
Bill of Sale
Bills of Exchange and Promissory Notes
Bond
Bottomry
Bribery
Bye-Law
Charter-Party
Churches and Chapels
Common
Composition with Creditors
Contracts
Contribution
Copyhold
Copyright
Covenant
Damage Feasant
Deceit
Decoy
Deed
Demurrage
Detinue
Distress
Dower
Ejectment
Election
Escape
Execution
Extortion
False Imprisonment
Fences
Ferry
Fish and Fishery
Fixtures
Forcible Entry
Franchises
Frauds, Statute of
Freight
Game
Gaming
Goods Sold and Delivered
Guarantee
Highway
Hundred
Insurance, Marine
„ on Lives
„ from Fire
Interest
Joint-Stock Company
Judgment
Landlord and Tenant
Legacy
Libel
Lien
Malicious Arrest
„ Prosecution
Money Lent
„ Paid
„ Had and Received
Mortgage
Navy
Negligence
Nuisance
Parent and Child
Parliament
Party-Wall
Patent for Inventions
Penal Action
Perjury
Physician
Post-Horse Act
Post-Office
Prize and Prize-Money
Railway
Reward
Replevin
Salvage
School and Schoolmaster
Seduction
Ship and Shipping
Simony
Slander
Stamps
Stock
Taxes
Tithes
Tolls
Trade
Trespass
Trover
Turnpike Roads
Universities
Use and Occupation
Wager
Warrants
Waste
Watercourse
Way

(B) *Particular Character or Capacity of the Party.* See

Administration
Alien
Ambassador
Apothecary
Army
Assignee
Attorney
Auction and Auctioneer
Bail
Bankrupt
Barrister
Carrier
Churchwarden
Constable
Coroner
Corporation
Ecclesiastical Persons
Executor & Administrator
Hundred
Husband and Wife
Infant
Innkeeper
Joint-Tenants
Judge
Justice of the Peace
Lunatic
Master and Servant
Medical Practitioner
Navy
Overseer
Partners and Partnership
Pauper
Pawnbroker

Pilot	Prochein Amy	Tenants in Common
Principal and Agent	Proctor	Trustee
„ Surety	Receiver-General	Wharfinger
Printer	Sheriff	Witness

III. Misjoinder and Nonjoinder. *See* Abatement, vol. i. p. 19.

I. In General.

(A) *As to Plaintiffs in.*

(*a*) *In Actions* ex Contractu.[1]

(*b*) „ ex Delicto.[2]

(B) *As to Defendants.*

(*a*) *In Actions* ex Contractu.[3]

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[1] In general the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest is vested. *Dawes v. Peck*, 8 T. R. 330. *Doe v. Staple*, 2 id. 696; 1 East, 497; 1 Saund. 278.

The courts of law will not, in general, notice mere *equitable* rights, as contradistinguished from the strict *legal* title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name, although the equitable right embrace the most extensive, or even the exclusive interest in the benefit to be derived from the contract or subject-matter of litigation. Broom's *Parties to Action;* 1 Chit. Pl. 1.

This rule could not be disregarded without destroying the fundamental distinction between courts of *law* and courts of *equity*, with reference to the remedy peculiar to each jurisdiction; if the cestui que trust were permitted to sue at law in his own name, the benefit and protection intended to result from the intervention of a trustee, clothed with a legal title, might be lost, and the advantages arising from giving courts of equity exclusive control over matters of trust would be defeated. *Goodtitle v. Jones*, 7 T. R. 50. *Bauerman v. Radenius*, id. 667. Hence, where a contract is made with A. to pay him or B. a sum of money for the use of B., the action must be brought in the name of A. *Offley v. Ward*, 1 Lev. 235. *Shark v. Anthony*, 1 M. & P. 575.

Where a contract is made with several persons *jointly*, and not *severally*, they must join as co-plaintiffs in suing upon it. *Eccleston v. Clipshaw*, 1 Wms. Saund. 153.

When a contract is made with several, if their legal interest be joint, they must all, if living, join. *Hill v. Tucker*, 1 Taunt. 7. *Anderson v. Martindale*, 1 East, 497. And if the legal interest of two or more be several, and there be no express contract with all, they must sue separately. *Brand v. Boulcott*, 3 B. & P. 235. *Graham v. Robertson*, 2 T. R. 282. *Camden v. Anderson*, 5 id. 711. And a contract will be construed to be joint or several, according to the interest of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous, or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if the words are unmistakably joint, then, although the interest be several, all the parties must be joined in the action; if the words are unmistakably several, the action must be several, though the interest be joint. *Sorsbie v. Park*, 12 Mee. & W. 154. *Keightley v. Watson*, 3 Ex. 721. *Pugh v. Stringfield*, 27 L. J. C. P. 34; 3 C. B. (N. S.) 2. *Beer v. Beer*, 12 C. B. 60. *Foley v. Addenbrooke*, 4 Q. B. 197. *Haddon v. Ayers*, 28 L. J. Q. B. 105. *See* vol. iii. p. 502.

[2] The action for a tort must be brought in the name of the party whose *legal* right is injured. *Dawes v. Peck*, 8 T. R. 330. *Gordon v. Harper*, 7 id. 12.

An action for an injury to personalty may also be brought in the name of the person having only a special property, or interest of a limited or temporary nature therein. 2 Saund. 47, b, c, d. But in this case the general rule seems to be that the party should have had the actual possession (id.; 1 B. & P. 47); and the person in possession of real property corporeal, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title. 1 East, 244; Willes, 221; 3 Burr. 1563; 2 Stra. 123; Cro. Car. 586; Peake, 67; 1 Taunt. 83, 190, 191, 194; 8 East, 394; 5 B. & Ald. 600; 1 D. & R. 225, S. C.

[3] An action upon an express contract must in general be brought against the party who made it, either in person or by agent (*Young v. Brander*, 8 East, 12); and upon implied contracts against the person who is subject to legal liability. *Middleton v. Fowler*, 1 Salk. 282. *Rumsey v. George*, 1 M. & S. 180.

When there are several parties concerned,

PARTIES TO ACTIONS — *Continued.*

(*b*) *In Actions* ex Delicto.[1]

PARTITION.[2]

I. Partition by Joint-Tenants.[3]

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and the contract was joint, they should all be made defendants (*see* 1 Saund. 153, n. 1, 291, b, n. 4), and persons may be jointly liable as partners, either as having expressly contracted, or by holding themselves out to the world as such, or by a participation in the loss and profit. 16 East, 174; Dougl. 373; 2 H. Black. 246, 247.

If several persons dine together at a tavern, they are *primâ facie* jointly liable for the whole bill, and not merely each for his own share; but each of the officers of a regimental mess are only separately liable for his own share. 3 Camp. 51, 53, 168; 2 id. 640.

When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint (*see* 1 Saund. 153, n.; 2 Burr. 1290; Poph. 161); but if there be more than two parties to a joint and several contract, as where three obligors are jointly and severally bound, the plaintiff must either sue them all jointly, or each of them separately. *See* 3 T. R. 782; Bac. Abr. Obligation, D. 4; 1 Saund. 291, c. 2; Vin. Abr. 68, pl. 7. *See* vol. iii. p. 502.

In the case of a joint contract, if one of the parties die, the action should be brought against the survivors. *Godson v. Good*, 6 Taunt. 587.

[1] All persons who direct or assist in committing a tort are, in general, liable as principals, though not benefited by the act. *Menham v. Edmonson*, 1 B. & P. 369; 2 Esp. 553. They may be jointly sued, whether they assented to the act before or after it was committed (*Rafael v. Verelst*, 2 Bl. Rep. 983. *Freeman v. Blewitt*, 1 Salk. 479. *Badkin v. Powell*, Cowp. 478), unless the party be an infant or a *feme covert*, who cannot be sued in respect of a subsequent assent. Co. Litt. 180*b*, n. 4.

There are some torts which, in legal consideration, may be committed by several, and for which a *joint* action may be supported against all the parties; but if, in legal consideration, several cannot concur in the act complained of, separate actions must be brought against each: thus, a joint action may be brought against several for a malicious prosecution, or assault and battery, or for composing and publishing a libel (2 Saund. 117, a; Latch. 262; 2 Burr. 985; Bac. Abr. Actions in General); and for not setting out tithes (Carth. 361; 2 Vin. Abr. 73, pl. 21), or for keeping a dog to kill game, not being qualified. *See* 2 East, 237. But a joint action cannot be supported against two for verbal slander, and there ought to be separate actions against each (*see* 2 Wils. 227; Dyer, 193; Palm. 313; Cro. Jac. 64, 71; Bulstr. 15; 1 Roll. Abr. 781; 2 Vin. Abr. 64, pl. 27); nor will debt on a penal statute lie against several for what in law is a separate offence in each, as against two proctors for not obtaining and entering their certificate (1 N. R. 245; 2 East, 574. *See* Attorney, vol. i. p. 5; *post*, Penal Actions); or against several for bribery; and if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for taking away of goods by the others, because these trespasses are of several natures. 2 Saund. 117, a; Sty. 154, 154; 3 Esp. Rep. 202, 204.

[2] Partition (*partitio*) is dividing land descended by the common law, or custom, among coheirs or parceners, where there are two at least. Partition may also be made by joint-tenants, or tenants in common, by assent, deed, or writ. 31 Hen. 8, c. 1; 32 id. c. 32.

[3] Joint-tenants may destroy their estate by a voluntary partition among themselves; but such partitions must at all times have been made by deed, except where the estate was only for years, for there they might make a partition without deed. And a partition by parol and separate possession cannot be questioned after being acted on for more than twenty years. *Payne v. Ryder*, 24 Beav. 157.

By the common law, one joint-tenant could not compel the other to make partition, except by the custom of some particular borough. But by stat. 31 Hen. 8, c. 1, reciting the inconveniences which joint-tenants lay under, it is enacted that all joint-tenants of any estate or estates of their own inheritance, in their rights, or in right of their wives, in any manors, &c., shall and may be coacted and compelled to make partition between them of all such manors, &c., as they hold as joint-tenants by writ *de partitione faciendâ*, in that case to be devised in Chancery. As this statute only extended to joint-tenants having an estate of inheritance, an act was made (32 Hen. 8, c. 32) by which joint-tenants for life or years are enabled to make partition of their estates.

In the action of partition there were two judgments. The first, *Quod partitio fiat inter partes prædictas de tenementis cum pertinentiis;* and upon this there was issued a judicial writ to the sheriff to make partition. This action, among the other real actions, was abolished by 3 & 4 Wm. 4, c. 27, s. 36.

If any of the joint-owners, whether joint-tenants, tenants in common, coparceners,

or heirs in gavelkind, are unwilling to concur with the rest in making partition, or, by reason of minority or mental imbecility, are incapable of concurring, or for any other cause cannot come to an amicable arrangement for dividing the estate, any one or more of them may, by proceedings in Chancery, procure a partition to be made. 6 Jarm. & Byth. by Sweet, 587, 600, 603.

The mode in which relief is administered in equity is, by first ascertaining the rights of the several parties interested, and then issuing a commission to make the partition, and on the return of the commission and confirmation of the return by the court, the partition is finally completed by mutual conveyances of the lots made to the several parties. Story's Eq. Jur. 650; 6 Jarm. & Byth. by Sweet, 600. And the same conveyances are necessary as if the parties had agreed to a private partition. 6 Jarm. & Byth. by Sweet, 609. If the conveyances cannot be executed on account of infancy, or on account of an executory interest, the decree can only put the parties in possession, and secure them in the enjoyment of the parts allotted to them, until effectual conveyances can be made. Story's Eq. Jur. 652; 6 Jarm. & Byth. by Sweet, 609. The court will decree a partition even in a suit by or against persons who are only tenants for life or years, and the decree will be binding on all whom they virtually represent, but not on other persons. Thus, a decree in a suit by or against a tenant for life will be binding on the remainderman, who is not *esse* at the time, on the ground of virtual representation, if the court is of opinion that it will be for the benefit of such remainderman that the agreement should be carried into effect, either as it stands or with such variations as the court may think proper (Story's Eq. Jur. 655, 656, a); but a tenant for years or for life cannot insist, as against the owners of the other shares, upon a partition to endure beyond his own estate. 6 Jarm. & Byth. by Sweet, 603.

A bill in equity would not lie for a partition of copyholds, nor of customary freeholds, before the 4 & 5 Vic. c. 35, s. 85. *Horncastle v. Charlesworth*, 11 Sim. 315. *Sope v. Moorshead*, 6 Beav. 213.

Partition in equity proceeds upon conveyances to be executed by the parties, and if the parties be not competent to execute the conveyances, the partition cannot be effectuated. If the defendants be infants *cestuis que trust*, the conveyance is respited until they attain twenty-one. 1 Mod. Rep. 214. But where, in a suit for partition, it appeared that the estate was vested as to one moiety in A. in fee, and as to the other in B. in fee, but in trust for infants:—*Held*, that a conveyance from B., and the decree of the Court of Chancery, would give A. a good title to the tenements allotted to him, and, therefore, that it was not necessary for the infants to convey when they came of age. *Cole v. Sewell*, 17 Sim. 40.

A partition decreed without a commission, in a case in which infants were interested, upon satisfactory evidence of the value. *Greenwood v. Percy*, 26 Beav. 572.

In a partition suit to which minors are parties, they may be declared trustees of the portions not allotted to them, and their proportion of the costs declared a charge upon the estate of the minors in the land. *St. Leger v. Ferguson*, 10 Ir. Ch. Rep. 488. *See* also *Stanley v. Wrigby*, 3 S. M. & G. 18. 24 L. J. Ch. 176.

It has been said that a decree for a partition is a matter of right, and that there is no instance of not succeeding in it, but where no proof is adduced of a title in the plaintiff. 1 Ves. & B. 554.

On the other hand it has been observed, that as a plaintiff has a legal title, it is discretionary in the court whether they will grant a partition or not; and, where there are suspicious circumstances in the plaintiff's title, the court will leave the party to law. 2 Atk.

The plaintiff must, it appears, state upon the record his own title to a moiety (2 Atk. 380), and the titles of the defendants; and the better to enable the plaintiff to obtain a judgment for partition, the court will direct inquiries to ascertain who are together with him entitled to the whole subject. 17 Ves. 552; 2 Ves. jun. 570.

On a partition, every portion of the estate need not be divided. If there be three houses, it would not be right to divide every house, for that would be to spoil them, but some recompense is to be made, either by a sum of money or rent for owelty of partition, to those that have the houses of least value. If, however, there be but one house, there may be a decree for the partition of the same, though highly inconvenient (11 Ves. 143); and where exceptions were taken to the report of commissioners for the partition of a house among joint-tenants, one party complaining that she could not get to her division except up stairs, which stairs were allotted to another person, the Chancellor would not interfere; and where the bill was for a partition of a cold bath, it was decreed. So it is if there be but one mill or an advowson to be divided (1 Dick. 69; 2 id. 652); but it is different where there are other lands which may make up the share. 11 Ves. 143.

A partition was decreed between tenants in common of a waste, though great inconvenience might ensue, as the want of pasture, shade, &c.

It is no objection to a partition that other persons may come *in esse* and be entitled; otherwise, in every case where there is a settled estate, with remainders to persons who may come *in esse*, there never could be a partition. 6 Ves. 498. And *see*, as to the practice of the courts of equity herein, *Mole v. Mansfield*, 15 Sym. 41. *In re Bloomar*, 2 De Gex & J. 88; 27 L. J. Ch. 173. *Clarke v. Clayton*, 2 Giff. 338; 6 Jur. N. S. 1238. And as to the costs, see *Lyne v. Lyne*, 21 Beav. 318. *Cox v. Cox*, 3 Kay & J. 554. *Agar v. Fairfax*, 7 Ves. 558; 2 Ves. jun. 568; 2 P. Wms. 377, 378; 1 Ves. & B. 554.

II. Partition by Coparceners.[1]
III. „ Tenants in Common.[2]
IV. „ Deed.[3]

PARTICULAR Average.[4]

PARTNERSHIP.

I. Definition of, p. 67.

[1] Estates in coparcenary may be destroyed by partition, which disunites the possession, and Littleton mentions four sorts of voluntary partitions. The first is, where coparceners agree to make partition, and do make partition of the tenements, so that each takes a particular part in severalty. The second mode of voluntary partition is, where coparceners agree to choose some friend to divide the lands; in which case the eldest daughter shall choose first, and the other daughters according to their seniority. The third mode of voluntary partition is where the eldest makes the division of the lands, in which case she shall choose last; for Lord Coke says the rule of law is, *Cujus est divisio alterius est electio*, for avoiding partiality. The fourth mode of voluntary partition is to have the lands divided, and then the sisters to draw lots for their shares. And Lord Coke observes, that in this kind of partition coparceners *fortunam faciunt judicem*. These partitions might formerly have been made by parol only, without deed or livery; but in consequence of the Statute of Frauds (29 Car. 2, c. 3), no legal partition can now be made between coparceners without deed. But an agreement in writing to make a partition will have the same effect in equity as an actual partition at law.

There is no general rule as to which of the coparceners is entitled to the custody of a partition deed. The custody was given to three of the coparceners, to whom one-fourth of the estate had been allotted, upon their entering into joint and several covenants for production, and with a direction that the deed should be inrolled in Chancery. *Elton v. Elton, Bayly v. Elton*, 6 Jur. N. S. 136.

[2] A tenancy in common may be destroyed by a voluntary partition of the several shares, which might formerly have been done without deed, provided it was executed in severalty by livery of seisin.

In consequence of the Statute of Frauds (29 Car. 2, c. 3), no legal partition can now be made between tenants in common without deed; but an agreement in writing to make partition will have the same effect in equity as an actual partition at law.

Tenants in common were compellable to sever. 31 & 32 Hen. 8; 8 & 9 Wm. 3, c. 31.

Partitions of estates held in common are now usually made by a commission out of Chancery, in the same manner as partitions of joint-tenancies; but in such case it is not necessary that every part of the estate should be divided; for it will be sufficient if each tenant in common have an equal share of the whole. *See* 1 P. Wms. 446; 2 id. 518; Amb. 191; 1 Ves. 551.

A partition by tenants in common does not operate as a revocation of a prior devise made by one of the tenants as his share, even though such a partition be corroborated by a fine.

Where one of the tenants in common under a partition directed by the court has dealt with a stranger, and he asks a direction to the commissioners to make a particular allotment in respect of such dealings, the court has no jurisdiction to grant such an application. *Wright v. Vernon*, 8 W. R. 724.

Where tenants in common under a partition have had dealings *inter se*, the court will interfere by giving directions to the commissioners as to such dealings. (Id.)

[3] It has been stated that joint-tenants, coparceners, and tenants in common, may make a voluntary partition of their estates. The instrument to effect this is called a deed of partition, by which the lands are divided into distinct portions, and allotted to the several parties, who take them in severalty: in the old deeds of partition it was merely agreed that one should enjoy a particular part, and the other another part in severalty, which must have been executed by entry; but now it is usual for the several parties mutually to convey to each other the different estates, which they are to take in severalty under the partition.

By the common law coparceners, being compellable to make partition, might have done it by parol only, but joint-tenants, and tenants in common, must have done it by deed; the Statute of Frauds has abolished this distinction, and made a deed equally necessary in all cases.

[4] *In the Law of Insurance.*—Every kind of expense or damage, short of a total loss, which regards a particular concern, and which is to be borne by the proprietors of that concern alone. Stevens and Benecke on Average (by Phillips), 341. A loss borne wholly by the party upon whose property it takes place; so called in distinction from a general average, for which different parties contribute. 2 Phillips on Ins. 191.

Lord Tenterden has objected to this term as "a very incorrect expression used to denote every kind of partial loss or damage happening either to ship or cargo, from any cause whatever." Abbott on Ship. 473. But Mr. Benecke claims that it should be retained, not only as being universally adopted and understood, but also because it is more expressive than the term "partial loss," which may also convey the idea of the total loss of a part, in which sense it is sometimes used. Stevens and Benecke on Average, 342.

(A) *Public.* *See* Corporations, vol. iii. p. 263.

(B) *Private*, p. 67. *See* Joint-Stock Companies, vol. v. p. 238; *post*, Railways.

II. Persons who may become Partners, p. 67.

III. Creation of Partnerships, p. 67.

(A) *Public*, p. 68. *See* Corporations, vol. iii. p. 263.

(B) *Private*, p. 68.

(*a*) Inter se, p. 68.

(*b*) *As respects Third Persons*, p. 69.

(*c*) *Agreement for*, p. 69.

IV. Partnership Property, p. 70.

(A) *Personal Property*, p. 70.

(B) *Real Property*, p. 70.

V. Authority of One Partner to bind the Firm, p. 70.

(A) *In General*, p. 70.

(B) „ *Particular*, p. 71.

(*a*) *By Admission*, p. 71.

(*b*) „ *Bill or Note*, p. 71.

(*c*) „ *Deed*, p. 71.

(*d*) „ *Guarantee*, p. 71.

(*e*) „ *Insurance*, p. 72.

(*f*) „ *Legal Proceedings*, p. 72.

(*g*) „ *Loans of Money*, p. 72.

(*h*) „ *Notice*, p. 72.

(*i*) „ *Payment*, p. 72.

(*k*) „ *Pledge*, p. 72.

(*l*) „ *Purchase*, p. 72.

(*m*) „ *Receipt*, p. 72.

(*n*) „ *Release*, p. 72.

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(C) *Effect of Adoption*, p. 73.

VI. Remedies between Partners and by and against Third Persons, p. 73.

(A) *Between Partners*, p. 73.

(*a*) *At Law*, p. 73.

(*b*) *In Equity*, p. 74.

(*c*) *Jurisdiction of County Court*, p. 75.

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(*b*) „ *Declaration of Dissolution*, p. 77.
(*c*) „ *Interference of Equity*, p. 77.
(*d*) „ *Death*, p. 77.
(*e*) „ *Bankruptcy*, p. 77.
(*f*) „ *Marriage*, p. 78.
(*g*) „ *Civil Death*, p. 78.
(*h*) „ *Notice in consequence of Improper Conduct of Co-partner*, p. 78.
(*i*) *What sufficient Notice of*, p. 78.
(*j*) *Effect of Dissolution*, p. 78.
(1) *As to Third Persons*, p. 78.
(2) „ *between Themselves*, p. 78.

I. Definition of.

(A) *Public.* *See* Corporations, vol. iii. p. 263.

(B) *Private.*[1] *See* Joint-Stock Companies, vol. v. p. 238.

II. Persons who may become Partners.[2]

III. Creation of Partnerships.

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[1] Partnership is a voluntary contract between two or more persons for joining together in a common undertaking their money, goods, labour, and skill, or any or all of them, upon an agreement that the gain or loss shall be divided proportionably between them. It may be either in a continuous business or one undertaking. It is enough that there be a combination of property or labour for a common profit. *Ex-parte Gillon*, 1 Rose, 297. *Salomons v. Nissen*, 2 T. R. 674.

Community of profit is sufficient to constitute a partnership, and if one partner stipulate that he shall be held free from *loss*, however valid such stipulation may be *inter se*, he will be a partner *quoad* the world (*Gilpin v. Enderby*, 5 B. & A. 954. *Bond v. Pittard*, 3 Mee. & W. 357); for by taking a part of the profits, he takes from the creditors a portion of that fund which is the proper security to them for the payment of their debts. *Waugh v. Carver*, 2 H. Bl. 235. *Barry v. Nesham*, 3 C. B. 641. *Hickman v. Cox*, 18 id. 617. And it is the same with a *dormant* partner. *Robinson v. Wilkinson*, 3 Price, 538. *Wintle v. Crowther*, 1 C. & J. 316.

[2] All persons having legal capacity to contract may become partners; hence, an infant may. But if he means to avail himself

(A) *Public.* *See* Corporations, vol. iii. p. 263; Joint-Stock Companies, vol. v. p. 238.

(B) *Private.*[1]

of his minority, he must, on his attaining the age of twenty-one, notify his disaffirmance. *Goode v. Harrison*, 5 B. & Al. 147.

A partnership with an infant is only *voidable*, not absolutely. He may avoid when he arrives at full age (*Holmes v. Blogg*, 8 Taunt. 35, 508. *North-Western Railway Co. v. M'Michael*, 5 Ex. 114. *Cork and Bandon Railway Co. v. Cazenove*, 10 Q. B. 935); but absolutely *void* if with a married woman, unless she be trading by the custom of London. *Beard v. Webb*, 2 B. & P. 93.

Trustees or executors carrying on trade for the benefit of infants are personally liable as partners to third persons. *Wightman v. Townroe*, 1 M. & S. 412.

[1] A private partnership is the bare consent of the partners, fixed and certified by acts or contracts: so that, if two or more merchants join together in trade, or in any other transaction, or for the performance of any particular concern, with a mutual, though perhaps not an equal, participation in the profit and loss, they are in every respect to be considered as partners; and this partnership may be limited to a particular concern, without extending to all the concerns in which another member is engaged. Cowp. 814; 2 B. & B. 11. And there must be the consent of every individual member of the firm to authorise the introduction of a new one. *Pearse v. Chamberlain*, 2 Ves. 33. *Ex-parte Barrow*, 2 Rose, 225. *M'Neil v. Read*, 9 Bing. 68.

A contract of partnership need not be in writing. *Alderson v. Clay*, 1 Stark. 405. And a partnership commences on the day agreed on, though the deed be not executed till at a subsequent period. *Batty v. Lewis*, 1 Man. & G. 155; 1 Scott, N. S. 143. *Peacock v. Peacock*, 16 Ves. 49.

A participation between two or more persons in profit arising out of a speculation constitutes a partnership (*see ante*, p. 67. *Cheap v. Cramond*, 4 B. & A. 663); and equality of the terms on which the arrangement has been made is not material (*Morisset v. King*, 2 Burr. 891. *Fromont v. Coupland*, 2 Bing. 171); and one partner may contribute all the labour, all the stock, or all the money, but if there be no community of profit, there is no real partnership. *Hoare v. Dawes*, Dougl. 371.

Where two persons are in partnership, the presumption is that they are interested in the partnership stock in equal moieties. *Farrow v. Beswick*, 1 M. & Rob. 527. *Coope v. Eyre*, 1 H. Black. 37. And an individual to be a partner must share in the community of profit as a principal, and not be mere agent or servant receiving in salary or wages a sum proportioned to the profits realised. *Meyer v. Sharpe*, 5 Taunt. 74. *Dixon v. Cooper*, 3 Wilson, 40. *Harrington v. Churchward*, 29 L. J. Ch. 521; 6 Jur. N. S. 576. *Mair v. Glennie*, 4 M. & S. 240. *Rawlinson v. Clarke*, 15 Mee. & W. 292.

"It is clearly settled," said *Lord Eldon*, in *Ex-parte Hampden*, 17 Ves. 112, "though I regret it, that if a man stipulates that he shall have, as the reward of his labour, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, he is as to third persons a partner." See *Ex-parte Rowlandson*, 19 Ves. 461. The proper test of liability as a partner is not whether the party sought to be charged has stipulated for a participation in profits as such, but whether the person by whom the trade was actually carried on earned it in the capacity of agent for him. *Wheatcroft v. Hickman*, 9 C. B. (N. S.) 47; 8 H. L. C. 268; 30 L. J. C. P. 125. *See* 5 L. J. Ex. 428; 31 L. J. C. P. 15. So, the consignment of dollars to A., with direction to pay over a certain number to B., does not create a joint-partnership between them. *Jackson v. Anderson*, 4 Taunt. 26. And if a person make himself responsible to the vendor for a purchase, on an agreement with the purchaser that if any profit arise from the sale he shall have a moiety for his trouble, this does not form a partnership. *Hesketh v. Blankard*, 4 East, 144. So, a person receiving a per-centage on sales effected through his influence is not liable as a partner. *Pott v. Eyton*, 3 C. B. 32.

So, a conditional agreement to divide profits in manufacturing an invention does not create a partnership. *Eligie v. Webster*, 5 Mee. & W. 518.

An agreement between underwriters to act in concert, and share equally the profit and loss of all insurances, constitutes a partnership, though each underwrote policies in his own name for distinct sums. *Brett v. Beckwith*, 3 Jur. N. S. 31; 26 L. J. Ch. 130.

Where two solicitors, who are not in partnership, are employed in the same matter for a client, as in the defence of an action, the *primâ facie* inference of law is that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each. *Robinson v. Anderson*, 20 Beav. 98.

S., by deed of arrangement, for the benefit of his creditors, assigned all his estate, real and personal, to A.B., C.D., E.F., and G.H., of the second part, as trustees, upon trust to stand possessed of the property, to collect debts, to carry on business under the name of S. Iron Company, to sell iron, and with power to take new leases and erect new buildings, to pay all the charges incurred in carrying on the business, and to divide the net residue of the profits rateably among the creditors, parties of the third part. There was a resulting trust in favour of T.

(*a*) Inter se.

(*b*) *As respects Third Persons.*[1]

(*c*) *Agreement for.*[2]

The deed contained a provision for the registration of trustees, and the appointment of new trustees, and also a clause that the majority of creditors at a meeting might alter the trusts of the deed, or direct the works to be discontinued. All the trustees were creditors, and executed the deed as such, as parties of the third part. The plaintiff supplied goods to the S. Iron Company, and bills of exchange were drawn by him on the company, and were accepted by A. B. (one of the trustees, who was authorised to accept bills), thus:—"*Per proc.* S. Iron Company, A. B." C. D. never acted as trustee. E. F. acted for a short time, and then resigned, and his resignation was effected, pursuant to the deed, long before the bills were accepted. The plaintiff sued C. D. and E. F. on the bills of exchange:—*Held*, by *Coleridge, J.*, *Erle, J.*, and *Compton, J.* (of the Common Pleas), that the trustees were merely agents and managers for the creditors, and that all the creditors who executed the deed were liable as partners in the S. Iron Company, since the deed was not for the purpose of winding up the business, but contemplated the carrying of it on indefinitely, and the creditors were to share the net profits among them; consequently, that C. D. and E. F. were liable as partners in the firm, being parties to the deed as creditors. *Hickman v. Cox*, 4 Jur. N. S. 88; 27 L. J. C. P. 129. *Held, contra*, by *Martin, B.*, *Bramwell, B.*, and *Watson, B.*, that the persons parties to the deed as creditors were not liable as partners to the S. Iron Company, and that the company was composed of the trustees only: consequently, as C. D. and E. F. had ceased to be trustees at the time the bills were accepted, the action could not be maintained. (Id.)

[1] Partnership, as regards third persons, may be constituted either by a contract between him and the ostensible person to share in the profit, or by holding himself out as one jointly responsible. *Hoare v. Dawes*, Dougl. 373. *Day v. Boswell*, 1 Camp. 329. And, as regards third persons, it is not necessary that the individuals should really be partners. *Waugh v. Carver*, 2 H. Black. 235. But though persons may be partners towards the world without being partners between themselves, yet if they be partners between themselves, they are undoubtedly partners as to the world. *Stanton Iron Co.* 25 L. J. Ch. 142; 21 Beav. 164.

A man whose name is made use of without his really having an interest in the business is called a *nominal* partner, and any act done by him which will induce another to believe him to be a partner, will make him liable to that other. *Dickenson v. Valpy*, 10 B. & C. 140. *Mutford v. Griffin*, 1 F. & F. 145. *Spencer v. Billing*, 3 Camp. 310. *Parker v. Barker*, 1 B. & B. 9. *Shot v. Stratfield*, 1 M. & Rob. 2. *Wood v. Duke of Argyll*, 6 Man. & G. 928. *Gurney v. Evans*, 3 H. & N. 122; 27 L.J.Ex. 166. But if the acts relied on as constituting the holding out were done without the knowledge or default of the person thereby represented as a partner, or if it can be proved that the party seeking to charge him had notice of the real circumstances of the case, he will not be answerable. *Fox v. Clifton*, 6 Bing. 776; 9 id. 118. *Alderson v. Pope*, 1 Camp. 404. And a man who describes himself as partner with another in a particular kind of transaction, does not thereby hold himself out as his general partner in any other business which he may carry on. *De Berkom v. Smith*, 1 Esp. 29. *Ridgway v. Phillip and another*, 1 C., M. & R. 415. And no subsequent act will create in a party the character of, or render him liable as, a partner in a contract, if it clearly appear that a partnership did not exist at the time the contract was made. *Saville v. Robertson*, 4 T. R. 720. *Baird v. Planque*, 1 F. & F. 344. And statements by one of two persons that another is his partner, will not be evidence to render the other liable as an ostensible partner. *Edmondson v. Thompson and another*, 31 L. J. Ex. 207.

[2] An agreement to form a partnership after a valuation is prospective. *Howell v. Brodie*, 4 Bing. N. C. 44; 8 Scott, 372. And where there is an agreement for a partnership to commence at a future day, a person is not liable for a debt contracted before that day. *Gabriel v. Evill*, 9 Mee. & W. 297.

Misrepresentation of material facts is a ground for setting aside a partnership contract. *Rawlings v. Wickham*, 1 Giff. 355; 3 De Gex & J. 304. *Jauncey v. Knowles*, 29 L. J. Ch. 95. *Rawlins v. Wickham*, 28 L. J. Ch. 189. *Peto v. Blades*, 5 Taunt. 657. But if a person is induced, by false representations as to the nature and profits of a business, to enter into and continue in partnership with another, and to give him money as part of the capital of the concern, the whole scheme not being a mere sham, the latter cannot be indicted for having obtained the money by false pretences. *R. v. Watson*, 27 L. J. M. C. 18. And it is no answer to an action for breach of agreement to enter into partnership with plaintiff to plead that, after the agreement, and before breach, defendant discovered that plaintiff had, before the making of the agreement, acted with fraud and dishonesty towards a former partner of plaintiff in the conduct of the partnership business, which had been carried on by plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to defendant at the time of his entering into the said agreement. *Andrewes v. Garstin*, 31 L. J. C. P. 15; 7 Jur. N. S. 1124.

IV. Partnership Property.

(A) *Personal Property.*[1]

(B) *Real Property.*[2]

V. Authority of One Partner to bind the Firm.

(A) *In General.*[3]

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[1] Partners having a unity, though not an entirety, of interest in all the stock-in-trade of the partnership, and their title being undivided, they have the same species of interest therein, whether each individual member contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions, and the different conditions of, and agreements under which the partnership is formed. 2 Bl. Com. 188. Though in the absence of agreement they are taken to be equally interested. *Farrar v. Beswick*, 1 M. & Rob. 527. *Mayhew v. Herrick*, 7 C. B. 229. The unity of interest extends not only to such particular stock as may be brought into the partnership at the time of its formation, but on all such as may at any time arise in the co-partnership's dealings from the time of its formation (*Anon.* 2 Ves. 629; 16 id. 49); and the *quantum* allowed to each partner of this acquired property must be governed in the same manner as in the above-mentioned method, in the case of stock contributed at the outset of the partnership; however, to whatever share of these profits or stock a party may be entitled, or in whatever sum the firm may be indebted to him, he has no exclusive right to enjoy or receive it until a balance of accounts be struck between him and his fellow-partners. *See* 1 Ves. 242; Cowp. 449, 471; 2 Camp. 45; 11 Ves. 49.

As between himself and his partners, the valuable interest of any single partner may amount to little or nothing, nay, he may be indebted to the concern of which he is a member; for it is to be observed, that a partnership is held in equity so far distinct from the individuals composing it, that each of them may buy or borrow from the firm, and the firm from him, *vice versâ*. "But though these terms 'creditor and debtor' are so used, nothing can be more inconsistent with the law of partnership than to consider the situation of either party as in any degree resembling the situation of those from whom the appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt, and the supposed debtor is liable to no proceedings, either at law or in equity, assuming always that no separate security has been given:" *per Lord Cottenham, C. Richardson v. Bank of England*, 4 Mylne & C. 172. In short, a partner's interest in the partnership property is his share upon a division of the surplus after payment of the partnership debts. *Garbett v. Veale*, 0 Q. B. 408; 13 L. J. Q. B. 98. And though the goods of the partnership may be sold by the sheriff for the private debt of a single partner, yet the purchaser from the sheriff buys only that to which the defendant is entitled to as between himself and his companions (*Heydon v. Heydon*, 1 Salk. 392. *Chapman v. Koops*, 3 B. & P. 289. *Johnson v. Evans*, 7 Man. & G. 240. *Mayhew v. Herrick*, 18 L. J. C. P. 179); and the court will order the sheriff to pay over to the other his share, to be ascertained by the master. *Eddie v. Davidson*, 2 Dougl. 650. *Parker v. Victor*, 3 M. & S. 287. *See* also *Fraser v. Kershaw*, 2 Kay & J. 496. So also under an extent against one partner, the Crown can only take his separate interest. *R. v. Sanderson*, Weightw. 50. *R. v. Rock*, 2 Price, 198. And the rule is the same on the bankruptcy of one partner. *West v. Skip*, 1 Ves. 242. *Holderness v. Shackles*, 8 B. & C. 612.

[2] When real property is held or purchased for the purpose of a partnership concern, the partners are, to all beneficial intents, tenants in common thereof, without regard to the form of the conveyance, the individual to whom it is made, or the length of time for which the interest is to enure. Courts of law, it is true, must look to the legal estate; they will consider the survivor of two joint-tenants as invariably entitled to the whole by survivorship; and if lands are conveyed to one of several partners, they will invest him with all the right of a tenant in severalty, excluding from their attention the fund from which such lands were bought, and the object of the purchases: but courts of equity, unfettered by technical rules, seek to effectuate the intention of the parties, and are guided by the justice of each particular case; they therefore conceive that there is a tendency in common between partners of real property, and they decree the person in whom the legal estate is vested to be a trustee for those beneficially interested. 3 P. Wms. 158; 1 Inst. 182; 1 Vern. 217; 2 Lev. 188, 228; 1 Ves. 433; 3 id. 696; 5 id. 308; 7 id. 453; 3 Bro. 199; 9 Ves. 500; 1 Stark. 181. But, though the general rule is, that estates purchased out of the partnership fund shall belong to all the partners as tenants in common, even if conveyed to one only; yet it will be otherwise if there be an express agreement that the estates shall be the partner's to whom they are conveyed, and that he shall be a debtor to the partnership for the money. *See* also *Gordon v. Scott*, 12 Moo. P. C. C. 1. *Holroyd v. Holroyd*, 28 L. J. Ch. 902; 7 W.R. 426. *Burden v. Parkins*, 31 L.J.Ch.521.

[3] It is an universal principle, that partners, whether actual, ostensible, or dor-

(B) *In Particular.*

(*a*) *By Admission.*[1]

(*b*) „ *Bill or Note.*[2]

(*c*) „ *Deed.*[3]

(*d*) „ *Guarantee.*[4]

mant, are bound by the act of their copartner, made in the course of, and with reference to, the partnership business, and in the regular course of dealing by the firm; and though the general rule of law is, that no one is liable upon any contract except such as are privy to it, yet this is not contravened by the liability of partners, as they may be imagined virtually present at and sanctioning the proceedings they singly enter into in the course of trade, or, as such, vested with a power enabling them to act at once as principals and as the authorised agent of their copartnerships (*Vere v. Ashby*, 10 B. & C. 288. *Bond v. Gibson*, 1 Camp. 185. *Wintle v. Crowther*, 1 C. & J. 316); and this, although it may have been agreed among themselves that he shall have no such authority, unless the party dealing with him have notice of the arrangement. *South Carolina Bank v. Case*, 8 B. & C. 427. *Minnet v. Whinbry*, 5 Bro. P. C. 489. *Willis v. Dyson*, 1 Stark. 164. *Hawken v. Bourne*, 8 Mee. & W. 703. *Grout v. Enthoven*, 1 Ex. 382.

[1] The admission of one partner binds his copartner (*Nichols v. Dowding*, 1 Stark. 81. *Grant v. Jenkins*, Peake, 203), as regards partnership transactions. *Jaggers v. Benning*, 1 Stark. 64. *See* Admissions, vol. i. p. 195.

[2] If one partner of a trading firm accept, draw, or indorse a bill in the name of the firm, such act will render all the parties liable (*Mason v. Rumsey*, 1 Camp. 384) to a *bonâ fide* holder, although the other partners were ignorant of the transactions, and were even intentionally defrauded by their partner (1 Salk. 126; Ld. Raym. 175; id. 1484; 1 Salk. 292); by entering into the partnership each party reposes confidence in the other, and constitutes him his general agent, as to all the partnership concerns; and it would be a great impediment to commerce if, in the ordinary transactions of their trade, it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was really for the benefit of the firm: hence the act of one, when it has the appearance of being on behalf of the firm, is considered as the act of the rest; and whenever a bill is drawn, accepted, or indorsed by one of several partners, as on behalf of the firm, during the existence of the partnership, and it gets into the hands of a *bonâ fide* holder, the partners are liable to him, though, in truth, one party only negotiated the bill for his own particular benefit, without the consent of his copartners. *Ridley v. Taylor*, 13 East, 175. *Galway v. Matthew*, 10 id. 264. *Sherreff v. Wilks*, 1 East, Rep. 48. *See* also *Kirk v. Blurton*, 9 Mee. & W. 284. *Faith v. Richmond*, 11 Ad. & E. 339. *Norton v. Seymour*, 3 C. B. 792. *Ex-parte Buckley*, 14 Mee. & W. 469. *South Carolina Bank v. Case*, *supra*. See *Greenslade v. Dower*, 7 B. & C. 638. The acceptance by one member of a firm, in his own name, of a bill of exchange addressed to the firm, renders the acceptor personally liable thereon. *Owen v. Van Uster*, 10 C. B. 318. When a bill is to be considered to be the acceptance of the whole firm, though the name of one party be omitted, &c. See *Lloyd v. Ashby*, 2 B. & Adol. 23. One partner may sign a note for the weekly payment, under the Lords' Act. *Meux v. Humphrey*, 8 T. R. 25. *Burton v. Issitt*, 5 B. & A. 267. If one partner pays away partnership bills for a private debt the firm cannot maintain trover for the bills. *Jones v. Yates*, 9 B. & C. 532. But a new partner is not liable on a bill for a debt before he became partner. *Vere v. Ashby*, 10 B. & C. 288. But where persons are partners only in a particular transaction, and not general partners, they are not liable even to a *bonâ fide* holder of a bill issued by one of them in relation to a different concern. *Williams v. Thomas*, 6 Esp. 18. *Semble contra*, *Swan v. Steele*, 7 East, 210. Of course, after dissolution duly certified, an acceptance by one no longer binds the firm (*Wrightson v. Pullan*, 1 Stark. 375); but if after dissolution the retiring partners suffer their names to appear it is otherwise. *Williams v. Keats*, 2 id. 290; and *see* Bills and Notes, vol. ii. pp. 415–418.

[3] *See* Deed, vol. iv. p. 11. It would seem that, in a partnership which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty-one years of premises to be used for partnership purposes, so as to bind the other partners. *Sharp v. Milligan*, 22 Beav. 606.

[4] As it is not usual for merchants in the common course of business to give collateral engagements of that sort, the plaintiff should prove that the partner signing had authority from his copartner to sign the partnership firm to the guarantee. *Hope v. Cust*, 1 East, 53. *Hasleham v. Young*, 5 Q. B. 833. *Brettel v. Williams*, 4 Ex. 623. But it would be sufficient to prove a parol acknowledgment from the other partner subsequently to the guarantee that it was properly given (*Ex-parte Bonbonus*, 8 Ves. 540); or to show a previous course of dealing in which similar guarantees had been given in the name of the firm, with the privity of both partners (*Sandilands v. Marsh*, 2 B. & A. 673, 678, 679); or that the guarantee was given in the course of, and as

(*e*) *By Insurance.*[1]
(*f*) „ *Legal Proceedings.*[2]
(*g*) „ *Loans of Money.*[3]
(*h*) „ *Notice.*[4]
(*i*) „ *Payment.*[5]
(*k*) „ *Pledge.*[6]
(*l*) „ *Purchase.*[7]
(*m*) „ *Receipt.*[8]
(*n*) „ *Release.*[9]
(*o*) „ *Representation.*[10]
(*p*) „ *Sales.*[11]

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incidental to, a transaction falling within the ordinary course of the business of the firm, and that it was notified to the other partners, who expressed no dissent. *Ex-parte Nolte*, 2 Glyn & J. 225. *See* Guarantee, vol. iv. p. 612.

[1] One partner may order insurances to be effected in the name of the firm, and may thereby render the other members liable. *Hooper v. Lusbey*, 4 Camp. 66.

[2] A partner may bind his copartner in legal proceedings (*Whitcomb v. Whiting*, Dougl. 651. *Meux v. Humphrey*, 8 T. R. 25); but one partner has no implied authority to consent to an order for a judgment in an action against himself and his copartner. *Hambridge v. de la Croúée*, 3 C. B. 742; 10 Jur. 1096; 16 L. J. C. P. 85. Service of a notice of declaration on one of two joint defendants, who are partners, at the particular place of business, is not a sufficient service upon the other. *Moulston v. Wire*, 1 D. & L. 527. S. C. nom. *Mosedon v. Wyer*, 6 Scott, N. R. 945; 6 Man. & G. 278. *Quære*, whether the service would be sufficient if it appeared that the subject-matter of the declaration related to a partnership debt? (Id.)

[3] A partner is bound to pay money borrowed by his copartner for partnership purposes (*Rorthwell v. Humphrey*, 1 Esp. 406); and it is an incident of a common trading partnership that the managing partners have authority to borrow money for partnership purposes, which include the payment of partnership debts incurred in the ordinary course of business; and this authority is not excluded by special provisions in the partnership deed, as to the raising of additional capital for supplying deficiencies in the funds by contributions of the partners. *Brown v. Kidger*, 28 L. J. Ex. 66.

[4] Notice to one partner is equivalent to notice to all. *Bignold v. Waterhouse*, 1 M. & S. 259.

[5] A payment by one partner is payment for all. *Meux v. Humphrey*, 8 T. R. 25; 2 B. & B. 464. So a payment to one partner, though the firm have authorised an agent to receive the debt, is good. *Porter v. Taylor*, 6 M. & S. 156.

[6] A pledge of partnership property by one partner, without fraud or collusion on the part of the pawnee, gives the latter a right to hold the goods as against the partnership. *Reid v. Hollingshead*, 4 B. & C. 867. *Brownrigg v. Rae*, 5 Ex. 489. *Raba v. Ryland*, Gow. 132. *Ex-parte M'Kenna*, 30 L. J. Bank. 183. Yet the same rule does not hold to part-owners, or persons who have jointly engaged in a particular speculation. *Barton v. Williams*, 5 B. & A. 395. So, one of several partners in a contract with government cannot pledge goods in his possession expressly for that contract. *Snaith v. Burridge*, 4 Taunt. 684.

[7] One partner may bind his copartner by purchase. *Bond v. Gibson*, 1 Camp. 185. In the absence of a notice or countermand to the contrary. *Willes v. Dyson*, 1 Stark. 164. *Brown v. Kidger, supra.*

[8] A receipt by one partner binds his copartners. *Henderson v. Wild*, 2 Camp. 561. But where a receipt was given by one of several partners without the knowledge of the others, in an action to recover the partnership debt:—*Held*, that evidence was admissible to show that the receipt was fraudulently given by the co-plaintiff; in all cases a receipt is only *primâ facie* evidence, which admits of explanation. *Farrar v. Hutchinson*, 9 Ad. & E. 641; 1 Per. & D. 437.

[9] A release by or to one partner is effective as to his copartners. *Aston v. Booth*, 4 Moore, 192. *Cheetham v. Ward*, 2 B. & P. 630; and *see* Deed, vol. iv. p. 11.

[10] A representation in matters connected with the partnership by one partner binds his copartners. *Rapp v. Latham*, 2 B. & A. 798; id. 678.

[11] A contract for the sale or purchase of partnership property is equally valid if made by one partner as if it were directly and personally assented to by all the members of the firm (Godb. 244; Cowp. 445; 5 B. & A. 405). And where one partner is allowed by the others to appear as the *sole owner* of goods, the property of the firm, and to give a third party instructions to sell them as if he were such sole owner, the firm will be bound by an advance of money made to that partner in anticipation of the profits of sale. *Gordon v. Ellis*, 7 Man. & G. 607; and *see* 2 C. B. 321.

(*q*) *By Submission to Arbitration.*[1]

(*r*) „ *Tender.*[2]

(*s*) „ *Torts or Negligence.*[3]

(C) *Effect of Adoption.*[4]

VI. Remedies between Partners, and by and against Third Persons.

(A) *Between Partners.*

(*a*) *At Law.*[5]

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[1] One partner has no implied authority to bind his copartner by a submission to arbitration. *Hatton v. Royle*, 27 L. J. Ex. 486; 3 H. & N. 500; and *see* Arbitration, vol. i. p. 439.

[2] A tender to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683.

[3] With respect to the liability of partners for torts, the general rule is, that they are not liable for the wrongs of each other unconnected with contracts. Of course, if they all join in one trespass or tort, they may all be sued and compelled to make compensation for such injury; but this action arises from their personal misconduct, and not from the relation of partnership which subsists between them. *Ashworth v. Stanwix*, *infra*. With regard to matters unconnected with the partnership trade or business there can be no question; and, in general, the wilful misconduct of a partner unconnected with any contract only implicates those that are guilty of the tort. Thus, if one of two bankers in partnership should commit usury in discounting, or if one of two attornies in partnership should practise without a certificate, the innocent copartner would not be liable to action for penalties.

The defendants were partners in business as brewers; and one of them, in the name of the others, wrongfully ejected the tenant of a canteen, who held under a lease from the Board of Ordnance, they (the defendants) being sureties for the payment of his rent, and for his quiet tenantship. It was ruled that one partner has no right to involve another, unless in the ordinary course of their business, not, for instance, in a trespass, as above stated. *Petrie v. Lamont*, Car. & M. 93. However, one person is, in general, responsible for the acts of his copartner in performance of a duty connected with their trade. *Wellett v. Chambers*, Cowp. 814. *Moreton v. Hardern*, 4 B. & C. 223. *Ashworth v. Stanwix*, 30 L. J. Q. B. 183. *Mellors v. Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333. And a bookseller was held liable in an action of libel for the acts of his copartner, the name of the firm being printed on the title-page of the work. *R. v. Almon*, 5 Burr. 2686. *R. v. Topham*, 4 T. R. 126. And where one F., a partner in the plaintiff's house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm; F. having been convicted of another forgery committed under similar circumstances, and executed:— *Held*, that the defendant might recover the amount in an action against the surviving partners for money had and received to their use. *Marsh v. Keating*, 1 Scott, 5.

Semble, the rule that there is no contribution amongst tort-feasors does not apply where they are so by mere inference of law, but is confined to cases where they must be presumed to be cognisant of the wrongful act. *Pearson v. Shelton*, 1 Mee. & W. 504; S. C. 1 Tyr. & G. 848. *See* vol. ii. p. 213.

Partners, like individuals, are responsible for the negligence of their servants in the course of their business, and for infractions of revenue law committed by one of them; and if one of the partners act, he is considered in this instance as the servant of the rest: in these cases the tort is looked upon as the joint and several tort of all the partners, so that they may be either proceeded against as a body, or one may be singled out and sued alone for the whole of the damage done. This happens not unusually in actions for driving against carriages, running down ships, &c. With respect to smuggling, it may be collected, that if one partner be guilty of it on the partnership account, the other partners are liable to the duties and the penalty; but the Crown may proceed against the real delinquent alone, or against all the partners jointly.

[4] If it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner, not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods, will make him liable in an action for goods sold and delivered, though he will be liable in an action on the bill of exchange. *Saville v. Robertson*, 4 T. R. 720.

[5] One partner may maintain an action of account against his copartner (*see* Co. Litt. 172, a; vol. i. p. 108); but this remedy has, in a great measure, fallen into disuse, a preference of late years being given to the mode of proceeding by bill in a court of equity, where a discovery by the defendant's answer upon oath may be obtained.

The defence that the parties are partners may be set up under "never indebted." *Bosanquet v. Wray*, 6 Taunt. 597. *Worrall*

(*b*) *In Equity.*[1]

v. Grayon, 1 Mee. & W. 166; *see* id. 183. Where there has been a balance struck, one partner may sue another on the account stated. *Morond v. Levy*, 2 T. R. 483. *Carr v. Smith*, 5 Q. B. 128. *Brown v. Tapscott*, 6 Mee. & W. 119. *Henley v. Soper*, 8 B. & C. 16. *Fromont v. Coupland*, 2 Bing. 170. *Sim v. Sim*, 11 Ir. Ch. Rep. 310. So, one partner may maintain an action against his copartner for money received to the separate use of the former, and wrongfully carried to the partnership account (*Smith v. Barrow*, 2 T. R. 476), and may be maintained by a partner for cash which he advanced to his copartner before the partnership, and in order to its formation (*Venning v. Leckie*, 13 East, 7. *Elgie v. Webster*, 5 Mee. & W. 518); and in some instances, even after its formation (*French v. Styring*, 26 L. J. C. P. 181); or which he has paid, since its dissolution, to a stranger who had not due notice of that event, and to whom, therefore, his late partner was able to render him liable, though he had no interest in the dealing by which such liability accrued to him. *Osborne v. Harper*, 5 East, 225. *Hutton v. Eyre*, 1 Marsh. 603; 7 Ex. 43. So he may also recover for work done for the firm before he became a member of it. *Lucas v. Beach*, 1 Man. & G. 417. It was formerly held, that if one of the partners pay the whole of a partnership debt, without any express promise from the other, the law gives him a right to recover it back, in an action for money paid to the use of that other partner; and it proceeds on this ground—that both are liable to pay. But in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other, by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other. *Abbott v. Smith*, 2 Black. 947. *Petrie v. Hannay*, 3 T. R. 418. But this is only so where the partnership is an isolated transaction. *Sadler v. Nixon*, 5 B. & Adol. 936. *Wilson v. Cutting*, 10 Bing. 436. *Pearson v. Skelton*, 1 Mee. & W. 504. And one partner may sue another on a covenant or special undertaking (*Brown v. Tapscott, supra. Bedford v. Brutton*, 1 Bing. N. C. 399); or on transactions separate from the joint account (*Elgie v. Webster, supra. Coffey v. Brian*, 3 Bing. 54. *Brown v. Tapscott, supra*); or on certain terms of an agreement, by which the one party is rendered liable to the other in an action, notwithstanding that by other terms of the same agreement a partnership is constituted. *Blech v. Balleras*, 29 L. J. Q. B. 261. The members of a private copartnership, as a cost-book mining company, cannot stipulate by their rules that unpaid calls shall be recovered as a debt from the defaulting shareholder to the purser, so as to enable the latter to maintain an action for the calls against the shareholder. *Hybart v. Parker*, 4 C. B. (N. S.) 209; 27 L. J. C. P. 120.

The reason why a partner cannot in general sue his copartner at law, is founded on the fact, that in an action at law complete justice cannot be done, as the forms of such action (excepting the action of account) prevent an investigation of the whole state of the accounts. The action of account, however, or arbitration, would frequently be much preferable to having recourse to a court of equity. *Baxter v. Hosier*, 5 Bing. N. C. 288. *Sturton v. Richardson*, 13 Mee. & W. 17.

Ejectment, on demise of one partner, against his copartner after dissolution, for a house agreed to be occupied by the partners during its continuance, lies without notice to quit. See *Doe d. Waithman v. Miles*, 1 Stark. 181.

One partner cannot maintain trover against his companion for partnership property in possession, but it may be maintained by one partner against his copartner upon destruction by him of the partnership property. *See* Bull. N. P. 34; 4 East, 121. See *per Bayley*, 5 B. & A. 1103, and 1 Taunt. 241.

[1] A court of equity will, in some cases, order a specific performance of an agreement for a partnership (*Sichel v. Mosenthal*, 31 L. J. Ch. 386; 8 Jur. N. S. 275; *see* 3 Meriv. 383); but it is clear that a court of equity will not compel the performance of an agreement for a partnership which the partner may immediately dissolve. If one partner pay a partnership debt, equity will enforce a contribution. *See* 5 Ves. 792; 1 East, 20. If a partner make the partnership liable for his separate debt, and his executrix confess judgment, a court of equity will restrain proceedings. But the court will not appoint a receiver when the partnership is to continue, except in a case of the grossest abuse.

It has been doubted whether in equity one partner can pray an account without a dissolution. *Forman v. Humphray*, 2 Ves. & B. 329. *Richardson v. Bank of England*, 4 Mylne & C. 170; id. 619). But it would seem that the court will entertain such a bill where one partner is violating the partnership contract for the fraudulent purpose of compelling a dissolution, and has excluded his copartner from the books. *Fairthorne v. Weston*, 3 Hare, 387. And in cases of misconduct equity will sometimes interfere, by decreeing a dissolution of partnership and restraining the offender from a repetition of his ill-behaviour by injunction. In some cases, too, where one partner seeks to exclude another from that share of the concern to which he is entitled, and the partnership concern is in danger, a receiver may be appointed (*Hall v. Hall*, 20 L. J. Ch. 585. *Bowkes v. Henry*, 6 L. T. (N. S.) 43. *Baxter v. West*, 28 L. J. Ch. 169); but in general, he will only be appointed as ancillary to a dissolution. (Id.) The court will appoint a receiver of the

(*c*) *County Court Jurisdiction.*[1]

(B) *By Partners against Third Persons.*

(*a*) *At Law.*[2]

(*b*) *In Equity.*[3]

(C) *By Third Persons against Partners.*

(*a*) *At Law.*[4]

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partnership stock (*Wilson v. Greenwood*, 1 Swanst. 471. *Peacock v. Peacock*, 16 Ves. 49) with reluctance, since such a step can scarcely be taken without injury to the trade (*Goodman v. Whitcombe*, 1 J. & W. 589. *Oliver v. Hamilton*, 2 Anst. 453. *Richards v. Davies*, 2 Russ. & M. 347. *Madgwick v. Wimble*, 6 Beav. 495); and further, as to the Court of Equity, *see* Story on Equity Jurisprudence; Madd Ch.; Spencer, id.

[1] The jurisdiction of the county courts extends to the recovery of any demand not exceeding the sum of 50*l.*, which is the whole or part of the unliquidated balance of a partnership account. 9 & 10 Vic. c. 95, s. 65; 13 & 14 Vic. c. 61, s. 1. See *Fuller v. Mackay*, 2 E. & B. 573; 22 L. J. Q. B. 415; and 8 Ex. 208.

[2] It is a general rule, that whatever remedy is afforded to a private person for an invasion or infraction of the rights of property, the same remedy is available to persons who have contracted the relation of partners. But as no right of action can result to an individual out of a transaction which is illegal or immoral, so neither can contracts entered into by partners, which are tainted with illegality, be enforced. If, therefore, one of four partners, who is resident abroad, send and sell goods to a purchaser in England for the purpose of being smuggled, the firm cannot maintain an action for the purchase-money, although the contract is made and the goods delivered without the privity of the other partner.

So, a firm may maintain an action for slander spoken of them in their trade. *Cook v. Batchelor*, 3 B. & P. 150. Where a contract is made with partners who are all actual parties to it, they must all join in suing, otherwise there will be a variance at the trial, which, unless amended, will be ground of nonsuit. Where the contract is made in a partnership name, without mention of individual names, the question arises with whom the contract was actually made; that is to say, who were the persons represented in the contract under the partnership name? and this will determine who ought to sue and to be sued upon it. *Carter v. Whalley*, 1 B. & Adol. 11. *Hallett v. Dowdall*, 18 Q. B. 2. *Cox v. Hickman*, 30 L. J. C. P. 125; 9 C. B. (N. S.) 47. Where the plaintiff carried on business under the name of himself and son, it was held that the plaintiff could not alone sue a party dealing with him in the business without giving proof that his son was not a partner. *Teed v. Elworthy*, 14 East, 210. But in a similar case, upon proof that the son was not a partner, and that the father was solely interested in the business, the latter was held entitled to maintain the action. *Kell v. Nainby*, 10 B. & C. 20. Where the contract is made in a partnership name, and there are partners who did not appear in the transaction, and were unknown to the other contracting party, the secret partners are in the position of undisclosed principals; and although they *may* join in suing upon the contract, the other contracting party cannot be compelled to sue them. He may join them with the ostensible partners as defendants if he pleases; or he may sue the ostensible partners only, and in the latter case there is no ground for a plea in abatement of the nonjoinder of the secret partners. *De Mautort v. Saunders*, 1 B. & Adol. 398. Where a contract is made with one partner in his own name only, without mention of his firm, on account of the partnership business, the other partners may join with him in suing upon it (*Skinner v. Stocks*, 4 B. & A. 437. *Garrett v. Handley*, 4 B. & C. 664. *Cothay v. Fennell*, 10 id. 671. *Robson v. Drummond*, 2 B. & Adol. 303. *Alexander v. Barker*, 2 C. & J. 133). And it would seem, that in such case the contracting partner may sue alone upon the contract (*Mawman v. Gillett*, 2 Taunt. 325. *Lloyd v. Archbowle*, 2 id. 324. *Agacio v. Forbes*, 4 L. T. (N. S.) 155), upon the same principle, that where an agent contracts for an undisclosed principal, either the former or latter may sue upon it. *Sims v. Bond*, 5 B. & Adol. 389, 393; 2 Smith's L. C. 5th ed. 336. The test of liability of a partner who is not an actual party to the contract is, whether the partner or partners who contracted did so in the capacity of agents for him. *Cox v. Hickman*, *supra*. In cases of doubt as to the proper joinder of co-plaintiffs, the C. L. P. Act, 1860, s. 19, which authorises the joinder as plaintiffs of all persons supposed to be legally entitled, will apply; and it will, in general, be advisable to join all persons who may appear to have an interest as partners.

[3] The equitable remedies possessed by partners for the vindication of their rights against strangers, are analogous to those which may be resorted to as between individuals; nor are there any striking peculiarities to be remarked in the prosecution of a suit in equity by them. *See* works referred to, n. [1]

[4] In order to render a firm liable in an

(1) *Execution against.*[1]

(*b*) *In Equity.*[2]

(D) *Proceedings against Partners at the Suit of the Crown.*[3]

(E) *In case of Surviving Partners.*[4]

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action on contract credit should be given to them collectively, for if the separate liability of a single partner is alone regarded, no action lies against the firm. *Emly v. Lye*, 15 East, 11. So, if a member of a firm sign letters in his own name, and promise, without mentioning to his partner, to pay a debt, he is only liable (*Murray v. Somerville*, 2 Camp. 99. *Reid v. White*, 5 Esp. 122). But, as a general rule, one partner is liable for the act of his copartner, even though the conduct of the latter has been fraudulent. *Napp v. Latham*, 2 B. & A. 793. *Hudson v. Robinson*, 4 M. & S. 475. And the same rules apply to dormant partners. *Robertson v. Wilkinson*, 3 Price, 538. Indeed, an action may be maintained against a dormant partner alone upon a joint contract, if he do not avail himself of the legal objections arising from the nonjoinder of the ostensible partners, by pleading in abatement. 4 T. R. 724. And it is no security to him, any more than it is to an ostensible partner, that he stipulated that his copartner should carry on the trade at his own separate risk, and that he should not be answerable for any of the joint debts or engagements. Even those acts done by a creditor, such as selecting one partner, accepting new bills, &c., which are usually held to operate in discharge of the other partners, will not liberate an unknown dormant partner if they were done by the creditor during the time of his concealment.

Where a policy of insurance is made in the name of an unincorporated company or partnership, all the members may be sued, though they have not signed it. *Hallett v. Dowdall*, 18 Q. B. 2. Where the contract is made by one partner in his own name, on account of the partnership business, he may be sued alone upon it, or the other partners may be joined with him as co-defendants. Thus, where the two ostensible partners in a business signed a written agreement for the service of the plaintiff in their business, the plaintiff was held entitled to sue them jointly with another partner who had not signed the agreement, and who was unknown to him at the time of making it. *Beckham v. Drake*, 9 Mee. & W. 79; 11 id. 315. But when the contract is made with partners who are all actual parties to it, they must be sued jointly, otherwise the partners sued may plead the nonjoinder in abatement. *See* vol. i. p. 19.

In actions of tort the plaintiff may sue part or the whole of the firm at his option *Bristow v. James*, 7 T. R. 257); and the nonjoinder cannot be pleaded in abatement. (*Rice v. Shute*, 2 Black. 695; 5 Burr. 2611. *Child v. Sands*, Carth. 294.

[1] Under a *fi. fa.* against one of two partners the sheriff may seize the goods of both (*Johnson v. Evans*, 7 Scott, N. R. 1035; 1 D. & L. 935; 7 Mee. & W. 240. *Farrar v. Beswick*, 1 Mee. & W. 682), and sell the defendant's undivided moiety in them. *Johnson v. Evans*, *supra*. *Jacky v. Butler*, 2 Ld. Raym. 871. As to the sheriffs not being liable in trover for the mere sale of the whole, see *Mayhew v. Herrick*, 7 C. B. 229; L. J. C. P. 179. *Fraser v. Kershaw*, 25 L. J. Ch. 445. *Eddie v. Davidson*, 2 Dougl. 650. *Pope v. Hayman*, Comb. 217. *Heydon v. Heydon*, 1 Salk. 392. *Morley v. Strombom*, 3 B. & P. 254, 288. *Rackhurst v. Clinkard*, 1 Show. 169. *Garbett v. Veale*, 18 L. J. Q. B. 98; 5 Q. B. 408; 1 D. & M. 458. *Johnson v. Evans*, *supra*. *Dalton v. Morrison*, 17 Ves. 193. *Taylor v. Fields*, 14 Ves. 396; Tidd, 4th ed. 1807. The seizure does not divest the other partner of his property or possession in the goods seized (*Johnson v. Evans*, *supra*); therefore, when the sheriff enters and takes possession of partnership property, he seizes in execution only the interest of the defendant in the goods. *Johnson v. Evans*, *supra*. As to what interest in the partnership property can be sold by the sheriff, see *Burton v. Green*, 3 C. & P. 306. *Holmes v. Mentz*, 5 Ad. & E. 131. *Burnell v. Hunt*, 5 Jur. 650. The proper course seems to be to purchase the defendant's share, and file a bill in equity for an account.

[2] Creditors and persons contracting with a partnership firm may likewise, where there is a defect of remedy at law, resort to a court of equity, and call in aid its interference. In many instances more effectual relief is administered in equity than the forms and technicalities of the law will allow it to grant.

[3] If by an act of law the interest of some parties vests in the Crown, the queen is entitled to all the partnership property. *Miles v. Williams*, 10 Mod. 245. Hence, if wine be imported by one partner for himself and firm, an information lies against all (*Attorney-General v. Stannyforth*, Bunb. 97), or against any member of the firm. *Attorney-General v. Burg*, id. 223; 1 Wright, 50.

[4] On the death of one partner, the legal right to money due to the partnership wholly survives to the other by whom the action should be brought (*Smith v. Barrow*, 2 T. R. 476. *Tasker v. Shepherd*, 6 H. & W. 575; 30 L. J. Ex. 207), and not by the surviving partners, jointly with the executors of the deceased partner. *Anderson v. Martindale*, 1 East, 497. And the fact of his being a survivor must appear in the declaration. *Jell v. Douglas*, 4 B. & A. 374. In an action at the suit of a surviving partner, he may include a count for a debt due to himself in his own separate right. 3 T. R. 433; 5 id. 493; 6 id. 582. On the death of the last

VII. Of Nominal and Dormant Partners.[1]
IX. The Dissolution.
(A) *By Act of the Parties.*
(*a*) *By Effluxion of Time.*[2]
(*b*) „ *Declaration of Dissolution.*[3]
(*c*) „ *Interference of Equity.*[4]
(*d*) „ *Death.*[5]
(*e*) „ *Bankruptcy.*[6]

surviving partner, his executor or administrator alone can sue, and the personal representatives of the partner who first died cannot be joined.

When one of several partners dies, the survivors alone are responsible. *Godson v. Good*, 2 Marsh. 302; 6 Taunt. 587. *Poston v. Stanway*, 5 East, 261. In this case the contract may be described as made with the defendant alone, and plaintiff may recover with such demand another due to him in his own right. *Richards v. Heather*, 1 B. & A. 29.

On the death of the last surviving partner, the right of action results against his representatives, and not against them jointly with those of the other deceased partners.

[1] A nominal partner who merely suffers his name to be used is equally liable as if he had an interest in the concern. *Naugh v. Connor*, 2 W. Black. 235. And so is a dormant partner. *Robertson v. Wilkinson*, 3 Price, 538.

A dormant partner is a participant in the profits of the trade, but his name being suppressed and concealed from the firm, his interest is consequently not apparent. A nominal partner has not any actual interest in the trade or its profits; but by allowing his name to be used he holds himself out to the world as having an apparent interest. Where a copartner contracts avowedly in his individual capacity, though tacitly for his companions also, they cannot be joined as co-plaintiffs for non-performance of the contract. *Lucas v. De la Cour*, 1 M. & S. 249. *Loyd v. Machbowle*, 2 Taunt. 324. *Maxman v. Gillet*, id. 325, n. The joint-owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale was made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. *Skinner v. Stocks*, 4 B. & A. 437.

[2] It frequently happens that, by articles of partnership, a precise time is fixed for the duration of the contract; in that case, the partnership is regularly dissolved by the effluxion or expiration of that time for which it was originally agreed between the parties to continue their compact.

[3] If no fixed duration, either party has the power of determining it at any time. *Heath v. Sansom*, 1 Nev. & M. 104; 4 B. & Adol. 172. And if a partnership existing for a limited time, with a right to dissolve upon giving a year's notice, be continued without any new agreement after the expiration of the limited time, such new partnership is dissoluble at the will of either party. A partnership created by deed, where no specified time is mentioned as to its duration, should, it seems, be dissolved by an instrument of as high a nature; if created by parol, it may be dissolved at the will of either party at any time; yet a reasonable notice of the intention to dissolve must be given to the other partners, in order that the partnership concerns may be wound up: there is no fixed rule to determine as to what shall be reasonable notice; it must be left to a jury or a court of equity to consider, from the nature of the trade and other circumstances of the case. *See* also *Holland v. King*, 6 C. B. 727. *Peacock v. Peacock*, 16 Ves. 50.

[4] In cases where a partner so misconducts himself as to be injurious to the partnership, or to his copartner, and defeats the object for which the partnership was formed, or, where a partner is so insane and in such a state of mind as to render him permanently incapable of transacting his business, or where a partnership is formed for a particular purpose, which becomes impracticable, a court of equity will decree a dissolution of the partnership. *Baring v. Dix*, 1 Cox, 212. *Jennings v. Baddeley*, 3 Kay & J. 78. *Bailey v. Ford*, 13 Sym. 495. *Waters v. Taylor*, 2 Ves. & B. 299. *Anderson v. Anderson*, 25 Beav. 190. *Featherstonhaugh v. Turner*, 25 id. 382. *Lee v. Page*, 30 L. J. Ch. 857.

[5] The death of one of the partners operates as a dissolution. Ins. 3, 26, 5. *Bank of Scotland v. Christie*, 8 Clark & Fin. 214. Equity, however, considers that his representatives are entitled to an account, and his estate liable to the demands of the partnership creditors, until the debts which affected him at the time of his decease have been fully discharged. *Vulliamy v. Noble*, 3 Mer. 598. *See* the judgment in *Winter v. Innes*, 4 M. & C. 111: and *quære* as to the effect of the Statute of Limitations on the creditors' equity against the estate of the deceased partner. If the firm be indebted to his estate beyond the proportion it ought to bear of the claim, it seems the statute would bar the equity; and it is clear that a payment of part, or of interest, by the surviving members, will not deprive the executors of the deceased partner of this defence. *Way v. Bassett*, 5 Hare, 55, 68. *Thompson v. Waithman*, 26 L. J. Ch. 134.

[6] The bankruptcy of the whole firm or of one member is a dissolution. *Fox v. Hanbury*, Cowp. 446. *Ex-parte Smith*, 5 Ves.

(*f*) *By Marriage.*[1]
(*g*) „ *Civil Death.*[2]
(*h*) „ *Notice in consequence of Improper Conduct of Copartner.*[3]
(*i*) *What sufficient Notice of.*[4]
(*j*) *Effect of Dissolution.*
(1) *As to Third Persons.*[5]
(2) *As between Themselves.*[6]

295; Collyer on Partnership, 58. But bankruptcy does not necessarily vacate the office of director of a joint-stock company. *Phelps v. Lyle*, 11 Ad. & E. 113.

[1] The marriage of a female partner will operate as a dissolution, since her husband would otherwise be introduced into the firm without the consent of the copartners. *Nerot v. Burnand*, 4 Russ. 260. *Wickam v. Huddleston*, 1 Swanst. 517.

[2] A partnership is dissolved by the civil death of a partner, as by his outlawry or attainder for treason or felony. The outlaw being dead in law is incapable of entering into any contract, bringing any suit, or holding any property; it is clear that a partnership in which he was is *ipso facto* dissolved, and he is incapable of the functions of a partner in trade. The effects of his delinquency are extremely severe upon his copartner; as, upon the outlawry of attainder of one, all the partnership effects become vested in the Crown; the share of the partner outlawed or attainted is in the first place forfeited to the Crown; whereby, if the queen were capable of being so, she would become joint-tenant or tenant in common of the partnership effects with the other partners: but, as this would be inconsistent with the dignity of the monarch, she is strictly entitledto the whole; but the right of the Crown is seldom enforced, either against creditors or deserving partners. Collyer on Partnership, 60–62.

[3] If a partner has been guilty of embezzlement, or has committed a breach of trust, his copartner may, by notice, dissolve the partnership from the date of the notice, notwithstanding the articles of partnership provide for its continuance for the joint lives of the partners. *Essell v. Hayward*, 6 Jur. N. S. 690; 29 L. J. Ch. 806.

[4] The above modes of dissolution are effective *as between the members themselves*, but to determine it as to strangers, notice should be given to them of such dissolution; otherwise to the world the partnership liabilities will still continue. *Parkins v. Carruthers*, 3 Esp. 248. *Graham v. Hope*, Peake, 154. To persons who have not dealt with the firm, notice in the *Gazette* will be sufficient. *Godfrey v. Turnbull*, 1 Esp. 371. *Wrightson v. Pullan*, 1 Stark. 375. To persons who have so dealt, express notice ought to be given. *Kirwan v. Kirwan*, 2 C. & M. 617; 4 Tyr. 491. *Graham v. Hope*, Peake, 208. This is usually done by circular letters (*Newsome v. Coles*, 2 Camp. 617. *Jenkins v. Blizzard*, 1 Stark. 418); but if a fair presumption can be raised from other circumstances that the party had actual notice, that will be enough. *M'Iver v. Humble*, 16 East, 169. Thus a change in the wording of checks has been held notice to a creditor who uses them. *Barfoot v. Goodall*, 3 Camp. 147. *Millerst v. Keene*, 27 Beav. 236. *Hart v. Alexander*, 2 Mee. & W. 484.

A dormant partner may withdraw without making the dissolution public. *Evans v. Drummond, supra. Farrer De Flinne*, 1 C. & Kir. 580.

[5] After notice of dissolution, the firm are not bound by an act of an individual partner (*Kilgour v. Finlyson*, 1 H. Black. 155. *Rathbone v. Drakeford*, 6 Bing. 375), even though the transaction be founded on the original liabilities of the partnership. *Pinder v. Wilks*, 1 Marsh. 248; 4 Esp. 89. But the partnership rights and liabilities will exist as transactions entered by the firm before dissolution. *Ridley v. Taylor*, 13 East, 175; 1 Camp. 292. Whether a partner has ceased to be a member of the firm is a question for the jury. *Vice v. Fleming*, 1 Gale & J. 227. *Hart v. Alexander*, 2 Mee. & W. 484; 7 C. & P. 746.

On a partner dissolving the partnership, removing his name from the firm, and duly promulgating notice of his withdrawal, all danger of his liability for the future acts of his companions is at an end. *Abel v. Sutton*, 3 Esp. 108. *Heath v. Sansom*, 4 B. & Adol. 177. *Smith v. Winter*, 4 Mee. & W. 454. And though he remains liable for the contracts made by the firm while he continued to belong to it, yet his liability will be reduced by the amount of all payments (*Brooke v. Enderby*, 2 B. & B. 70. *Newmarch v. Clay*, 14 East, 239. *Clayton's case*, 1 Mer. 572) made by his late companions since the dissolution of the partnership, and appropriated, either specifically or impliedly, to the reduction of the demands upon the firm. See *Pemberton v. Oakes*, 4 Russ. 154.

[6] One or more partners cannot legally insist on another that he shall take his share at a valuation, or that he shall remove his proportion from the premises, thereby securing the goodwill. The share of each partner consists of his interest in the surplus after the partnership engagements are discharged; but no dividend can be paid till that event. The partnership property consists of the remaining stock which existed at the formation of the partnership, with the additions made and obtained during the continuance of the partnership for the purpose of the partnership concern. If a member of a firm, dissoluble at pleasure, privately

PARTY-WALLS.[1]

PASSPORTS.[2]

PATENTS for Inventions.

I. By Whom they may be Granted, p. 85.

II. For What they may be Granted, p. 85.

(A) 21 *Jac.* 1, *c.* 3, *s.* 6, p. 85.

(B) *Meaning of word "Manufacture,"* p. 85.

(C) *Manufacture must be New*, p. 87.

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III. To Whom they may be Granted, p. 87.

(A) *Meaning of words "Inventor" and "Invention,"* p. 88.

IV. For what Term they may be Granted, p. 88.

V. Statutory Enactments respecting Patents, p. 88.

[Besides the 21 Jac. 1, c. 3, c. 6, for which *see post*, p. 85, the acts relating to Letters Patent now in force are the 5 & 6 Wm. 4, c. 83; 2 & 3 Vic. c. 67; 7 & 8 id. c. 69; 12 & 13 id. c. 109, ss. 12, 13, 19, 29; 15 & 16 id. c. 83; 16 id. c. 5; 16 & 17 id. c. 115.]

(A) 5 & 6 *Wm.* 4, *c.* 83, *Provisions of*, p. 88.

(1.) Sect. 1. *Patentee may enter Disclaimer, and herein of Disclaimer*, p. 88.

(*a*) *Decisions on above Section*, p. 89.

(*b*) *By* 7 & 8 *Vic. c.* 69, *s.* 6, *Disclaimer may be entered, although Patentee have Assigned*, p. 89.

(*c*) *By* 7 & 8 *Vic. c.* 69, *s.* 6, *Disclaimer already made to be Valid*, p. 89.

(*d*) *Sufficiency and Effect of Disclaimer*, p. 89.

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obtain a renewal of a lease of part of the partnership premises, such lease is partnership property; but it does not follow that all the concerns conducted on the premises are partnership property. Upon the dissolution of a partnership, if there is a fair and *bonâ fide* transmutation, either in writing or not, of the partnership property by the outgoing partner to the remaining partner, or other person, without any fraud, the joint property of the firm becomes the separate property of the remaining partner, or such third person, and the assignment may be absolute or conditional. In general, the profits of a partnership must stop the moment a party ceases to be a partner. If upon the dissolution of a partnership the remaining partners trade with the partnership stock, the outgoing partner is entitled to an account of the profits; but doubts have been entertained whether such outgoing partner is entitled to profits made after the dissolution by the remaining partners with the old stock, mixed with property of their own. Courts of equity will, on dissolution of a partnership, sometimes appoint a receiver; but the mere dissolution of partnership is not of itself a sufficient ground for so doing. There must be some breach of duty in a partner. *See ante*, p. 74.

[1] A landlord is justified under sect. 83 of the 18 & 19 Vic. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by sect. 35, such tenant not being an owner within the interpretation clause, sect. 3; and it is no objection that he has neglected to give the notice to the district surveyor, required by sect. 38. *Wheeler v. Gray*, 6 C. B. (N. S.) 606; 28 L. J. C. P. 200.

Case or trespass lies for an encroachment by a party-wall. *Wells v. Ody*, 1 Mee. & W. 452; 7 C. & P. 410. And *see* Building Acts, vol. ii. pp. 543, 544, 547–552, 556, 560, 561, 563, 564, 570–573.

[3] By 21 Vic. c. 24, the duty on a passport was reduced from 5*s.* to 6*d.*

(2.) Sect. 2. *Proceedings to obtain Confirmation of Patent where Patentee is not the true Inventor*, p. 89.

(*a*) *Decisions on above Section*, p. 90.

(3.) Sect. 3 *is implicitly repealed by* 15 *&* 16 *Vic. c.* 83, *s.* 43.

(4.) Sect. 4. *Application for Prolongation of Patent, and herein of Prolongation of Patent*, p. 90.

(*a*) *Decisions on* 5 *&* 6 *Wm.* 4, *c.* 83, *s.* 4, p. 90.

(*b*) *By* 2 *&* 3 *Vic. c.* 67, *s.* 2, *Term may be extended, though Application not prosecuted with effect*, p. 90.

(*c*) *By* 7 *&* 8 *Vic. c.* 69, *s.* 2, *the Crown may extend Term where Expense of Patent great and Remuneration small*, p. 91.

(*d*) *By* 7 *&* 8 *Vic. c.* 69, *s.* 3, *Extension may be for less Time than prayed*, p. 91.

(*e*) *By* 7 *&* 8 *Vic. c.* 69, *s.* 4, *Assignee of Patent may obtain Extension*, p. 91.

(*f*) *Principles on which Extension of Patents will be granted*, p. 91.

(*g*) *When Costs will be given*, p. 92.

(5.) Sect. 5. 5 *&* 6 *Wm.* 4, *c.* 83, *ss.* 5, 6, *relate to Notice of Action, Writs, &c. in Actions for Infringement. See post*, Infringement.

(6.) Sect. 6. 5 *&* 6 *Wm.* 4, *imposes a Penalty of* 50*l. for using unauthorised the Name, Stamp, or Mark of a Patentee.* And see *Myers v. Baker*, 28 L. J. Ex. 90; 3 H. & N. 802.

(B) 2 *&* 3 *Vic. c.* 67, *Provisions of.*

(1.) Sect. 1. *Repeals part of* 5 *&* 6 *Wm.* 4, *c.* 83, *s.* 1, *not previously inserted.*

(2.) Sect. 2. *See supra*, Prolongation of Patent.

(C) 7 *&* 8 *Vic. c.* 69, *Provisions of.*

(1.) Sect. 1. *Recital merely.*

(2.) Sect. 2. *See supra*, Prolongation of Patent.

(3.) Sect. 5. *See ante*, Disclaimer.

(4.) Sect. 7. *Provides that new Letters Patent granted under* 5 *&* 6 *Wm.* 4 *to Assignees shall be valid.*

(5.) Sect. 8. *Empowers Judicial Committee to appoint Clerk of Privy Council to take formal Process in matters referred to them.*

(D) 12 *&* 13 *Vic. c.* 109, *Provisions of*, p. 92.

(1.) Sect. 12. *Certificate of Inrolment in Petty-Bag Office to be Evidence*, p. 92.

(2.) Sect. 13. *Copies of Documents Sealed in Petty-Bag Office to be Evidence.*[1]

(3.) Sect. 19. *Sealed Copies of Enrolments to be Evidence*, p. 92.

(4.) Sect. 29. Scire Facias *may be directed to the Sheriff of the County*, p. 92.

(E) 15 & 16 *Vic. c.* 83, *Provisions of*, p. 92.

(1.) *By s.* 1, *certain Persons appointed Commissioners of Patents*, p. 92.

(2.) *By s.* 2, *Commissioners may make a Seal to seal Warrants for Letters Patent, to be taken Notice of and received in Evidence in all Courts.*

(3.) *By s.* 3, *the Commissioners from time to time to make Rules and Regulations respecting the Business of their Office, and matters within their control.*

(4.) *By s.* 4, *Commissioners of Treasury are to provide and appoint, from time to time, proper Places or Buildings for an Office or Offices.*

(5.) *By s.* 5, *the Commissioners, with the Consent of the Commissioners of the Treasury, from time to time to appoint and remove such Clerks and Officers as they may think proper.*

(6.) *By s.* 6, *Petition and Declaration to be accompanied with a Provisional Specification*, p. 92.

(7.) *By s.* 7, *Application to be referred to Law Officer*, p. 92.

(8.) *By s.* 8, *Provisional Specification to be referred to Law Officer, who may give a Certificate of Allowance, and the Invention may then be used and published for Six Months, which is called Provisional Protection*, p. 93.

(*a*) *Decisions as to Provisional Specification*, p. 93.

(*b*) *By* 16 & 17 *Vic. c.* 115, *s.* 2, *Provisional Specifications may be Inspected*, p. 93.

(9.) *By s.* 9, *if "Complete," instead of "Provisional" Specification be deposited, Applicant has for Six Months Powers of Letters Patent*, p. 93.

(10.) *By s.* 10, *Patent to first Inventor not affected by Protection obtained in Fraud*, p. 94.

(11.) *By s.* 11, *Commissioners to cause Protections to be Advertised, and Persons interested in opposing may leave Particulars of Objection*, p. 94.

(12.) *By s.* 12, *Applications for Patent to be Advertised*, p. 94.

(13.) *By s.* 13, *Specification and Objection referred to Law Officer*, p. 94.

(14.) *By s.* 14, *Power of Law Officer to order Costs of Inquiry*, p. 94.

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[1] Now, by 15 & 16 Vic. c. 83, s. 27, specifications are to be filed and not enrolled; and by sect. 31, enrolments may be removed from Petty-Bag Office to Office of Commissioners.

(15.) *By s.* 15, *Law Officer may cause Warrant to be made for Sealing Letters Patent.* Scire Facias *to lie for repeal*, p. 94.

(16.) *By s.* 16, *not to affect Prerogative of Crown to grant or withhold Patent*, p. 95.

(17.) *Sect.* 17 *repealed by* 16 *Vic. c.* 5, *s.* 2.

(18.) *By s.* 18, *Patent under Great Seal valid for United Kingdom*, p. 95.

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(21.) *By s.* 21, *Letters Patent may be granted to Personal by Representatives of the Applicant*, p. 96.

(22.) *By s.* 22, *if Letters Patent be destroyed or lost, others may be issued*, p. 96.

(23.) *By s.* 23, *Letters Patent may be dated as of the Day of the Application*, p. 96.

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(25.) *By s.* 25, *Letters Patent obtained in the United Kingdom for Patented Foreign Inventions not to continue in force after the Expiration of the Foreign Patent*, p. 96.

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(27.) *By s.* 27, *Specifications to be filed, instead of being enrolled*, p. 97.

(28.) *By s.* 28, *Specifications to be filed in such office as Lord Chancellor shall direct, and extra copies of Drawings*, p. 97.

(29.) *By s.* 29, *Copies of Specifications to be Open to Inspection at Office of Commissioners, and at Edinburgh and Dublin*, p. 97.

(30.) *By s.* 30, *Specifications and other Documents to be Printed and Published, and Copies of Publications may be presented to Public Libraries, &c.*, p. 97.

(31.) *By s.* 31, *Enrolments may be removed to the Office for Specifications*, p. 97.

(32.) *By s.* 32, *Indexes to be made to Old Specifications, &c.: such Specifications, &c. may be Printed and Published*, p. 98.

(33.) *Sect.* 33 *repealed by* 16 *&* 17 *Vic. c.* 115, *s.* 1.

(34.) *By s.* 34, *Register of Patents, Specifications, Disclaimers, Memoranda of Alterations, to be kept open for Public Inspection*, p. 98.

(35.) *By s.* 35, *a Register of Proprietors to be kept at the Office for filing Specifications; certified Copies of Entries to be Evidence*, p. 98.

(36.) *By s.* 36, *Power for more than Twelve Persons to have a Legal Interest in Letters Patent*, p. 99.

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(38.) *By s.* 38, *Entries may be expunged if any party aggrieved, on Application to Court*, p. 99.

(39.) *By s.* 39, *Provisions of* 5 *&* 6 *Wm.* 4, *c.* 83, *and* 7 *&* 8 *Vic. c.* 69, *as to Disclaimers and Memoranda of Alterations, to apply to Patents under this Act. Applications for Disclaimers and Caveats to be at Office of Commissioners*, p. 99.

(40.) *By s.* 40, *Provisions of* 5 *&* 6 *Wm.* 4, *c.* 83, 2 *&* 3 *Vic. c.* 67, *and* 7 *&* 8 *Vic. c.* 69, *as to Confirmation and Prolongation, to apply to Patents under this Act*, p. 99.

(41.) *By s.* 41, *in Action for Infringement of Letters Patent, or* Scire Facias *to Repeal Particulars of Vouchers to be delivered, and no Evidence allowed not mentioned therein*, p. 100.

(*a*) *Decisions as to Particulars of Breaches*, p. 100.

(42.) *By s.* 42, *Courts of Common Law may grant Injunction, Inspection, or Account, in case of Infringement*, p. 100.

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(43.) *By s.* 43, *Particulars to be regarded in Taxation of Costs, Judge's Certificate as to Costs, and Validity of Patent being in question*, p. 101.

(*a*) *Decisions on above Section*, p. 101.

(44.) *Sects.* 44, 45, *and* 46, *repealed by* 16 *Vic. c.* 5, *s.* 2.

(47.) *Sect.* 47 *relates to the Payment of Fees to Law Officers in case of Opposition.*

(48.) *Sect.* 48 *relates to the Fees and Salaries of Officers.*

(49.) *Sect.* 49, *how Salaries paid.*

(50.) *Sect.* 50 *relates to Compensation of Persons affected by this Act.*

(51.) *Sect.* 51, *Accounts of Fees, &c. to be laid before Parliament.*

(52.) *Sect.* 52 *relates to Patents applied for before Act.*

(53.) *Sect.* 53 *repealed by* 16 *Vic. c.* 5, *s.* 2.

(54.) *Sect.* 54, *Forms in Schedule may be used and varied by the Commissioners.*

(55.) *Sect.* 55, *Interpretation of Terms.*

(56.) *Sect.* 56, *Act to be called "The Patent Law Amendment Act*, 1852."

(57.) *Sect.* 57, *Act to commence October* 1, 1852.

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(3.) *Provisional Specification, Form of,* p. 102.

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(5.) *Warrant, Form of,* p. 102.

(6.) *Letters Patent, Form of,* p. 103.

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(F) 16 *Vic. c.* 5, *Provisions of.*

Sect. 1 *repeals ss.* 17, 44, 45, 46, 53, *of* 15 *&* 16 *Vic. c.* 83.

Sect. 2 *makes Letters Patent subject to Avoidance on Non-payment of Stamp Duties in Schedule to this Act.*

Sect. 3 *provides what Stamp Duties are payable.*

Sect. 4 *relates to Payment of Stamp Duties on Letters Patent for England, Scotland or Ireland, respectively.*

Sect. 5, *Duties to be under the Management of the Commissioners of Inland Revenue.*

Sect. 6, *how Stamps to be provided.*

Sect. 7, *Conditions of Letters Patent granted under* 5 *&* 6 *Vic. c.* 83, *to be satisfied by Payment of Stamp Duties, &c. under this Act.*

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Sect. 9, *word "Duplicate" to mean Letters Patent issued by the* 15 *&* 15 *Vic. c.* 83, *s.* 22, *in case of Letters Patent being lost, &c.*

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(G) 16 *&* 17 *Vic. c.* 115, *Provisions of.*

Sect. 1 *repeals s.* 33 *of* 15 *&* 16 *Vic. c.* 83, *and part of s.* 28.

Sect. 2. See *ante,* p. 81.

Sect. 3. *Copies of every Specification and complete Specification to be left, with Drawings, at Office on filing.*

Sect. 4. *Copies or Extracts of Letters Patent, &c. certified and sealed, filed at Commissioner's Office, to be received in evidence.*

Sect. 5. *Certified printed Copies of Specifications, &c., under Seal of Commissioners, to be transmitted to the Director of Chancery in Scotland, and to the Court of Chancery in Ireland, which shall be evidence, without production of originals.*

Sect. 6. *Lord Chancellor in certain cases may seal Letters Patent after the expiration of Provisional Protection.*

Sect. 7 *removes Doubts as to provision of* 15 *&* 16 *Vic. c.* 83, *respecting the making and sealing of new Letters Patent for a further Term.*

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V. Specification, p. 105.
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(B) *Complete Specification, Requisites of*, p. 105.
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I. By Whom they may be Granted.[1]
II. For What they may be Granted.
(A) 21 *Jac.* 1, *c.* 3, *s.* 6.[2]
(B) *Meaning of word "Manufacture."*[3]

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[1] At common law the Crown may, for a reasonable time, make a valid grant to any individual of the sole use of an art invented or first brought into the realm by the grantee. Noy. 182, 183. This seems to be founded on the presumption that it is expedient, on public grounds, to allow the inventor to remunerate himself for his labour and expense, as, if no such indulgence were given, few people would be disposed to embark their capital, or exercise their ingenuity, in making new and beneficial experiments. Whether this presumption be correct may well be doubted. It is, however, clear, that it was on this principle that the statute against monopolies (the 21 Jac. 1, c. 3, s. 6) preserves the right of the Crown to grant letters patent, for the term of fourteen years, for new manufactures. It is on the above statute that the present law of patents is founded.

By 22 Vic. c. 13, provisions are made for protecting inventions in munitions of war, by assignment to the Secretary of State for War.

Letters patent (*literæ patentes*) are so called because they are not sealed up, but lie open, with the great seal affixed.

[2] In the words of the 21 Jac. 1, c. 3, s. 6, "letters patent and grants of privileges" may be obtained "for fourteen years or under thereafter to be made, for the sole working or making of any *new manufactures* within the realm, to the true and first inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use, so as they be not contrary to law nor mischievous to the state, by raising the prices of commodities at home, or hurtful to trade, or generally inconvenient; the said fourteen years to be accounted from the date of the letters patent or grant, which were to be of such force only as they would be of it that act had not been made."

[3] Manufactures are things made by the hands of man, and are reducible to two principal classes, namely, machinery and substances. In the former case, the machine, in the latter, the substance produced, forms the manufacture, and is consequently the subject of a patent. 2 H. Black. 481, 482. As stated by *Eyre, C. J.*, the word "manufacture" is of extensive signification. It applies not only to things made, but to the practice of making, to principles carried into practice. Under things made, we may class new compositions of things, such as manufactures in the most ordinary sense of the word; all mechanical inventions, whether made to produce old or new effects: for a new piece of mechanism is certainly a thing made. Under the practice of making, we may class all new artificial manners of operating with the hand, or with instruments in common use; new processes in any art producing effects useful to the public. New methods of manufacturing articles in common use, where the whole merit and effect produced are the saving of time and expense, and thereby lowering the price of the articles, may be said to be new manufac-

tures in one of the common acceptations of the word, and agreeable to the spirit and meaning of the act. "To the same effect," it was observed by *Abbott, C. J.*, in *The King v. Wheeler*, 2 B. & A. 349, "that the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a machine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose, as a stocking-frame, or a steam-engine for raising water from mines; or, it may perhaps extend also to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper and more expeditious manner, or of a better and more useful kind." And in *Edgeberry v. Stephens*, 2 Salk. 447, the words "new devices" are substituted and used as synonymous with the words "new manufactures." The novelty of the invention for which the patent is obtained is indispensable to its validity; but the patent is good, though it consist in inventions, through the medium of mechanism, and the materials used be well known and have been used before, if the arrangement or combination of them be new, that is, produce a new effect; but in such case the patent must be for the compound article, and not for the old materials or ingredients of which it is made. *See* also *Morgan v. Seaward*, 2 Mee. & W. 555. *Cornish v. Keene*, 3 Bing. N. C. 570. *Household Co. v. Neilson*, 9 Clark & Fin. 788. And a patent may not only be obtained for a mere process, as, for instance, "for a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances" (*Boulton v. Bull*, 2 H. Black. 468. *Rex v. Wheeler*, 2 B. & A. 345); but also for improvements in the mode of doing anything by a known process. *Electric Telegraph Co. v. Brett*, 20 L. J. (N. S.) 123, C. P. *Cornish v. Keene*, *supra*. And an invention consisting in no more than in the use of things already known, and acting with them in a way already known, and producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public, is also properly the subject-matter of a patent (*Crane v. Price*, 12 L. J. (N. S.) 81, C. P. *Sed vide Horton v. Mabon*, 12 C. B. 437; 31 L. J. C. P. 255. *Harwood v. Gt. N. Rail. Co.* 2 B. & S. 194; 31 L. J. Q. B. 198. *Ormson v. Clark*, 32 L. J. C. P. 8. There may be a valid patent in an addition to a known thing (*Morris v. Branson*, Bull. N. P. 76, c. *Jessop's case*, cited 2 H. Black. 489. *Bramah v. Hardcastle*, Holroyd on Patents, 81, n. *Hornblower v. Boulton*, 8 T. R. 95. *Boulton v. Bull*, 2 H. Black. 463. *Hullett v. Hague*, 2 B. & Adol. 370. *Bovill v. Moore*, Davies, P. C. 361); or, as it seems, in the omission of a useless part of a known machine. See *Minter v. Mower*, 1 Nev. & P. 595; 6 Ad. & E. 735. So a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result produced, is good. *Brunton v. Hawkes*, 4 B. & A. 541. *Huddart v. Grimshaw*, Davies, P. C. 625; Webb, P. C. 85. *Templeton v. Macfarlane*, 1 H. L. C. 595. So, also, if the result produced by such combination is either a better article, or a cheaper article to the public than that produced before by the old method. *Per Tindal, C. J.: Crane v. Price*, 4 Man. & G. 603; Web. P. C. 409. *Rex v. Wheeler*, 2 B. & A. 350. *Hill v. Thompson*, 3 Mer. 629; Web. P. C. 237. *Steiner v. Heald*, 20 L. J. Ex. 410; 2 C. & Kir. 1022. So there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials (*Hill v. Thompson*, 3 Mer. 629; 8 Taunt. 391. *Cornish v. Keen*, Web. P. C. 501; 3 Bing. N. C. 570); or for the new application of a well-known principle (*Neilson v. Harford*, 8 Mee. & W. 806. *Minter v. Wells*, 1 C., M. & R. 505. *Huddart v. Grimshaw*, Dav. P. C. 265; Web. P. C. 85), and it seems such combination may include the subject of another patent then in force. *Lewis v. Davis*, 3 Car. & P. 502. *Harmar v. Playne*, 11 East, 101. *Neilson v. Harford*, 8 Mee. & W. 806; Web. P. C. 295, 331. But if the invention be for improvements upon an engine, for which a patent has already been granted, and those improvements cannot be used without the original engine, at the end of fourteen years the patentees can make use of a patent taken out upon their improvements, though before that period they would have no right to make use of the other substratum. See *per Lord Eldon, C.: Ex-parte Fox*, 1 Ves. & B. 67. *Baldon v. Smith*, 9 C. B. 117.

Though a patent cannot be taken out for a principle, it may for a principle united with the mode of carrying that principle into operation (*Jupe v. Pratt*, Web. Ca. 144. *Crossley v. Beverley*, 9 B. & C. 63; 3 Car. & P. 513; Web. P. C. 106; M. & M. 283. *Neilson v. Harford*, *supra*. *Household Co. v. Neilson*, 9 Web. Ca. 683; 9 Clark & Fin. 718. *Electric Telegraph Co. v. Brett*, 20 L. J. C. P. 123); but then the patent "must be taken out, not for the principle itself, but for the mode of carrying the principle into effect." *Per Alderson, B.: Neilson v. Harford*, *supra*. *Minter v. Mower*, *supra*. *Harrison v. Gt. Northern Railway Co.* 29 L. J. Q. B. 193.

A patent may be obtained for a manufacture which is new in this realm, although it was originally invented abroad. *Edgeberry v. Stephens*, 2 Salk. 447. And there is a material distinction between applying a new contrivance to an old object, and an old contrivance to a new object. Thus, the application of an old wheel to railroads is not the subject of a patent. *Losh v. Hague*, Web. Pat. Cas. 207. And the application of a known article to a new use, the mode of application not being new, cannot be the subject of a patent. *Reg. v. Cutter*, 3 C. & Kir.

(C) *Manufacture must be New.*[1]

(D) „ *Useful.*[2]

III. To Whom they may be Granted.[3]

215; 14 Q. B. 372, n. *Brook v. Aston*, 8 E. & B. 478; 27 L. J. Q. B. 145. So, the discovery of a particular advantage to be obtained from a piece of mechanism previously known cannot be treated as a new invention which will support a patent. *Tetley v. Easton*, 26 L. J. C. P. 269.

[1] *The manufacture must also be a new manufacture, and one which others, at the time of making such letters patent and grants, shall not use.* By "using" is meant a using publicly as distinguished from a using in secret. It is not necessarily a using generally. *Boulton v. Bull*, 2 H. Black. 487. *Lewis v. Marling*, 10 B. & C. 22. Hence, a patent cannot be obtained for an article which has been publicly vended. *Wood v. Lorrimer*, Holt, N. P. 58. But the allowing one person to know the secret of a patent is not such publication as avoids it. *Morgan v. Seaward*, 2 Mee. & W. 544. A new invention is that which has not been brought into public use (*Lewis v. Marling, supra. Carpenter v. Smith*, 11 L. J. Ex. 213. *Jokes v. Pearce*, Web. P. C. 122. *Cornish v. Keene*, id. 501, 519; 3 Bing. N. C. 570. *Gibson v. Brand*, Web. P. C. 627), or made public by publication in a book. *Rex v. Arkwright*, Dav. P. C. 61; Web. P. C. 72, 553. *Long v. Gisborne*, 31 L. J. Ch. 769. And if any part of that which is of the substance of the invention has been communicated to the public in the shape of a specification of any other patent, or is a part of the knowledge of the country, so as to be a known thing, in that case the patentee cannot claim the benefit of the patent. *Per Lord Ellenborough: Huddart v. Grimshaw*, Dav. P. C. 265; Web. P. C. 86. *Hill v. Thompson*, 8 Taunt. 375. *Brunton v. Hawkes*, 4 B. & A. 542. *Forsyth v. Riviere*, Chit. Pre. Cr. 182, n. *Betts v. Menzies*, 30 L. J. Q. B. 81. *Oxley v. Holden*, 8 C. B. 666; 30 L. J. C. P. 68. *Seed v. Higgins*, 8 H. L. Ca. 550; 30 L. J. Q. B. 314. Still, however, a man may make experiments in his own closet for the purpose of improving any art or manufacture in public use. If he makes these experiments, and never communicates them to the world, and lays them by as forgotten things, another person who has made the same experiments, or has gone a little farther, or is satisfied with the experiments, may take out a patent for them, and it will be no answer to him to say that another person before him made the same experiments, and therefore that he was not the first inventor (*Cornish v. Keene*, Web. P. C. 508. *Galloway v. Bleadon*, id. 521. *Dollond's Patent*, id. 43; 2 H. Black. 487. *Newall v. Elliott*, 27 L. J. C. P. 337; 4 Jur. N. S. 562); and originality of invention is not destroyed by previous glimpses of the same thing. *Household Co. v. Neilson*, 9 Clark & Fin. 788. So the deposit of an invention in a public room, merely to get the qualities tested, is not a publication. *Bentley v. Fleming*, 1 C. & Kir. 587. *Long v. Gisborne*, 31 L. J. Ch. 769.

[2] *The invention must also be useful*, so as to be appreciable by a jury. *Morgan v. Seaward*, 2 Mee. & W. 544. A grant of a monopoly for an invention which is altogether useless may well be considered "as mischievous to the state, to the hurt of the trade, or generally inconvenient." *Per Parke, B.: Morgan v. Seaward*, 2 Mee. & W. 562. *Manton v. Parker*, Dav. P. C. 327. *Reg. v. Prosser*, 11 Beav. 306. And it seems that if the invention be generally useful, though cases may occur in which it does not answer the object (Id. *Haworth v. Hardcastle*, 1 Bing. N. C. 182. *Neilson v. Harford, supra. Boulton v. Bull*, 2 H. Black. 498. *Huddart v. Grimshaw*, Dav. P. C. 265), or in which part of the invention may be useless, that will be sufficient. *Lewis v. Marling, supra.*

[3] By the 21 Jac. 1, c. 3, the patent must be granted to *the true and first inventor.* The person who introduces a discovery to the public is entitled to a patent for it, whether he happens to be the original inventor or not; for where one person had discovered a new method of making refracting telescopes, but, never having made it public, another had obtained a patent for it, the patent was for that reason confirmed. *Dollond's case*, 2 H. Black. 487. So, any person in this country, in possession of a foreign discovery, may have a patent on publishing it, for the act intended to encourage new devices useful to the kingdom, and whether learned by travel or study, it is the same thing; indeed, the express words of the statute speak of manufactures new within the realm. *Edgeberry v. Stephens*, 2 Salk. 447. *Beard v. Egerton*, 15 L. J. C. P. 270.

If an inventor has published his invention before taking out his patent, so that the public are in possession of the discovery, he cannot support his patent, though he is the first inventor thereof, for the statute requires, not only that they should be *new manufactures*, but such as others, at the time of making the patents, shall not use. *See* Davies, 428; and *Tennant's case*, id. 429. Thus, a sale of the discovery by the patentee for four months before the patent passed the Great Seal avoided it. *Wood v. Zimmer*, Holt, C. N. P. 58. So, the patentee must be the sole inventor (*Tennant's case, supra*); for a patent is in the nature of an agreement between the queen and a subject, that, in consideration that the latter will put the public in possession of a new beneficial invention, he shall have the exclusive possession for fourteen years: therefore, as the patentee can make no such valid consideration, where the public already possess the discovery, if any person has used

(A) *Meaning of words "Inventor" and "Invention."*[1]

IV. For what Term they may be Granted.[2]

V. Statutory Enactments respecting Patents.

(A) 5 & 6 *Wm.* 4, *c.* 83, *Provisions of.*

(1.) Sect. 1. *Patentee may enter Disclaimer, and herein of Disclaimer.*[3]

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an article, for which a patent is obtained previously to the date of the patent, although he had kept it a great secret from all but his two partners and two servants concerned in preparing it, it will be a ground of nonsuit; but it must be known and practised by more than one, as in *Dollond's case*, where it was held, that a person promulgating its practice was entitled to be called the inventor, in preference to the person who kept his discovery confined in his closet. Cited by *Buller, J.*, 2 H. Black. 487. Thus it will appear, that the greatest secrecy should be observed with regard to inventions till the patent has passed the Great Seal; and *Lord Eldon* has said, that were he an inventor, he would not disclose a discovery to his brother till his right was so secured. *See* Davies, 444, 446.

[1] The word "inventor" implies some exertion of ingenuity, so that a manufacture requiring no contrivance or skill is not a fit subject for a patent. Steph. Com. 2, p. 88. A person is not the true inventor if it appear that the novelty was suggested to him by some other person in this country (*Lewis v. Marling*, *ante*, p. 87), or that he has taken it from a book. *Arkwright's case*, Dav. Pat. Ca. 129. *Wallire v. Potter*, Web. P. C. 592. *Cornish v. Keene*, *ante*, p. 87. *Long v. Gisborne*, *ante*, p. 87. But a discoverer who has employed a skilful person to assist in the mechanical parts of his contrivance has a right to the additions made by that person, and may include them in his patent. *Bloxam v. Elsee*, 1 C. & P. 558. And the adoption by an inventor of a suggestion made in the course of experiments, of something calculated more easily to carry his conceptions into effect, does not affect the validity of a patent (*Allen v. Rawson*, 1 C. B. 551); nor do previous glimpses of the same thing destroy the originality of the invention. *Household Co. v. Neilson*, Web. P. C. 690.

Although a party may believe himself to be the first and original inventor, yet he cannot shelter himself under wilful ignorance, but will be fixed, not only with what he knew, but that which he might have known had he made the inquiries which he ought to have made. *Hainball's Patent*, 9 Moore, P. C. C. 378. A first—an original inventor—means a person who could claim the merit of the invention, without reference to the user. (Id.)

In the case of two simultaneous discoveries, he who first procures the patent before the matter is made public is entitled to enjoy it. Steph. Com. 2, 88. *Boulton v. Bull*, 2 H. Black. 487. *Lewis v. Marling*, *supra*.

By 15 & 16 Vic. c. 83, s. 55, the expression "invention" shall mean any manner of new manufacture the subject of letters patent and grant of privilege, within the meaning of 21 Jac. 1. c. 3.

[2] This privilege is, by 21 Jac. 1, c. 3, s. 6, allowed to be enjoyed *for fourteen years or under*, which term is to be accounted from the date of the first letters patent or grant of such privilege. But *see post*, Extension of Patent.

[3] By 5 & 6 Wm. 4, c. 83, s. 1, "any person who, as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain, letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the Clerk of the Patents of England, Scotland, or Ireland, respectively, as the case may be, having first obtained the leave of his majesty's Attorney-General, or Solicitor-General, in case of an English patent; of the Lord Advocate or Solicitor-General of Scotland, in the case of a Scotch patent; or of his majesty's Attorney-General or Solicitor-General for Ireland, in the case of an Irish patent, certified by his fiat and signature, a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer, or such alteration as shall extend the exclusive right granted by the said letters patent; and such disclaimer or memorandum of alteration being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent, or such specification, in all courts whatever: Provided always, that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration; which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the Attorney-General, or Solicitor-General, or Lord Advocate respectively: Provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was enrolled, but in every such action or suit the original title or specification alone shall be given in evidence, and deemed and taken to be the title and speci-

(*a*) *Decisions on above Section.*[1]

(*b*) *By 7 & 8 Vic. c. 69, s. 5, Disclaimer may be entered, although Patentee have Assigned.*[2]

(*c*) *By 7 & 8 Vic. c. 69, s. 6, Disclaimer already made to be Valid.*[3]

(*d*) *Sufficiency and Effect of Disclaimer.*[4]

(2.) Sect. 2. *Proceedings to obtain Confirmation of Patent where Patentee is not the true Inventor.*[5]

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fication of the invention for which the letters patent have been, or shall have been granted: Provided also, that it shall be lawful for the Attorney-General, or Solicitor-General, or Lord Advocate, before granting such fiat, to require the party applying for the same to advertise his disclaimer or alteration, in such manner as to such Attorney-General, or Solicitor-General, or Lord Advocate shall seem right, and shall, if he so require such advertisement, certify in his fiat that the same has been duly made."

[1] Before this enactment, if a patent was taken out for two things, and one of them was old, the whole patent was void, although the other was new, and a proper subject for a patent. *Brunton v. Hawkes*, 4 B. & A. 553. *Campion v. Benyon*, 3 B. & B. 5. *Bloxam v. Elsee*, 6 B. & C. 169. *Seed v. Higgins*, 8 H. L. Ca. 550; 30 L. J. Q. B. 314.

By 15 & 16 Vic. c. 83, s. 29, copies of disclaimer are to be kept open for inspection at the office of Commissioners. The object of the statute in permitting disclaimers, was not only to enable patentees to set themselves right when their patents are void, but also to afford them the means of preventing the doubts and difficulties which so frequently hang over trials relating to patents. *Stocker v. Warner*, 14 L. J. (N. S.) 90, C. P.

[2] The disclaimer may be read as part of the original specification. *R. v. Mills*, 20 L. J. C. P. 16. But see *Tetley v. Easton*, *infra*.

By 7 & 8 Vic. c. 69, s. 5, "in case the original patentee or patentees hath or have departed with his or their whole or any part of his or their interest, by assignment to any other person or persons, it shall be lawful for such patentee, together with such assignee or assignees, if part only hath been assigned, to enter a disclaimer and memorandum of alteration under the powers of the said recited act; and such disclaimer and memorandum of such alteration having been so entered and filed as in the said recited act mentioned, shall be valid and effectual in favour of any person or persons in whom the rights under the said letters patent may then be, or thereafter become, legally vested; and no objection shall be made in any proceeding whatsoever on the ground that the party making such disclaimer or memorandum of such alteration had not sufficient authority in that behalf."

[3] By 7 & 8 Vic. c. 69, s. 6, "any disclaimer or memorandum of alteration, before the passing of this act, or by virtue of the said recited act, by such patentee, with such assignee, or by such assignee as aforesaid, shall be valid and effectual to bind any person or persons in whom the said letters patent might then be or have since become vested; and no objection shall be made in any proceeding whatsoever that the party making such disclaimer or memorandum of alteration had not authority in that behalf."

[4] As to what is a sufficient disclaimer, see *Seed v. Higgins*, 6 Jur. N. S. 1264; and *supra*. The effect of a disclaimer is merely to strike out from the specification those parts of the machinery which are disclaimed; it cannot be read as explanatory of that which remains. *Tetley v. Easton*, 2 C. B. (N. S.) 706.

[5] By 5 & 6 Wm. 4, c. 83, s. 2, "if in any suit or action it shall be proved or specially found by the verdict of a jury that any person who shall have obtained letters patent for an invention, or supposed invention, was not the first inventor thereof, or of some part thereof, by reason of some other person or persons having invented or used the same, or some part thereof, before the date of such letters patent, or if such patentee or his assigns shall discover that some other person had, unknown to such patentee, invented or used the same, or some part thereof, before the date of such letters patent, it shall and may be lawful for such patentee, or his assigns, to petition his majesty in council to confirm the said letters patent, or to grant new letters patent, the matter of which petition shall be heard before the judicial committee of the Privy Council; and such committee, upon examining the said matter, and being satisfied that such patentee believed himself to be the first and original inventor, and being satisfied that such invention, or part thereof, had not been publicly and generally used before the date of such first letters patent, may report to his majesty their opinion that the prayer of such petition ought to be complied with, whereupon his majesty may, if he think fit, grant such prayer; and the said letters patent shall be available in law and equity to give to such petitioner the sole right of using, making, and vending such invention as against all persons whatsoever, any law, usage, or custom to the contrary thereof notwithstanding: Provided that any person

(*a*) *Decisions on above Section.*[1]

(4.) Sect. 4. *Application for Prolongation of Patent, and herein of Prolongation of Patent.*[2]

(*a*) *Decisions on* 5 *&* 6 *Wm.* 4, *c.* 83, *s.* 4.[3]

(*b*) *By* 2 *&* 3 *Vic. c.* 67, *s.* 2, *Term may be extended, though Application not prosecuted with effect.*[4]

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opposing such petition shall be entitled to be heard before the said judicial committee: Provided also, that any person, party to any former suit or action touching such first letters patent, shall be entitled to have notice of such petition before presenting the same."

[1] The authority conferred by this section is discretionary in the judicial committee to recommend or not a confirmation. *Honiball's Patent*, 9 Moore, P. C. C. 378. The applicant must establish, first, that before the date of the letters patent the invention was not publicly and generally used; and secondly, that the grantee of such letters believed himself to be the original inventor. (Id.)

Under this section the Privy Council refused to confirm a Scotch patent, the invention having been used in England before the date of the Scotch patent. *Robinson's Patent*, 5 Moore, P. C. 65.

Upon an application for such confirmation, it was proved that the patent article was not publicly and generally known prior to the letters patent, but that some persons had systematically used an article, identical with the patent article, for several years prior to the grant of the letters patent, and that the subject of the patent was little more than an application of a well-known article in trade. Under such circumstances the Privy Council held that it was not a case to which the statute was intended to apply. *Card's Patent*, 6 Moore, P. C. 207. This section applies to confirmations of letters patent of an extended term. *Honiball's Patent, supra.*

Opposition to an application for confirmation is rather encouraged than otherwise; and on a successful opposition the opposer's costs will be allowed. (Id.)

[2] By 5 & 6 Wm. 4, c. 83, s. 4, "if any person who now hath or shall hereafter obtain any letters patent as aforesaid shall advertise in the *London Gazette* three times, and in three London papers, and three times in some country paper published in the town where or near to which he carried on any manufacture of anything made according to his specification, or near to or in which he resides, in case he carried on no such manufacture, or published in the county where he carries on such manufacture, or where he lives, in case there shall not be any paper published in such town, that he intends to apply to his majesty in council for a prolongation of his term of sole using and vending his invention, and shall petition his majesty in council to that effect, it shall be lawful for any person to enter a caveat at the Council Office; and if his majesty shall refer the consideration of such petition to the judicial committee of the Privy Council, and notice shall first be by him given to any person or persons who shall have entered such caveats, the petitioner shall be heard by his counsel and witnesses to prove his case, and the persons entering caveats shall likewise be heard by their counsel and witnesses; whereupon and upon hearing and inquiring of the whole matter, the judicial committee may report to his majesty that a further extension of the term in the said letters patent should be granted, not exceeding seven years; and his majesty is hereby authorised and empowered, if he shall think fit, to grant new letters patent for the said invention for a term not exceeding seven years after the expiration of the first term, any law, custom, or usage to the contrary in anywise notwithstanding." The remaining part of this section is repealed by the 2 & 3 Vic. c. 83, s. 1.

[3] Before presenting the petition, the requisites in the above section as to advertising must be complied with. *Woodcroft's Patent*, 3 Moore, P. C. 171. But where the petitioner is resident abroad, and has no manufactory in England, it is enough if he advertise in the towns or county in which his licensees reside. *Derosne's Patent*, 4 id. 416. The Crown has power under 5 & 6 Wm. 4, c. 83, s. 4, to grant new letters patent, after the expiration of the term for which the original letters patent were granted, if the petition is presented and referred to the Privy Council, and the report made in favour of the grant. Persons using the invention in the interval are not liable to an action; and those who have invested capital in it may be heard before the Privy Council. The power of renewal given by 5 & 6 Wm. 4, c. 83, s. 4, extends to assignees as well as to grantees of patents. *Ledsam and others v. Russell*, 16 L. J. Ex. 145. See *Whitehouse's Patent*, Web. P. C. 473. *Southworth's Patent*, id. 486. *Wright's Patent*, id. 561.

[4] By 2 & 3 Vic. c. 67, s. 2, "it shall be lawful for the judicial committee of the Privy Council, in all cases where it shall appear to them that any application for an extension of the term granted by any letters patent, the petition for which extension shall have been referred to them for their consideration, has not been prosecuted with effect before the expiration of the said term from any other causes than the neglect or default of the petitioner, to entertain such application, and to report thereon as by the said recited act provided, notwithstanding the

(*c*) *By 7 & 8 Vic. c. 69, s. 2, the Crown may extend Term where Expense of Patent is great and Remuneration small.*[1]

(*d*) *By ditto, s. 3, Extension may be for less Time than Prayed.*

(*e*) „ *s. 4, Assignee of Patent may obtain Extension.*[2]

(*f*) *Principles on which Extension of Patents will be granted.*[3]

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term originally granted in such letters patent may have expired before the hearing of such application; and it shall be lawful for her majesty, if she shall think fit, on the report of the said judicial committee recommending an extension of the term of such letters patent, to grant such extension, or to grant new letters patent for the invention or inventions specified in such original letters patent, for a term not exceeding seven years after the expiration of the term mentioned in the said original letters patent: Provided always, that no such extension, or new letters patent, shall be granted if the petition for the same shall not have been presented as by the said recited act directed before the expiration of the term sought to be extended, nor in case of petitions presented after the 30th day of November, 1839, unless such petition shall be presented six calendar months at the least before the expiration of such term, nor in any case unless sufficient reason shall be shown to the satisfaction of the said judicial committee for the omission to prosecute with effect the said application by petition before the expiration of the said term."

[1] By 7 & 8 Vic. c. 69, s. 2, "if any person, having obtained a patent for any invention, shall, before the expiration thereof, present a petition to her majesty in council, setting forth that he has been unable to obtain a due remuneration for his expense and labour in perfecting such invention, and that an exclusive right of using and vending the same for the further period of seven years, in addition to the term in such patent mentioned, will not suffice for his reimbursement and remuneration, then, if the matter of such petition shall be by her majesty referred to the judicial committee of the Privy Council, the said committee shall proceed to consider the same after the manner and in the usual course of its proceedings touching patents; and if the said committee shall be of opinion, and shall so report to her majesty, that a further period greater than seven years' extension of the said patent term ought to be granted to the petitioner, it shall be lawful for her majesty, if she shall so think fit, to grant an extension thereof for any time not exceeding fourteen years, in like manner and subject to the same rules as the extension for a term not exceeding seven years is now granted under the powers of the said act of the sixth year of the reign of his late majesty."

[2] By 7 & 8 Vic. c. 69, s. 4, "it shall be lawful for her majesty, on the report of the judicial committee, to grant such extension as is authorised by the said act and by this act, either to an assignee or assignees, or to the original patentee or patentees, or to an assignee or assignees and original patentee or patentees conjointly."

By 15 & 16 Vic. c. 103, the provisions of 5 & 6 Wm. 4, c. 83; 2 & 3 Vic. c. 67; and 7 & 8 Vic. c. 69, as to prolongation are to apply to patents under 15 & 16 Vic. c. 103.

[3] The petitioner should show, first, some invention; secondly, that it is of a nature to benefit the public; and thirdly, that the inventor has not received an adequate reward. *Derosne's Patent*, 4 Moore, P. C. 415. *Bodmer's Patent*, id. 468. *Sinister's Patent*, id. 164; Web. P. C. 723. The circumstance of a patent article, when once well known, not becoming of extensive application, goes far to negative its general utility. (Id.) *Perkin's Patent*, 12 Jur. 233. The questions to be considered on application for an extension are, the ingenuity of the inventor, the want of capital and means, the utility of the invention, and the sufficiency of the remuneration. *Downton's Patent*, Web. P. C. 567. *Southworth's Patent*, id. 487. The invention being very meritorious, the result of a great deal of labour, care, and science, and extremely useful, and the party having sustained considerable loss, a patent will be extended. *Swaine's Patent*, id. 560. *Bate's Patent*, id. 739. And the insufficiency of the usual term to afford remuneration, regard being had to the nature of the invention, is ground for an extension. *Jones's Patent*, id. 579. On an application for extension, the merit and utility of the invention, and the expenses and the profits, must be proved. *Heurtecoupe's Patent*, id. 560, 567; Markwick, 8 W. R. 333. The novelty of an invention may be small; but this does not afford a reason against a prolongation, as it does where the utility is small, provided the public have derived great benefit from the discovery. *Decosne's Patent*, 4 Moore, P. C. Prcf. 416. After an assignee of a patentee had incurred considerable loss in carrying out a patent for a smoke-prevention apparatus, a statute passed to compel the owners of furnaces in the metropolis to construct them so as to consume their own smoke:—*Held*, that on an application for a prolongation of the letters patent, that though the act might, in effect, compel the use of the petitioner's patent, yet that such circumstance formed no objection to a renewal of the term of the letters patent; the merits of the invention and loss incurred in carrying it out being established. *Foarde's Patent*, 9 Moo. P.C.C.376.

Where an invention is not prosecuted until a short time before the patent expires, a strong reason is afforded for refusing an extension. *Patterson's Patent*, 6 Moore, P. C. Rep. 469. An extension was refused on

(*g*) *When Costs will be given.*[1]

(D) 12 & 13 *Vic. c.* 109, *Provisions of.*

(1.) Sect. 12. *Certificate of Enrolment to be Evidence.*

(3.) Sect. 19. *Sealed Copies of Enrolments to be Evidence.*[2]

(4.) Sect. 29. Scire Facias *may be directed to the Sheriff of any County.*[3]

(E) 15 & 16 *Vic. c.* 83, *Provisions of.*

(1.) *By s.* 1, *certain Persons appointed Commissioners of Patents.*[4]

(6.) *By s.* 6, *Petition and Declaration to be accompanied with a Provisional Specification.*[5]

(7.) *By s.* 7, *Application to be referred to Law Officer.*[6]

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the ground of insufficient merit. *Woodcroft's Patent, supra. Markwick's Patent*, 13 Moore, P. C. C. 310. *Newton's Patent*, 14 id. 156.

In granting extensions, the Privy Council will sometimes impose conditions on the party applying. Thus, where the application was in respect of an improved propeller for steam and other vessels, a condition was imposed that the Lords of the Admiralty should have the right of manufacturing the invention for the service of her majesty without licenses from the patentee. *Pettit Smith's Patent*, 7 Moore, P. C. 133. So they will take care of the patentee's interests, even after assignment, where the inventors and patentees have made nothing by their invention, and impose terms by which they may be benefited. *Hardy's Patent*, 6 id. 441. *Russell's Patent*, 2 id. 496.

[1] Opposition to an application for extension is encouraged, and if the opposer make out his case his costs will be allowed. *Honiball's Patent*, 9 id. 378. A discretion will be exercised as to the allowance of an opposer's costs upon an abandoned petition for extension of letters patent. *Milner's Patent*, id. 39. *Macintosh's Patent*, Web. P. C. 739.

Where there are two opponents to an application for a prolongation of a patent, upon substantially the same grounds of objection, the judicial committee, upon a successful opposition, allowed a gross sum for the costs of both parties. *Jones's Patent*, 9 Moore, P. C. C. 41. Costs will be given where there is no ground for opposition. *Downton's Patent*, Web. P. C. 567. Affidavits to oppose the grant must be filed before the hearing. 1 L. T. (N. S.) 19. Leave may be obtained to oppose, though time for entering opposition has expired. 7 Jur. N. S. 690.

[2] By 12 & 13 Vic. c. 109, s. 18, "every document sealed as above mentioned, purporting to be a copy of any enrolment, or of any document or writing, including drawings, maps, plans, &c. thereunto annexed or indorsed thereon, shall be admissible in evidence, as well to prove the contents of such documents, &c., as the enrolment and the date thereof."

[3] By 12 & 13 Vic. c. 109, s. 29, "any writ of *scire facias* for repealing, cancelling, or vacating any letters patent or charter, which shall or may at any time hereafter be issued in any action at the suit of her majesty, hereafter to be commenced, shall or may be directed and sent to the sheriff of any county in England or Wales, although the record upon which such writ shall be founded or issued may be or remain in the county. But *see* 15 & 16 Vic. c. 83, s. 35. Also *Scire facias* to repeal Patent, *post*, p. 95.

[4] By 15 & 16 Vic. c. 83, s. 1, "the Lord Chancellor, the Master of the Rolls, her Majesty's Attorney-General for England, the Lord Advocate, her Majesty's Solicitor-General for Scotland, her Majesty's Attorney-General for Ireland, and her Majesty's Solicitor-General for Ireland, for the time being respectively, together with such other person or persons as may be from time to time appointed by her majesty, as hereinafter mentioned, shall be Commissioners of Patents for Inventions; and it shall be lawful for her majesty from time to time, by warrant under her royal sign-manual, to appoint such other person or persons as she may think fit to be a commissioner or commissioners as aforesaid, and such persons are to continue such during her majesty's pleasure, and the powers vested in them may be exercised by any three or more."

[5] By sect. 6, "every petition for the grant of letters patent for an invention, and the declaration required to accompany such petition, shall be left at the office of the commissioners, and there shall be left therewith a statement in writing, hereinafter called the 'provisional specification,' signed by or on behalf of the applicant for letters patent, describing the nature of the said invention; and the day of the delivery of every such petition, declaration, and provisional specification, shall be recorded at the said office, and indorsed on such petition, declaration, and provisional specification, and a certificate thereof given to such applicant or his agent; and all such petitions, declarations, and provisional specifications shall be preserved in such manner as the commissioners may direct, and a registry thereof, and of all proceedings thereon, kept at the office of the commissioners." *See* Forms of Petition and Declaration, and Provisional Specification, *post*, p. 102.

[6] By sect. 7, "every application for letters

(8.) *By s.* 8, *Provisional Specification to be referred to Law Officer, who may give a Certificate of Allowance, and the Invention may then be used and published for Six Months, which is called "Provisional Protection."*[1]

(*a*) *Decisions as to Provisional Specification.*[2]

(*b*) *By* 16 *&* 17 *Vic. c.* 115, *s.* 2, *Provisional Specifications may be Inspected.*[3]

(9.) *By s.* 9, *if "Complete," instead of "Provisional" Specification, be deposited, Applicant has for Six Months Powers of Letters Patent.*[4]

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patent made under this act shall be referred by the commissioners, according to such regulations as they may think fit to make, to one of the law officers." *See* Form of Reference, *post*, p. 102.

[1] By sect. 8, "the provisional specification shall be referred to the law officer, who shall be at liberty to call to his aid such scientific or other person as he may think fit, and to cause to be paid to such person by the applicant such remuneration as the law officer shall appoint; and if such law officer be satisfied that the provisional specification describes the nature of the invention, he shall allow the same, and give a certificate of his allowance, and such certificate shall be filed in the office of the commissioners, and thereupon the invention therein referred to may, during the term of six months from the date of the application for letters patent for the said invention, be used and published without prejudice to any letters patent to be granted for the same, and such protection from the consequences of use and publication is hereinafter referred to as provisional protection: Provided always, that in case the title of the invention or the provisional specification be too large or insufficient, it shall be lawful for the law officer to whom the same is referred to allow or require the same to be amended."

[2] The provisional specification is only required to describe generally the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out. *Newall v. Elliott*, 4 Jur. N. S. 562; 27 L. J. C. P. 337. A provisional specification relating to a part of a patent was delivered in on the 17th of March. Another provisional specification was delivered in on the 10th of April, as of which day the patent, which was granted on the 10th of October, and which was founded on the specification of the 10th of April, was dated, and the original specification was abandoned:—*Held*, that the provisional specification abandoned did not become public by abandonment; that though the first provisional specification might afford an objection to the receiving of the second, or granting a patent for the invention after the first specification has expired, there is no principle of law and no enactment making a patent void if it is so granted. *Oxley v. Holden*, 8 W. R. 626; 2 L. T. (N. S.) 464; 30 L. J. C. P. 68.

[3] By 16 & 17 Vic. c. 115, s. 2, "true copies of all provisional specifications left at the office of the commissioners are to be open to the inspection of the public." An application under sect. 2 of the 16 & 17 Vic. c. 115, for the inspection of the provisional specification of letters patent, on the ground that the subject-matter was the same as that for which the applicant had obtained letters patent, was refused. *Tolson's Patent*, 6 De Gex, M. & G. 422.

[4] By sect. 9, "the applicant for letters patent for an invention, instead of leaving with the petition and declaration a provisional specification as aforesaid, may, if he think fit, file with the said petition and declaration an instrument in writing under his hand and seal (hereinafter called 'a complete specification') particularly describing and ascertaining the nature of the said invention, and in what manner the same is to be performed, which complete specification shall be mentioned in such declaration, and the day of the delivery of every such petition, declaration, and complete specification shall be recorded at the office of the commissioners, and indorsed on such petition, declaration, and specification, and a certificate thereof given to such applicant or his agent; and thereupon, subject and without prejudice to the provisions hereinafter contained, the invention shall be protected under this act for the term of six months from the date of the application, and the applicant shall have during such term of six months the like powers, rights and privileges, as might have been conferred on him by letters patent for such invention, issued under this act, and duly sealed as of the day of the date of such application; and during the continuance of such powers, rights, and privileges under this provision, such invention may be used and published without prejudice to any letters patent to be granted for the same; and where letters patent are granted in respect of such invention, then, in lieu of a condition for making void such letters patent in case such invention be not described and ascertained by a subsequent specification, such letters patent shall be conditioned to become void if such complete specification, filed as aforesaid, does not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed; and a copy of every such complete specification shall be open to the

(10.) *By s.* 10, *Patent to first Inventor not affected by Protection obtained in Fraud.*[1]

(11.) *By s.* 11, *Commissioners to cause Protections to be Advertised, and Persons interested in opposing may leave Particulars of Objection.*[2]

(12.) *By s.* 12, *Applications for Patent to be Advertised.*[3]

(13.) *By s.* 13, *Specification and Objection referred to Law Officer.*[4]

(14.) *By s.* 14, *Power of Law Officer to order Costs of Inquiry.*[5]

(15.) *By s.* 15, *Law Officer may cause Warrant to be made for Sealing Letters Patent.* Scire Facias *to lie for repeal.*[6]

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inspection of the public, as hereinafter provided, from the time of depositing the same, subject to such regulation as the commissioners may make." As to requisites of complete specification, see *infra*, n. [4].

[1] By sect. 10, "in case of any application for letters patent for any invention, and the obtaining upon such application of provisional protection for such invention, or of protection for the same, by reason of the deposit of a complete specification as aforesaid in fraud of the true and first inventor, any letters patent granted to the true and first inventor of such invention shall not be invalidated by reason of such application, or of such provisional or other protection as aforesaid, or of any use or publication of the invention subsequent to such application, and before the expiration of the term of such provisional or other protection."

[2] By sect. 11, "where any invention is provisionally protected under this act, or protected by reason of the deposit of such complete specification as aforesaid, the commissioners shall cause such provisional protection as aforesaid to be advertised in such manner as they may see fit."

[3] By sect. 12, "the applicant for letters patent, as soon as he may think fit after the invention shall have been provisionally protected under this act, or where a complete specification has been deposited with his petition and declaration, then, so soon as he may think fit after such deposit, may give notice at the office of the commissioners of his intention of proceeding with his application for letters patent for the said invention, and thereupon the said commissioners shall cause his said application to be advertised in such manner as they may see fit; and any persons having an interest in opposing the grant of letters patent for the said invention shall be at liberty to leave particulars in writing of their objections to the said application at such place, and within such time, and subject to such regulations, as the commissioners may direct."

[4] By sect. 13, "so soon as the time for the delivery of such objection shall have expired, the provisional specification or complete specification (as the case may be), and particulars of objection (if any), shall be referred to the law officer to whom the application has been referred."

[5] By sect. 14, "it shall be lawful for the law officer to whom any application for such letters patent is referred, if he see fit, by certificate under his hand, to order by or to whom the costs of any hearing or inquiry upon any objection, or otherwise in relation to the grant of such letters patent, or in relation to the provisional (or other) protection acquired by the applicant under this act, shall be paid, and in what manner and by whom such costs are to be ascertained; and if any costs so ordered to be paid be not paid within four days after the amount thereof shall be so ascertained, it shall be lawful for such law officer to make an order for the payment of the same, and every such order may be made a rule of one of her majesty's superior courts at Westminster or Dublin, and may be recorded in the books of council and session in Scotland, to the effect that execution may pass thereupon in common form."

[6] By sect. 15, "it shall be lawful for such law officer, after such hearing (if any) as he may think fit, to cause a warrant to be made for the sealing of letters patent for the said invention, and such warrant shall be sealed with the seal of the commissioners, and shall set forth the tenor and effect of the letters patent thereby authorised to be granted, and such law officer shall direct the insertion in such letters patent of all such restrictions, conditions, and provisoes as he may deem usual and expedient in such grants, or necessary in pursuance of the provisions of this act; and the said warrant shall be the warrant for the making and sealing of letters patent under this act, according to the tenor of the said warrant: Provided always, that the Lord Chancellor shall and may have and exercise such powers, authority, and discretion in respect to the said warrant, and the letters patent therein directed to be made under this act, as he now has and might now exercise with respect to the warrant for the issue under the Great Seal of letters patent for any invention, and with respect to the making and issuing of such letters patent; and the writ of *scire facias* shall lie for the repeal of any letters patent issued under this act, in the like cases as the same would lie for the repeal of letters patent which may now be issued under the Great Seal."

(16.) *By s.* 16, *not to affect Prerogative of Crown to grant or withhold Patent.*[1]

(18.) *By s.* 18, *Patent under Great Seal valid for United Kingdom.*[2]

(19.) *By s.* 19, *Patent not to be issued after Three Months from Date of Warrant.*[3]

(20.) *By s.* 20, *no Letters Patent (except in lieu of those lost, &c.) to be issued after Expiration of Protection given by this Act.*[4]

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[1] By sect. 16, "provided also, that nothing herein contained shall extend to abridge or affect the prerogative of the Crown in relation to the granting or withholding the grant of any letters patent; and it shall be lawful for her majesty, by warrant under her royal sign manual, to direct such law officer to withhold such warrant as aforesaid, or that any letters patent for the issuing whereof he may have issued a warrant as aforesaid shall not issue, or to direct the insertion in any letters patent to be issued in manner herein provided of any restrictions, conditions, or provisoes, which her majesty may think fit, in addition to or in substitution for any restrictions, conditions, or provisoes which would otherwise be inserted therein under this act; and it shall also be lawful for her majesty, by like warrant, to direct any complete specification which may have been filed under the provision hereinbefore contained, and in respect of the invention described in which no letters patent may have been granted, to be cancelled, and thereupon the protection obtained by the filing of such complete specification shall cease."

[2] By sect. 18, "the commissioners, so soon after the sealing of the said warrant as required by the applicant for the letters patent, shall cause to be prepared letters patent for the invention, according to the tenor of the said warrant, and it shall be lawful for the Lord Chancellor to cause such letters patent to be sealed with the Great Seal of the United Kingdom, and such letters patent so sealed shall extend to the whole of the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man; and in case such warrant so direct, such letters patent shall be made applicable to her majesty's colonies and plantations abroad, or such of them as may be mentioned in such warrant; and such letters patent shall be valid and effectual as to the whole of such United Kingdom, and the said islands and isle, and the said colonies or plantations, or such of them as aforesaid, and shall confer the like powers, rights, and privileges as might, in case this act had not been passed, have been conferred by several letters patent of the like purport and effect passed under the Great Seal of the United Kingdom, under the seal appointed to be used instead of the Great Seal of Scotland, and under the Great Seal of Ireland, respectively, and made applicable to England, the dominion of Wales, the town of Berwick-upon-Tweed, the Channel Islands, and the Isle of Man, and the said colonies and plantations, or such of them as aforesaid, to Scotland, and to Ireland respectively, save as herein otherwise provided: Provided always, that nothing in this act contained shall be deemed or taken to give any effect or operation to any letters patent to be granted under the authority of this act in any colony in which such or the like letters patent would be invalid by the law in force in the same colony for the time being: Provided always, that a transcript of such letters shall, so soon after the sealing of the same, and in such manner as the commissioners shall direct, be transmitted to the Director of Chancery in Scotland, and be recorded on the records of Chancery in Scotland, upon payment of such fees as the commissioners shall appoint, in the same manner and to the same effect in all respects as letters patent passing under the seal appointed by the Treaty of Union to be used in place of the Great Seal of Scotland, have heretofore been recorded, and extracts from the said records shall be furnished to all parties requiring the same, on payment of such fees as the commissioners should direct, and shall be received in evidence in all courts in Scotland to the like effect as the letters patent themselves."

[3] By sect. 19, "provided always, that no letters patent, save as hereinafter mentioned in the case of letters patent destroyed or lost, shall issue on any warrant granted as aforesaid, unless application be made to seal such letters patent within three months after the date of the said warrant."

[4] By sect. 20, "provided also that no letters patent (save letters patent issued in lieu of others destroyed or lost) shall be issued, or be of any force or effect, unless the same be granted during the continuance of the provisional protection under this act, or where a complete specification has been deposited under this act, then, unless such letters patent be granted during the continuance of the protection conferred under this act by reason of such deposit, save that where the application to seal such letters patent has been made during the continuance of such provisional or other protection as aforesaid, and the sealing of such letters patent has been delayed by reason of a caveat, or an application to the Lord Chancellor against or in relation to the sealing of such letters patent, then such letters patent may be sealed at such time as the Lord Chancellor shall direct."

(21.) *By s.* 21, *Letters Patent may be granted to Personal Representatives of the Applicant.*[1]

(22.) *By s.* 22, *if Letters Patent be destroyed or lost, others may be issued.*[2]

(23.) *By s.* 23, *Letters Patent may be dated as of the Day of the Application,*[3]

(24.) *By s.* 24, *Letters Patent, when Antedated, to be of the same validity as if Sealed on the Day of the Date.*[4]

(25.) *By s.* 25, *Letters Patent obtained in the United Kingdom for Patented Foreign Inventions not to continue in force after the Expiration of the Foreign Patent.*[5]

(26.) *By s.* 26, *Letters Patent not to prevent the use of Inventions in Foreign Ships resorting to British Ports, except Ships of Foreign States in whose ports British Ships are prevented from using Foreign Inventions.*[6]

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[1] By sect. 21, "where the applicant for such letters patent dies during the continuance of the provisional protection, or the protection by reason of the deposit of a complete specification (as the case may be), such letters patent may be granted to the executors or administrators of such applicant during the continuance of such provisional or other protection, or at any time within three months after the death of such applicant, notwithstanding the expiration of the term of such provisional or other protection; and the letters patent so granted shall be of the like force and effect as if they had been granted to such applicant during the continuance of such provisional or other protection."

[2] By sect. 22, "in case any such letters patent shall be destroyed or lost, other letters patent of the like tenor and effect, and sealed and dated as of the same day, subject to such regulations as the commissioners may direct, be issued under the authority of the warrant, in pursuance of which the original letters patent were issued."

[3] By sect. 23, "it shall be lawful (the act of the 18 Hen. 6, c. 1, or any other act to the contrary notwithstanding) to cause any letters patent to be issued in pursuance of this act, to be sealed and bear date as to the day of the application for the same, and in case of such letters patent for any invention provisionally registered under the 'Protection of Inventions Act, 1851,' as of the day of such provisional registration, or where the law officer to whom the application was referred, or the Lord Chancellor, thinks fit and directs, any such letters patent as aforesaid may be sealed and bear date as of the day of the sealing of such letters patent, or of any other day between the day of such application or provisional registration and the day of such sealing."

[4] By sect. 24, "any letters patent issued under this act, sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date: Provided always, that save where such letters patent are granted for any invention in respect whereof a complete specification has been deposited upon the application for the same under this act, no proceeding at law or in equity shall be had upon such letters patent in respect of any infringement committed before the same were actually granted."

[5] By sect. 25, "where, upon any application made after the passing of this act, letters patent are granted in the United Kingdom for or in respect of any invention first invented in any foreign country, or by the subject of any foreign power or state, and a patent or like privilege for the monopoly or exclusive use or exercise of such invention in any foreign country is there obtained before the grant of such letters patent in the United Kingdom, all rights and privileges under such letters patent shall (notwithstanding any term in such letters patent limited) cease and be void immediately upon the expiration or other determination of the term during which the patent or like privilege obtained in such foreign country shall continue in force, or where more than one such patent or like privilege is obtained abroad, immediately upon the expiration or determination of the term which shall first expire or be determined of such several patents or like privileges: Provided always, that no letters patent for or in respect of any invention for which any such patent or like privilege, as aforesaid, shall have been obtained in any foreign country, and which shall be granted in the said United Kingdom after the expiration of the term for which such patent or privilege was granted or was in force, shall be of any validity."

[6] By sect. 26, "no letters patent for any invention (granted after the passing of this act) shall extend to prevent the use of such invention in any foreign ship or vessel, or for the navigation of any foreign ship or vessel, which may be in any port of her majesty's dominions, or in any of the waters within the jurisdiction of any of her majesty's courts, where such invention is not so used for the manufacture of any goods or commodities to be vended within or exported

(27.) *By s.* 27, *Specifications to be filed, instead of being enrolled.*[1]

(28.) *By s.* 28, *Specifications, &c. to be filed in such office as Lord Chancellor shall direct, and extra copies of Drawings.*[2]

(29.) *By s.* 29, *Copies of Specifications to be Open to Inspection at Office of Commissioners, and at Edinburgh and Dublin.*[3]

(30.) *By s.* 30, *Specifications and other Documents to be Printed and Published, and Copies of Publications may be presented to Public Libraries, &c.*[4]

(31.) *By s.* 31, *Enrolments, &c. may be removed to the Office for Specifications.*[5]

(32.) *By s.* 32, *Indexes to be made to Old Specifications, &c.: such Specifications, &c. may be Printed and Published.*[6]

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from her majesty's dominions: Provided always, that this enactment shall not extend to the ships or vessels of any foreign state of which the laws authorise subjects of such foreign state, having patents or like privileges for the exclusive use or exercise of invention within its territories, to prevent or interfere with the use of such inventions in British ships or vessels, or in or about the navigation of British ships or vessels, while in the ports of such foreign state, or in the waters within the jurisdiction of its courts, where such inventions are not so used for the manufacture of goods or commodities to be vended within or exported from the territories of such foreign state."

[1] By sect. 27, "all letters patent to be granted under this act (save only letters patent granted after the filing of a complete specification) shall require the specification thereunder to be filed in the High Court of Chancery, instead of requiring the same to be enrolled, and no enrolment shall be requisite." *See* 12 & 13 Vic. c. 109, s. 15.

[2] By sect. 28, "every specification to be filed in pursuance of the condition of any letters patent shall be filed in such office of the Court of Chancery as the Lord Chancellor shall from time to time appoint, and every provisional specification, and complete specification, left or filed at the office of the commissioners on the application for any letters patent, shall forthwith, after the grant of the letters patent, or if no letters patent be granted, then immediately on the expiration of six months from the time of such application, be transferred to and kept in the said office appointed for filing specifications in Chancery." The residue of this section is repealed by 16 & 17 Vic. c. 115, s. 1.

[3] By sect. 29, "the commissioners shall cause true copies of all specifications (other than provisional specifications), disclaimers, and memoranda of alterations filed under or in pursuance of this act, and of all provisional specifications after the term of the provisional protection of the invention has expired, to be open to the inspection of the public at the office of the commissioners, and at an office in Edinburgh and Dublin respectively, at all reasonable times, subject to such regulations as the commissioners may direct; and the commissioners shall cause a transcript of the said letters patent to be transmitted for enrolment in the Court of Chancery, Dublin, and shall cause the same to be enrolled therein, and the transcript or exemplification thenceforward shall have the like effect, to all intents and purposes, as if the original letters patent had been enrolled in the Court of Chancery, Dublin; and all parties shall have all their remedies by *scire facias*, or otherwise, as if the letters patent had been granted to extend to Ireland only." And *see* 16 & 17 Vic. c. 115, s. 2, *ante*, p. 93.

[4] By sect. 30, "the commissioners shall cause to be printed, published, and sold, at such prices and in such manner as they may think fit, all specifications, disclaimers, and memoranda of alterations deposited or filed under this act, and such specifications (not being provisional specifications), disclaimers, and memoranda respectively, shall be so printed and published as soon as conveniently may be after the filing thereof respectively, and all such provisional specifications shall be so printed and published as soon as conveniently may be after the expiration of the provisional protection obtained in respect thereof; and it shall be lawful for the commissioners to present copies of all such publications to such public libraries and museums as they may think fit, and to allow the person depositing or filing any such specification, disclaimer, or memorandum of alteration, to have such number, not exceeding twenty-five, of the copies thereof so printed and published, without any payment for the same, as they may think fit.

[5] By sect. 31, "it shall be lawful for the Lord Chancellor and the Master of the Rolls to direct the enrolment of specifications, disclaimers, and memoranda of alterations, heretofore or hereafter enrolled or deposited at the Rolls Chapel Office, or at the Petty-Bag Office, or at the Enrolment Office of the Court of Chancery, or in the custody of the Master of the Rolls as keeper of the public records, to be transferred to and kept in the office appointed for filing specifications in Chancery under this act."

[6] By sect. 32, "the commissioners shall cause indexes to all specifications, dis-

(34.) *By s.* 34, *Register of Patents, Specifications, Disclaimers, Memoranda of Alterations, &c. to be kept open for Public Inspection.*[1]

(35.) *By s.* 35, *a Register of Proprietors to be kept at the Office for filing Specifications; certified Copies of Entries to be Evidence.*[2]

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claimers, and memoranda of alterations, heretofore or to be hereafter enrolled or deposited as last aforesaid, to be prepared in such form as they may think fit, and such indexes shall be open to the inspection of the public at such place or places as the commissioners shall appoint, and subject to the regulations to be made by the commissioners; and the commissioners may cause all or any of such indexes, specifications, disclaimers, and memoranda of alterations, to be printed, published, and sold, in such manner and at such prices as the commissioners may think fit."

[1] By sect. 34, "there shall be kept at the office appointed for filing specifications in Chancery under this act, a book or books, to be called 'The Register of Patents,' wherein shall be entered and recorded, in chronological order, all letters patent granted under this act, the deposit or filing of specifications, disclaimers, and memoranda of alterations filed in respect of such letters patent, all amendments in such letters patent and specifications, all confirmations and extensions of such letters patent, the expiring, vacating, or cancelling such letters patent, with the dates thereof respectively, and all other matters and things affecting the validity of such letters patent as the commissioners may direct; and such register, or a copy thereof, shall be open at all convenient times to the inspection of the public, subject to such regulations as the commissioners may make."

[2] By sect. 35, "there shall be kept at the office appointed for filing specifications in Chancery under this act, a book or books, entitled 'The Register of Proprietors,' wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters patent, or of any share or interest therein, any license under letters patent and the district to which such license relates, with the name or names of any person having any share or interest in such letters patent or license, the date of his or their acquiring such letters patent, share, and interest, and any other matter or thing relating to or affecting the proprietorship in such letters patent or license, and a copy of any entry in such book, certified under such seal as may have been appointed, or as may be directed by the Lord Chancellor to be used in the said office, shall be given to any person requiring the same, on payment of the fees hereinafter provided; and such copies so certified shall be received in evidence in all courts and in all proceedings, and shall be *primâ facie* proof of the assignment of such letters patent, or share or interest therein, or of the license or proprietorship, as therein expressed: Provided always, that until such entry shall have been made, the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent, and of all the licenses and privileges thereby given and granted; that certified duplicates of all entries made in the said register of proprietors shall forthwith be transmitted to the office of the commissioners in Edinburgh and Dublin, where the same shall also be open to the inspection of the public; and any writ of *scire facias* to repeal such letters patent may be issued to the sheriff of the county or counties in which the grantee or grantees resided at the time when the said letters patent were granted; and in case such grantee or grantees do not reside in the United Kingdom, it shall be sufficient to file such writ at the Petty-Bag Office, and serve notice thereof in writing at the last known residence or place of business of such grantee or grantees; and such register, or a copy, shall be open to the inspection of the public at the office of the commissioners, subject to such regulations as the commissioners may make: Provided always, that in any proceeding in Scotland to repeal any letters patent, service of all writs and summonses shall be made according to the existing forms and practice: Provided also, that the grantee or grantees of letters patent to be hereafter granted may assign the letters patent for England, Scotland, or Ireland respectively, as effectually as if the letters patent had been originally granted to extend to England, Scotland, or Ireland only, and the assignee or assignees shall have the same rights of action and remedies, and shall be subject to the like actions and suits, as he or they should and would have had and been subject to upon the assignment of letters patent granted to England, Ireland, or Scotland, before the passing of this act."

The provisions contained in the 5 & 6 Wm. 4, c. 83, and the 15 & 16 Vic. c. 83, as to the notice of objections in actions for infringement of a patent, are confined to objections affecting the validity of the letters patent, and the defendant may object to the validity of an assignment of the patent, though no notice of such objection has been given.

To a declaration for the infringement of a patent, which alleged that by indenture the letters patent were duly assigned to the plaintiff, the defendant pleaded that the letters patent were not assigned as alleged: — *Held*, that the plaintiff's title under the assignment was put in issue, and, the assignment not being registered in pursuance of 15 & 16 Vic. c. 83, s. 35, that the verdict

(36.) *By s.* 36, *Power for more than Twelve Persons to have a Legal Interest in Letters Patent.*[1]

(37.) *By s.* 37, *Falsification or Forgery of Entries in Register of Proprietors a Misdemeanor.*[2]

(38.) *By s.* 38, *Entries may be expunged if any party aggrieved, on Application to Court.*[3]

(39.) *By s.* 39, *Provisions of* 5 *&* 6 *Wm.* 4, *c.* 83, *and* 7 *&* 8 *Vic. c.* 69, *as to Disclaimers and Memoranda of Alterations, to apply to Patents under this Act. Applications for Disclaimers and Caveats to be at Office of Commissioners.*[4]

(40.) *By s.* 40, *Provisions of* 5 *&* 6 *Wm.* 4, *c.* 83, 2 *&* 3 *Vic. c.* 67, *and* 7 *&* 8 *Vic. c.* 69, *as to Confirmation and Prolongation, to apply to Patents under this Act.*[5]

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was properly entered for the defendant upon the plea. *Chollett v. Hoffman*, 26 L. J. Q. B. 249.

[1] By sect. 36, "notwithstanding any proviso that may exist in former letters patent, it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in such letters patent."

[2] By sect. 37, "if any person shall wilfully make, or cause to be made, any false entry in the said register of proprietors, or shall wilfully make or forge, or cause to be made or forged, any writing falsely purporting to be a copy of any entry in the said book, or shall produce or tender, or cause to be produced or tendered, in evidence, any such writing, knowing the same to be false or forged, he shall be guilty of a misdemeanor, and shall be punished by fine and imprisonment accordingly."

[3] By sect. 38, "if any person shall deem himself aggrieved by any entry made under colour of this act in the said register of proprietors, it shall be lawful for such person to apply, by motion, to the Master of the Rolls, or to any of the courts of common law at Westminster in term time, or by summons to a judge of any of the said courts in vacation, for an order that such entry may be expunged, vacated, or varied; and upon any such application the Master of the Rolls, or such court or judge respectively, may make such order for expunging, vacating, or varying such entry, and as to the costs of such application, as to the said Master of the Rolls, or to such court or judge, may seem fit; and the officer having the care and custody of such register, on the production to him of any such order for expunging, vacating, or varying any such entry, shall expunge, vacate, or vary the same, according to the requisitions of such order." This may be done on motion. *In re Morey*, 25 Beav. 581. As to priority in registration, see *Green's Patent*, 24 id. 145. *Chollet v. Hoffman, supra.*

[4] By sect. 39, "all the provisions of the acts of the session holden in the 5 & 6 Wm. 4, c. 83, and of the session holden in the 7 & 8 Vic. c. 69, respectively, relating to disclaimers and memoranda of alterations in letters patent and specifications, except as hereinafter provided, shall be applicable and apply to any letters patent granted, and to any specification filed, under the provisions of this act: Provided always, that all applications for leave to enter a disclaimer or memorandum of alteration shall be made, and all caveats relating thereto shall be lodged, at the office of the commissioners, and shall be referred to the respective law officers in the said first-recited act mentioned: Provided also, that every such disclaimer or memorandum of alteration shall be filed in the office appointed for filing specifications in Chancery under this act, with the specification to which the same relates, in lieu of being entered, or filed, and enrolled, as required by the said first recited act, or by the act of the session holden in the 12 & 13 Vic. c. 109, and the said acts shall be construed accordingly: Provided also, that such filing of any disclaimer or memorandum of alteration, in pursuance of the leave of the law officer in the first-recited act mentioned, certified as therein mentioned, shall, except in cases of fraud, be conclusive as to the right of the party to enter such disclaimer or memorandum of alteration under the said acts and this act; and no objection shall be allowed to be made in any proceeding upon or touching such letters patent, specification, disclaimer, or memorandum of alteration, on the ground that the party entering such disclaimer or memorandum of alteration had not sufficient authority in that behalf: Provided also, that no action shall be brought upon any letters patent in which, or on the specification of which, any disclaimer or memorandum of alteration shall have been filed in respect of any infringement committed prior to the filing of such disclaimer or memorandum of alteration, unless the law officer shall certify in his fiat that any such action may be brought, notwithstanding the entry or filing of such disclaimer or memorandum of alteration."

[5] By sect. 40, "all the provisions of the said act of the 5 & 6 Wm. 4, c. 83, for the confirmation of any letters patent, and the grant of new letters patent, and all the provisions of the said act, and of the acts

(41.) *By s.* 41, *in Action for Infringement of Letters Patent, or* Scire Facias *to Repeal Particulars of Vouchers to be delivered, and no Evidence allowed not mentioned therein.*[1]

(*a*) *Decisions as to Particulars of Breaches.*[2]

(42.) *By s.* 42, *Courts of Common Law may grant Injunction, Inspection, or Account, in case of Infringement.*[3]

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of the session holden in the 2 & 3 Vic. c. 67, and of the session holden in the 7 & 8 Vic. c. 69, respectively, relating to the prolongation of the term of letters patent, and to the grant of new letters patent for a further term, shall extend and apply to any letters patent granted under the provisions of this act, and it shall be lawful for her majesty to grant any new letters patent, as in the said acts mentioned; and in the granting of any such new letters patent, her majesty's order in council shall be a sufficient warrant and authority for sealing of any new letters patent, and for the insertion in such new letters patent of any restrictions, conditions, and provisions in the said order mentioned; and the Lord Chancellor, on the receipt of the said order in council, shall cause letters patent, according to the tenor and effect of such order, to be made and sealed in the manner herein directed for letters patent issued under the warrant of the law officer: Provided always, that such new letters patent shall extend to and be available in and for such places as the original letters patent extended to and were available in: Provided also, that such new letters patent shall be sealed and bear date as of the day after the expiration of the term of the original letters patent which may first expire."

[1] By sect. 41, in any action in any of her majesty's superior courts of record at Westminster or in Dublin for the infringement of letters patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the said action, and the defendant, in pleading thereto, shall deliver with his pleas, and the prosecutor in any proceedings by *scire facias* to repeal letters patent, shall deliver with his declaration, particulars of any objection on which he means to rely at the trial in support of the pleas in the said action, or of the suggestions of the said declaration in the proceedings by *scire facias* respectively; and at the trial of such action or proceeding by *scire facias* no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered as aforesaid: Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars: Provided also, that it shall and may be lawful for any judge at chambers to allow such plaintiff, or defendant, or prosecutor, respectively, to amend the particulars delivered as aforesaid, upon such terms as to such judge shall seem fit: Provided also, that at the trial of any proceeding by *scire facias* to repeal letters patent, the defendant shall be entitled to begin and to give evidence in support of such letters patent, and in case evidence shall be adduced on the part of the prosecutor impeaching the validity of such letters patent, the defendant shall be entitled to a reply."

[2] The particulars of objections delivered by the defendant cannot go beyond the pleas. *Macnamara v. Halse*, 1 Car. & M. 471. Particulars, after stating that the invention had been used by the plaintiff and certain other persons who were named, "and by candlemakers generally in London and the vicinity thereof:"—*Held*, sufficient. *Palmer v. Wagstaffe*, 22 L. J. Ex. 295. *See* also *Palmer v. Cooper*, 9 Ex. 231; 23 L. J. Ex. 82.

An objection that the specification does not sufficiently describe the nature of the invention, and the manner in which it is to be performed, suffices. *Heath v. Unwin*, 10 Mee. & W. 684. *Leaf v. Topham*, 2 D. & L. 863. But an objection that the patentee had not caused any specification sufficiently describing the nature of the invention to be enrolled, will not be sufficient. *Leaf v. Topham, supra.* And if the defendant objects that the patent is not new, he should specify whether he objects to the patent generally on that ground, or to part only, and if so, to what part. *Russell v. Ledsam*, 11 Mee. & W. 647. *Heath v. Unwin, supra. Fisher v. Dewick*, 4 B. & C. 127.

If the particulars are too general, the party who means to object to them must procure an order for better particulars. *Hull v. Bollard*, 1 H. & N. 134; 25 L. J. Ex. 304.

As the only question at the trial is whether the particulars are sufficiently large to include the objections relied on (id. *Neilson v. Harford*, 8 Mee. & W. 806), the objection should be more specific than the pleas. (Id.)

The provisions of the above statute, we have seen, are confined to objections affecting the validity of letters patent, and a defendant may object to the validity of an assignment of the patent, though no notice of such objection has been given. *Cholett v. Hoffman*, 26 L. J. Q. B. 249. Costs of, where action abandoned, *see* El. & El. 961; 28 L. J. Q. B. 290.

[3] By sect. 42, "in any action in any of her majesty's superior courts of record at Westminster and Dublin for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court

(*a*) *Decisions on above Section.*[1]

(43.) *By s.* 43, *Particulars to be regarded in Taxation of Costs, Judge's Certificate as to Costs, and Validity of Patent being in question.*[2]

(*a*) *Decisions on above Section.*[3]

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be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings thereon respectively, as to such court or judge may seem fit."

[1] An application to inspect a defendant's machinery may be made by a plaintiff under this section, before the delivery of the declaration in an action for infringement of the plaintiff's patent; but such inspection will not be granted as of course, or without the party applying for it showing an inspection to be material for the purposes of the cause. *Amies v. Kelsey*, 22 L. J. Q. B. 84. *Shaw v. Bank of England*, 22 L. J. Ex. 26, 210. *Vidi v. Smith*, 23 L. J. Q. B. 342. *Holland v. Fox*, id. 211, 357.

The plaintiffs were owners of a type-founding patent. The defendant was a printer, who used types alleged to be colourable imitations of the type patented by the plaintiffs. On a bill for an injunction: — *Held*, that the court had jurisdiction to order the defendant to deliver a sample of type to the plaintiffs for analysis. *Patent Type-Founding Co. v. Walters*, 1 Johns. 727; 8 W. R. 353: — *Held*, also, that laches sufficient to defeat the plaintiffs' right to an interlocutory injunction was no bar to an order on the same motion for inspection and samples. (Id.) But in an action by an assignee of a patent against the publisher of a newspaper who had bought and used the article, the plaintiff having applied to the court to compel the defendant to "permit the plaintiff, his manager, and witnesses, to inspect the type of the defendant, used by him in printing the newspaper, and, if necessary, to take specimens thereof for the purpose of being analysed, in order to produce evidence thereof at the trial of the cause," the court refused the application. *Patent Type-Founding Co. v. Walters, supra. Same v. Lloyd*, 5 H. & N. 192; 29 L. J. Ex. 207.

In an action for the infringement of a patent for a mode of making veneers or mouldings, the court refused to order an inspection by the plaintiff of the defendant's manufactory and machinery, it being doubtful, on the plaintiff's affidavit, whether his patent was for the kind of veneering, or for the process by which it was done, and the defendant positively swearing that he used no machinery in the process. *Meadows v. Kirkman*, 29 L. J. Ex. 205.

[2] By sect. 43, "in taking the costs in any action in any of her majesty's superior courts of Westminster, or in Dublin, commenced after the passing of this act for infringing letters patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular, unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause; and it shall be lawful for the judge before whom any such action shall be tried to certify on the record that the validity of the letters patent in the declaration mentioned came in question; and the record with such certificate, being given in evidence in any suit or action for infringing the said letters patent, or in any proceeding by *scire facias* to repeal the letters patent, shall entitle the plaintiff in any such suit or action, or the defendant in such proceeding by *scire facias*, on obtaining a decree, decretal order, or final judgment, to his full costs, charges and expenses, taxed as between attorney and client, unless the judge making such decree or order, or the judge trying such action or proceeding, shall certify that the plaintiff or defendant respectively ought not to have such full costs: Provided always, that nothing herein contained shall affect the jurisdiction and forms of process of the courts in Scotland in any action for the infringement of letters patent, or in any action or proceeding respecting letters patent hitherto competent to the said courts: Provided also, that when any proceedings shall require to be taken in Scotland to repeal any letters patent, such proceedings shall be taken in the form of an action of reduction at the instance of her majesty's advocate, or at the instance of any other party having interest, with concurrence of her majesty's advocate, which concurrence her majesty's advocate is authorised and empowered to give, upon just cause shown only."

[3] When the plaintiff is nonsuited the defendant is not entitled to any costs in respect of particulars of objections delivered with the pleas under the above act, unless such particulars are certified by the judge to have been proved. *Losche v. Hague*, 7 Dowl. 495. As to costs in a *scire facias* to repeal letters patent, *see* Gray on Costs, 216; Webster on Patents. In a suit for the infringement of a patent, where the court considers the plaintiff entitled to full costs as between solicitor and client, the decree or order should contain an express direction that the costs be so taxed, notwithstanding the 43d section of the 15 & 16 Vic. c. 83, provides that he shall have such full costs, unless the judge shall certify that he ought not to have them. *Lister v. Leather*, 4 Kay & J. 425.

SCHEDULE — FORMS.

(1.) *Petition, Form of.*[1]

(2.) *Declaration with Petition, Form of.*[2]

(3.) *Provisional Specification, Form of.*[3]

(4.) *Reference to Law Officer, Form of.*[4]

(5.) *Warrant, Form of.*[5]

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[1] No.

PETITION.

To the Queen's most Excellent Majesty.

The humble petition of [*here insert name and address of petitioner*] for, &c.

Showeth,

That your petitioner is in possession of an invention for [*the title of the invention*], which invention he believes will be of great public utility; that he is the true and first inventor thereof, and that the same is not in use by any other person or persons, to the best of his knowledge and belief.

Your petitioner, therefore, humbly prays, that your majesty will be pleased to grant unto him, his executors, administrators, and assigns, your royal letters patent for the United Kingdom of Great Britain and Ireland, and the Channel Islands and Isle of Man [*colonies to be mentioned, if any*], for the term of fourteen years, pursuant to the statutes in that case made and provided.

And your petitioner will ever pray, &c.

[2] No.

DECLARATION.

I, of in the county of do solemnly and sincerely declare that I am in possession of an invention for [*the title, as in petition*], which invention I believe will be of great public utility; that I am the true and first inventor thereof, and that the same is not in use by any other person or persons, to the best of my knowledge and belief [*where a complete specification is to be filed with the petition and declaration, insert these words:* And that the instrument in writing under my hand and seal, hereunto annexed, particularly describes and ascertains the nature of the said invention, and the manner in which the same is to be performed]; and I make this declaration conscientiously, believing the same to be true; and by virtue of the provisions of an act made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late majesty King William the Fourth, intituled "An Act to repeal an Act of the present Session of Parliament, intituled 'An Act for the more Effectual Abolition of Oaths and Affirmations taken and made in Various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of Voluntary and Extra-judicial Oaths and Affidavits,' and to make other provi- for the Abolition of Unnecessary Oaths."

A. B.

Declared at this day of A.D. before me,

a Master in Chancery.

or

Justice of the Peace.

[3] No.

PROVISIONAL SPECIFICATION.

I, do hereby declare the nature of the said invention for [*insert title, as in petition*], to be as follows [*here insert description*].

Dated this day of A.D.

[*To be signed by applicant or his agent.*]

[4] REFERENCE.

[*To be indorsed on the petition.*]

Her majesty is pleased to refer this petition to to consider what may be properly done therein.

Clerk of Commissioners.

[5] WARRANT.

In humble obedience to her majesty's command, referring to me the petition of of to consider what may be properly done therein, I do hereby certify as follows: That the said petition sets forth that the petitioner [*allegations of the petition*]: And the petitioner most humbly prays [*prayer of the petition*]: That in support of the allegations contained in the said petition the declaration of the petitioner has been laid before me, whereby he solemnly declares, that [*allegations of the declaration*]. That there has also been laid before me [a provisional specification signed and also a certificate], *or* [a complete specification, and a certificate of the filing thereof], whereby it appears that the said invention was provisionally protected [*or* protected] from the day of A.D. in pursuance of the statute:

That it appears that the said application was duly advertised:

Upon consideration of all the matters aforesaid, and as it is entirely at the hazard of the said petitioner whether the said invention is new or will have the desired success, and as it may be reasonable for her majesty to encourage all arts and inventions which may be for the public good, I am of opinion that her majesty may grant her royal letters patent unto the petitioner, his executors, administrators, and assigns, for his said invention, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man [*colonies to be mentioned, if any*], for the term of fourteen years, according to the

(6.) *Letters Patent, Form of.*[1]

statute in that case made and provided, if her majesty shall be graciously pleased so to do, to the tenor and effect following: [*See next form.*]

Given under my hand this day of A.D.

[1] LETTERS PATENT.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith: To all to whom these presents shall come greeting:

Whereas hath by his petition humbly represented unto us that he is in possession of an invention for which the petitioner conceives will be of great public utility; that he is the true and first inventor thereof; and that the same is not in use by any other person or persons, to the best of his knowledge and belief: the petitioner, therefore, most humbly prayed that we would be graciously pleased to grant unto him, his executors, administrators, and assigns, our royal letters patent for the sole use, benefit, and advantage of his said invention, within our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man [*colonies to be mentioned, if any*], for the term of fourteen years, pursuant to the statutes in that case made and provided. [And whereas the said hath particularly described and ascertained the nature of the said invention, and in what manner the same is to be performed, by an instrument in writing, under his hand and seal, and has caused the same to be duly filed in]:

And we, being willing to give encouragement to all arts and inventions which may be for the public good, are graciously pleased to condescend to the petitioner's request: Know ye, therefore, that we, of our especial grace, certain knowledge, and mere notion, have given and granted, and by these presents, for us, our heirs and successors, do give and grant unto the said his executors, administrators, and assigns, and every one of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said his executors, administrators, or assigns, shall at any time agree with, and no others, from time to time and at all times hereafter during the term of years herein expressed, shall and lawfully may make, use, exercise, and vend his said invention within our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, in such manner as to him the said his executors, administrators, and assigns, or any of them, shall in his or their discretion seem meet; and that he the said his executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage, from time to time coming, growing, accruing, and arising, by reason of the said invention, for and during the term of years herein mentioned; to have, hold, exercise, and enjoy the said licenses, powers, privileges, and advantages hereinbefore granted or mentioned to be granted unto the said his executors, administrators, and assigns, for, and during, and unto the full end and term of fourteen years, from the day of A.D. next and immediately ensuing, according to the statute in such case made and provided: And to the end that he the said his executors, administrators, and assigns, and every of them, may have and enjoy the full benefit and the sole use and exercise of the said invention, according to our gracious intention hereinbefore declared, we do by these presents, for us, our heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, degree, name or condition soever may be, within our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man [*colonies to be mentioned, if any*], that neither they nor any of them, at any time during the continuance of the said term of fourteen years hereby granted, either directly or indirectly, do make, use, or put in practice the said invention, or any part of the same, so attained unto by the said as aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor shall make, or cause to made, any addition thereto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, devisor or devisors thereof, without the consent, license, or agreement of the said his executors, administrators, or assigns, in writing under his or their hands and seals first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command, and further, to be answerable to the said his executors, administrators, and assigns, according to law, for his and their damages thereby occasioned: And, moreover, we do by these presents, for us, our heirs and successors, will and command all and singular the justices of the peace, mayors, sheriffs, bailiffs, constables, headboroughs, and all other officers and ministers whatsoever, of us, our heirs and successors, for the time being, that they or any of them do not, nor shall at any time during the said term hereby granted, in anywise molest, trouble, or hinder the said his executors, administrators, and assigns, or any of them, or his or their deputies, servants, or agents, in or about the due and lawful use or exercise of the aforesaid invention, or anything relating thereto: Provided always, and these our letters patent are and shall be upon this condition, that if at any time during the said term hereby granted, it shall be made

(7.) *Specification, Form of.*[1]

to appear to us, our heirs, or successors, or any six or more of our then privy council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof, or that the said is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith cease, determine, and be utterly void, to all intents and purposes, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: Provided also, that these our letters patent, or anything herein contained, shall not extend or be construed to extend to give privilege unto the said his executors, administrators, or assigns, or any of them, to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any other of our subjects whatsoever, and publicly used or exercised, unto whom our like letters patent or privileges have been already granted for the sole use, exercise, and benefit thereof: it being our will and pleasure that the said his executors, administrators, and assigns, and all and every other person and persons to whom like letters patent and privileges have been already granted as aforesaid, shall distinctly use and practise their several inventions by them invented and found out, according to the true intent and meaning of the same respective letters patent and of these presents: Provided likewise, nevertheless, and these our letters patent are upon this express condition [that if the said shall not particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be filed in within calendar months next, and immediately after the date of these our letters patent:] [and also, if the said instrument in writing filed as aforesaid does not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed:] and also if the said his executors, administrators, or assigns, shall not pay, or caused to be paid, at the office of our Commissioners of Patents for Inventions, the sums following (that is to say): the sum of pounds on or before the day of A.D. and the stamp duty payable in respect of the certificate of such payment, and the sum of pounds on or before the day of A.D. and the stamp duty payable in respect of the certificate of such payment; and also if the said his executors, administrators, or assigns, shall not supply, or cause to be supplied for our service, all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required, in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same; that then, and in any of the said cases, these our letters patent, and all liberties and advantages whatsoever hereby granted, shall utterly cease, determine, and become void, anything herein efore contained to the contrary thereof in anywise notwithstanding: Provided that nothing herein contained shall prevent the granting of licenses in such manner and for such considerations as they may by law be granted. And, lastly, we do by these presents, for us, our heirs and successors, grant unto the said his executors, administrators, and assigns, that these our letters patent, or the filing thereof, shall be in and by all things good, firm, valid, sufficient, and effectual in the law according to the true intent and meaning thereof, and shall be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the said his executors, administrators, and assigns, as well in all our courts of record as elsewhere, and by all and singular the officers and ministers whatsoever of us, our heirs and successors, in our United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man [*colonies to be mentioned, if any*], and amongst all and every the subjects of us, our heirs and successors, whatsoever and wheresoever, notwithstanding the not full and certain describing the nature or quality of the said invention, or of the materials thereunto conducing and belonging.

In witness whereof we have caused these our presents to be made patent, this day of A.D. and to be sealed and bear date as of the said day of A.D. in the year of our reign.

[1] Specification.

To all to whom these presents shall come. I, of send greeting.

Whereas, her most Excellent Majesty Queen Victoria, by her letters patent bearing date the day of A.D. in the year of her reign, did for herself, her heirs and successors, give and grant unto me the said her special license that I the said my executors, administrators, and assigns, or such others as I the said my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man [*colonies to be mentioned, if any*], an invention for [*insert title, as in letters patent*], upon the condition (amongst others) that I the said by an instrument in writing under

(F) 16 *Vic. c.* 5: *Schedule of Stamp Duties.*[1]

V. Specification.

(B) *Complete Specification, Requisites and Effect of.*[2]

my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in within calendar months next and immediately after the date of the said letters patent: Now, know ye, that I the said do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement (that is to say), [*describe the invention*]:

In witness whereof I, the said A. B., have hereunto set my hand and seal, this day of A.D.

	A. B. £	s.	d.
[1] On petition for grant of letters patent	5	0	0
On certificate of record of notice to proceed	5	0	0
On warrant of law officer for letters patent	5	0	0
On the sealing of letters patent .	5	0	0
On specification	5	0	0
On the letters patent, or a duplicate thereof, before the expiration of the third year . .	50	0	0
On the letters patent, or a duplicate thereof, before the expiration of the seventh year .	100	0	0
On certificate of record of notice of objection	2	0	0
On certificate of every search and inspection	0	1	0
On certificate of entry of assignment or license	0	5	0
On certificate of assignment or license	0	5	0
On application for disclaimer .	5	0	0
On caveat against disclaimer .	2	0	0
On office copies of documents, for every ninety words . . .	0	0	2

[2] It has been seen (*ante*, p. 94) that if the patentee shall not describe particularly the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause it to be filed within the time limited, the letters patent will be void. This instrument is called the specification, or complete specification, as opposed to the provisional specification considered.

It should be so framed that others may be taught by it to do the things for which the patent is granted; for the end and meaning of the specification is to teach the public, after the term for which the patent is granted, what the art is. And it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it; and the description should be such as to enable persons of ordinary skill to make the patent article, by simply following the directions given, without resorting to contrivances of their own. *Bloxam v. Elsee*, 6 B. & C. 169. *Crossley v. Beverley*, 9 id. 63. *Hills v. Evans*, 31 L. J. Ch. 457. *Lindel v. Johnson*, Bull. N. P. 76. It must be *sufficient within itself*, and must not refer to books for information. *Harman v. Playne*, 11 East, 101. *Jessop's case*, 2 H. Black. 489. If it be sufficiently plain when read altogether to be understood by an operator of fair intelligence, it is good. *Beard v. Egerton*, 19 L. J. C. P. 36. It *must correspond with the title* of the patent, for if one thing be claimed by the patent, and another by the specification, the patent is void. *Croll v. Edge*, 9 C. B. 479. *Cochrane v. Smethurst*, 1 Stark. 208. *King v. Wheeler*, 2 B. & A. 345. *Nichols v. Haslam*, 7 Man. & G. 337.

It *must not cover too much*; that is, include in its claim of new invention anything known and practised. *Hill v. Thompson*, 2 Moore, 424. *Harman v. Playne*, *supra*. *Bovill v. Moore*, 2 Marsh. 211. *Brunton v. Hawkes*, 4 B. & A. 541. *Champion v. Benyon*, 6 Moore, 71. *Bloxam v. Elsee*, *supra*. *Saunders v. Aston*, 3 B. & Adol. 881. *Morgan v. Seaward*, 2 Mee. & W. 544. *Minter v. Mower*, 6 Ad. & E. 735; Steph. Com. vol. ii. p. 90. *Huddart v. Grimshawe*, Dav. Pat. Ca. 295. *Macfarlane v. Price*, 1 Stark. 199. And the old part must be distinguished from the new. *Holmes v. London & North Western Railway Co.* 22 L. J. C. P. 58.

A patentee, describing his invention in the specification, is to be taken to claim as part of his invention all that he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. *Tetley v. Easton*, 2 C. B. (N. S.) 706; 26 L. J. C. P. 269.

A patent was granted for "improvements in the manufacture of cases or envelopes for covering bottles." The specification, after describing the apparatus, in the arrangement of which the invention was stated to consist, claimed the combination of mechanism, and the making of envelopes for bottles as described:—*Held*, that the specification was for the mode of making, and not for the envelope, and that it was, therefore, not larger than the grant. *Patent Bottle Envelope Co. v. Seymer*, 28 L. J. C. P. 22. *See* Disclaimer, *ante*, p. 88.

It *must not be ambiguous*, nor give directions which tend to mislead the public. *Turner v. Winter*, 1 T. R. 602. *Hastings v. Brown*, 1 E. & B. 450; 22 L. J. Q. B. 161. And if it describe two ways of doing a thing, and by one of them it cannot be done, the specification is bad. *Beard v. Egerton*, 19 L. J. C. P. 36. And the specification of a patent is defective if the patentee professes to effect his object in one or two specified modes, or

(D) *Amendment of.*[1]

(E) *Construction of, a Question of Law.*[2]

(F) *Sufficiency of, a Question for a Jury.*[3]

VI. Title of Patent.[4]

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else in the other representing each as available, and it appears by evidence that one of them will effect the purpose but the other will not. *Reg. v. Cutler*, 14 Q. B. 372, n.; 3 C. & Kir. 215.

The specification of an invention, which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the proportions recommended. *Patent Type-Founding Co. v. Richard*, 1 Johns. 381.

It must be full, omitting no necessary circumstance (*Lindel v. Johnson*, Bull. N. P. 76); and *it must mention everything necessary for a beneficial enjoyment* of the invention. *Neilson v. Harford*, 8 Mee. & W. 806. And if anything be concealed which gives an advantageous operation to the thing invented, the specification is void (*Ward v. Zimmer*, Holt, 58. *Turner v. Winter*, 1 T. R. 607. *R. v. Wheeler*, 2 B. & A. 345); and it must disclose any improvement introduced at any time before filing. *Crossley v. Beverley*, 9 B. & C. 63.

Where A. has, in a specification, described a result, but has not added such a statement of means as to make that result practically attainable, and B. afterwards takes out a patent for the same result, but fully explains the means to be employed to attain it, the patent of B. is sustainable:—So held by the House of Lords, *Betts v. Menzies*, 31 L. J. Q. B. 233.

The insertion of a useless ingredient does not vitiate. *Lewis v. Marling*, 10 B. & C. 22. As to how far a specification amounts to a publication, see *Hills v. Evans*, 31 L. J. Ch. 457.

[1] As to amending a clerical error in the specification, see *In re Redmund*, 5 Russ. 44.

In a suit to restrain an infringement of a patent the plaintiff had, after filing his bill, and before the hearing, amended the specification of the patent by disclaiming part of the invention. At the hearing, the objection was taken by the defendant, that under the 4 & 5 Wm. 4, c. 83, s. 1, the plaintiff could not maintain his case by referring to the specification as it then stood, but that it must be taken still to be as it was when the bill was filed. The objection being fatal, the plaintiff paid all the costs up to that time, and amended the bill by varying the statement of the specification. The defendant by his answer, and at the bar, on a motion for an injunction made on the amended record, still relied on his old objection:—*Held*, that such objection was fatal; and the motion was refused accordingly. *Lister v. Leather*, 3 Jur. N. S. 433. Under the above circumstances the plaintiff, on the ensuing day, moved, by special motion, to dismiss his bill without costs, and without prejudice to filing a fresh bill on the same matters; and the motion was granted. (Id.)

[2] The construction of a specification is a question of law for the court, the meaning of the words having been interpreted, when necessary, by the jury. *Bovill v. Pimm*, 11 Ex. 718. *Neilson v. Harford, supra. Seed v. Higgins*, 8 H. L. C. 550; 30 L. J. Q. B. 314. *Hills v. Evans*, 31 L. J. Ch. 457. The judge is to say to the jury what the specification orders to be done, and the jury are to say whether it will produce the result. *Beard v. Egerton, supra. Elliott v. Turner*, 15 L. J. C. P. 49. The words are to be construed according to their ordinary and proper meaning, unless there be something in the context (which may be explained by evidence) to show that a different construction ought to be put. (Id.) The judge may compare the plaintiff's specification with a previous specification; and on such comparison direct the jury to find a verdict. *Bush v. Fox*, 5 H. L. Ca. 707; 25 L. J. Ex. 251; and see *Betts v. Menzies, supra. Hullett v. Hague*, 2 B. & Adol. 370.

The language of the specification is not to be astutely construed so as to overthrow the patent; and it is for the other side to make out his objection clearly. *Bickford v. Skewes*, 1 Gale & D. 736; 1 Q. B. 938; Web. Pa. Ca. 219. *Rolston v. Smith*, 11 C. B. (N. S.) 471; 31 L. J. C. P. 102.

[3] The specification of a patent instrument, called the "Miners' Safety Fuse," after describing the manner in which the case of the instrument was to be made, proceeded thus: "By means whereof I embrace in the centre of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter, prepared in the usual pyrotechnical manner of the firework for the discharge of ordnance." In an action for infringing the patent, issue was joined on a plea, denying that the patentee had, by his specification, particularly described and ascertained the nature of the invention, and in what manner the same was to be performed. At the trial it was objected that the plaintiff had not shown that any other material but common gunpowder had ever been used in the fuse, or, if introduced, would answer the purpose:—*Held*, that the question as to the sufficiency of the specification was for a jury. *Bickford v. Skewes, supra;* and 6 Jur. 167.

[4] The title need not give any idea of the invention; it is sufficient if the specification be consistent with it. *Neilson v. Harford*, Web. P. C. 333; 8 Mee. & W. 806. But it

VII. Agreements for Use and Assignment of Patent.[1]

VIII. Infringement of Patent.

(A) *What is.*[2]

should disclose the object. *Household Co. v. Neilson*, Web. Pat. Cas. 678. And it must (though not as minutely as the specification) describe the nature of the invention; and the patent is void if the title is so generally worded as to be capable of comprising, not only the particular invention, but improvements not contemplated in it: as where the patent was taken out for improvements in carriages, and the invention was, in fact, an improvement in German shutters, which were used only in some kinds of carriages. *Cook v. Pearce*, 8 Q. B. 1044.

Mere vagueness and generality in the title of the patent is an objection which may be taken on the part of the Crown before it grants the patent, but does not afford a ground for holding the patent void after it has been granted, in the absence of any evidence of fraud upon the Crown, or prejudice to the public. *Cook v. Pearce*, Web. P. C. 770; 8 Jur. 499; 13 L. J. Q. B. 189. Ex. Chamb. affirming the judgment of the court below, 7 Jur. 764: 12 L. J. Q. B. 187.

[1] Every assignment of a patent must be registered. *See ante*, p. 98.

To a declaration for infringement of a patent, brought by an alleged assignee (by deed) of the patent, the defendant pleaded by denying the assignment *modo et formâ*. On the trial it appeared that an instrument of assignment had been executed by the patentee, but that it had not been registered under the 15 & 16 Vic. c. 83: — *Held*, that as, by sect. 35, the original patentee is, until the entry of the registration, to be deemed and taken to be the sole and exclusive proprietor of the patent, the defendant was entitled to a verdict, although the objection was not specified in the notice of objections delivered by him. *Chollett v. Hoffman*, 7 E. & B. 686; 3 Jur. N. S. 935; 26 L. J. Q. B. 249. See *Notin v. Brooks*, 10 W. R. 111, Ex.

A patentee in 1853 assigned his patent, but the assignees omitted to register it under the 15 & 16 Vic. c. 83, s. 35. Afterwards, in August 1855, the patentee assigned the patent to another person, who registered it on the same day. The first assignees registered their assignment a week afterwards. The court, in 1857, on the motion of the first assignees, ordered the register of the second assignment to be expunged, and with costs, under sect. 38. *In re Green's Patent*, 24 Beav. 145.

Where a patentee agrees with another person for a valuable consideration, that the latter may use the manufacture for a certain time, upon certain conditions, an action for a breach of the contract may be answered by showing in any manner that the patent is invalid. *Hayne v. Maltby*, 3 T. R. 438. And so if the action be between joint patentees. *Chanter v. Leese*, 4 Mee. & W. 295; 5 id. 698. But if a person, imagining that he has discovered something new, obtain a patent for it, and then assign it for a valuable consideration to another, who uses it for some time, the assignee, though the patent afterwards prove to be a bad one, cannot recover the sum of money he originally gave for the purchase of it. *Taylor v. Hare*, 1 N. R. 260. If the grant be valid, the assignment in the usual way is of course valid and effectual (*Ex parte O'Reilly*, 1 Ves. jun. 118); and it will pass to the assignee of a bankrupt patentee. *Bloxam v. Elsee*, 6 B. & C. 169. *Hessee v. Stevenson*, 3 B. & P. 577.

Under a covenant licensing the use of a patent, the defendant is estopped from disputing the invention. *Bawman v. Taylor*, 2 Ad. & E. 278.

It is competent to an assignee of a separate and distinct portion of a patent to sue for an infringement of that part, without joining one who has an interest in another part, the damages to be recovered in the action accruing to the former alone. *Dunnicliff v. Mallet*, 7 C. B. (N. S.) 209; 6 Jur. N. S. 252; 29 L. J. C. P. 70; 8 W. R. 260.

The sale of the moiety of a patent right conveys an interest *pro tanto* in the patent. *Walton v. Lavater*, 6 Jur. N. S. 1251; 29 L. J. C. P. 275; 3 L. T. (N. S.) 272.

Where a patent is vested in trustees upon trust for several tenants in common or joint-tenants, *quære* whether any one of them is at liberty to work the patent on his own account? *Hancock v. Bewley*, 1 Johns. 601.

A voluntary assignment by the patentee of letters patent to trustees, for benefit of creditors more than twelve in number, is not such an assignment as will avoid the patent. *Macalpine v. Mangall*, 3 C. B. 496; 15 L. J. C. P. 298.

A license under seal to use a patented article does not require a stamp. *Chanter v. Johnson*, 14 Mee. & W. 408.

For other cases as to assignments and agreements for use of patents, see *Chanter v. Dewhurst*, 12 Mee. & W. 823; 13 L. J. Ex. 198. *Cutler v. Bower*, 11 Q. B. 973; 12 Jur. 721; 17 L. J. Q. B. 217. *Bower v. Hodges*, 17 Jur. 1057; 22 L. J. C. P. 194. *Warwick v. Hooper*, 3 Mac. & G. 60. *Tielens v. Hooper*, 5 Ex. 830; 20 L. J. Ex. 78. *Cherry v. Heming*, 2 Ex. 557; 17 L. J. Ex. 305. *Baird v. Neilson*, 8 Clark & Fin. 726. *Pidding v. Franks*, 1 Mac. & G. 56; 1 H. & T. 220; 18 L. J. Ch. 295. *Hills v. Laming*, 9 Ex. 256. *Webster v. Newson*, 5 H. & N. 42.

[2] In order to constitute an infringement, it is not necessary that the invention should have been servilely and precisely imitated; it will be sufficient that it has been so substantially, and in the main point. *Hill v. Thompson*, 3 Meriv. 622. *Bovill v. Moore*, Davies, P. C. 348. *Manton v. Manton*, id. Bull. N. P. 76.

Where a patent is for an invention consisting of several parts, the imitation of any part of the invention is an infringement of the patent. *Smith v. London & North-West-*

ern Railway Co. 2 E. & B. 69; 17 Jur. 1071. *Electric Telegraph Co. v. Brett*, 10 C. B. 838; 15 Jur. 579; 20 L. J. C. P. 123.

The doing of any of the acts specified in the prohibitory clause of the letters patent is an infringement. *Walton v. Bateman*, Web. P. C. 615. *Patent Bottle Envelope Co. v. Seymer*, 5 C. B. (N. S.) 164; 5 Jur. N. S. 174. *Hills v. Liverpool Gas Co.* 32 L. J. Ch. 28. *M'Cormick v. Gray*, 7 H. & N. 25; 31 L. J. Ex. 42.

The specification having described the invention to consist in welding iron by circular pressure through dies or holes, the welding produced by passing the iron through grooved rollers, though not so perfect, is an infringement. *Russell v. Cowley*, Web. P. C. 462.

The specification claiming the shearing from list to list with a rotary cutter; the use of that cutter for such a purpose is an infringement of the patent, without reference to the other mechanical arrangements employed. *Lewis v. Davis*, Web. P. C. 490.

The selling by the defendant of articles, the subject of any part of the patent, is sufficient evidence of infringement. *Cornish v. Keene*, Web. P. C. 502.

Giving an order to another to make the particular thing by the patented process is an infringement. *Gibson v. Campbell*, 11 L. J. C. P. 177. And it would seem, that even if a patent has been infringed unintentionally the patentee is entitled to redress. *Heath v. Unwin*, 15 Sim. 552; 11 Jur. 420; 16 L. J. Ch. 283.

The question of infringement is peculiarly for the jury, who must say whether the defendant has availed himself of the invention of the plaintiff, with such variation only as will prevent its being a new discovery. *Walton v. Potter*, Web. P. C. 586. *Delarue v. Dickinson*, 3 Jur. N. S. 841.

The declarations of a deceased inventor are inadmissible. *Hyde v. Palmer*, 32 L. J. Q. B. 126.

The selling for profit in England of an article of identically the same description as that of an article patented in England is an infringement of that patent, though the particular article sold be made in France. *Walton v. Lavater*, 6 Jur. N. S. 1251; 29 L. J. C. P. 275; 3 L. T. (N. S.) 272.

[1] In the case of an infringement, the patentee, or his assignee, may file a bill in equity for an account of the profits made from the illegal use of the invention, on which he may obtain an injunction to restrain the party from the further use of it, or he may bring an action at law for damages for the injury sustained, and in such action he may obtain from the court or judge an order for an injunction, inspection, or account. *See ante*, p. 100. *See* form of rule, 8 C. B. (N. S.) 162; and 14 Moore, P. C. C. 156. *Price's Patent Candle Co.* 4 K. & J. 729.

[2] A form of declaration for the infringement of a patent is given in schedule (B), No. 31, to the Common-Law Procedure Act, 1852, as follows:—

"That the plaintiff was the first and true inventor of a certain new manufacture; that is to say, of [certain improvements in the manufacture of sulphuric acid]; and thereupon her Majesty Queen Victoria, by letters patent under the Great Seal of England [*or* of the United Kingdom], granted to the plaintiff the sole privilege to make, use, exercise, and vend the said invention within England [*or* the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, *or as the case may be*], for the term of fourteen years from the day of A.D. subject to a condition that the plaintiff should, within six calendar months next after the date of the said letters patent, cause to be enrolled [*or* filed] in the High Court of Chancery, an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed; and the plaintiff did, within the time prescribed, fulfil the said condition, and the defendant, during the said term, did infringe the said patent right." *See* also *Unwin v. Heath*, 16 C. B. 713; 12 C. B. 522.

A like count with prayer for an injunction, &c., *Hills v. London Gas-Light Co.* 5 H. & N. 312. *Walton v. Lavater*, 29 L. J. C. P. 275. For count by assignee, see *Chollet v. Hoffman*, *supra*. For count by assignee of patent stating disclaimer of part, *Spilsbury v. Clough*, 2 Q. B. 466. Where assignment by moieties, *Walton v. Lavater*, 8 C. B. (N. S.) 162. It is the rule of a court of equity not to grant a perpetual injunction to restrain the infringement of a patent unless the legal validity of the patent has been conclusively established. *Hills v. Evans*, 31 L. J. Ch. 457.

In an action by an assignee, a declaration averring that the letters patent became duly assigned without showing how is sufficient after verdict (*Cornish v. Keene*, Web. P. C. 501, 519); but a plea denying that the property vested in the assignee is bad. 3 F. & F. 93.

A proceeding for an infringement can only be resisted on the ground that no infringement has, in fact, taken place, or that the patent is void; and its invalidity may be established by showing that the article was not a fit subject for a patent (*Horton v. Mahon*, 12 C. B. (N. S.) 437; 31 L. J. C. P. 255); or that the patentee was not the first inventor (*Hawood v. Northern Railway Co.* 2 B. & S. 194; 31 L. J. Q. B. 198. *Ormson v. Clarke*, 32 L. J. C. P. 8); or that the specification was insufficient. When the declaration shows a disclaimer of part, the pleas should be confined to the portion undisclaimed. *Clark v. Kenrick*, 12 Mee. & W. 219. The plea of not guilty merely denies the act of the infringement. *Stead v. Anderson*, 4 C. B. 806. All allegations which tend to deny the validity of the patent must be specially pleaded; as, that the plaintiff was not the true and first inventor; that he had no grant of letters patent; that the specification was insufficient; that the

IX. Scire Facias to Repeal.[1]

X. Rules of Practice promulgated by the Commissioners [2]

invention was not new; that the invention was not one for which letters patent could be granted. For forms of above pleas, see Bullen & Leake, Pl. 643. *Newball v. Elliot*, 32 L. J. Ex. 120. It is a good plea to an action for infringing a patent that a matter recited in the letters patent is untrue. *Morgan v. Seaward*, 2 Mee. & W. 544, 561. The exhibition of interrogatories before declaration has been refused. *Jones v. Pratt*, 6 H. & N. 627; 30 L. J. Ex. 365.

[1] A *scire facias* is the only means of repealing letters patent. The *scire facias* in this case may be brought either on behalf of the queen, or, when the patent has been granted to the prejudice of another, by the injured party at the queen's suit. It may be sued out either in the Petty-Bag Office, in Chancery (4 Inst. 88; 2 Saund. 72), or in the Court of Queen's Bench. 3 Hen. 4, 6, 29. *See*, as to this *scire facias*, 2 Saund. 72, p. 9; 6 Bac. Abr. Sci. Fa. 3. Also *see* 15 & 16 Vic. c. 83, s. 15; 12 & 13 Vic. c. 109, s. 29, *ante*, p. 92. The writ is not granted of course. The Attorney-General may issue it in his discretion, and he also has the control of the proceedings in the action, if he allow the writ. Particulars of objections to the patent must be delivered by the prosecutor with the declaration, as in an action for an infringement. *See ante*, p. 100. On the trial, the defendant has the right to begin. 15 & 16 Vic. c. 83, s. 41. The notice of objections in *sci. fa.* to repeal a patent is not part of the record, although it forms part of the transcript sent for trial from Chancery to the Common Pleas. *Reg. v. Mill*, 1 Prac. Rep. 695; 10 C. B. 379; 15 Jur. 59; 20 L. J. C. P. 16. To a declaration in *sci. fa.* to repeal letters patent, on the ground that the defendants (two in number) were not the first and true inventors, and that the invention was not new, nor an improvement. One of the defendants, B., pleaded that, before the suing out of the *sci. fa.*, the other defendant, S., assigned to him all his share in the letters patent, and the privilege thereby granted, and had not since had any interest whatever in the letters patent; that S. could not be compelled to plead or demur to the writ and declaration, and therefore B. prayed judgment, whether he ought to be compelled to plead or demur to the declaration:—*Held*, upon demurrer, that both the defendants had been properly made defendants, the letters patent having been granted to them jointly. *Reg. v. Betts*, 15 Q. B. 540; 14 Jur. 912; 9 L. J. Q. B. 531. A writ of *scire facias* having issued out of Chancery to repeal letters patent, the patentee presented a petition to the common-law side of the court, alleging that the writ contained improper recitals and suggestions, which, if used as a defence in an action for the infringement of a patent, would be inadmissible, and praying that the writ might be quashed or reformed by striking out the objectionable matter. *Cranworth, C.*, declined to exercise the jurisdiction reserved to him by sect. 46 of 12 & 13 Vic. c. 109, on the ground that by sect. 39 jurisdiction in such cases was conferred on the judges of the superior courts of common law, and that they could more satisfactorily dispose of the question of pleading involved in the case. *Reg. v. Hancock*, 5 De Gex, M. & G. 332. The judgment in *scire facias* to repeal a patent is, "that the said letters patent be cancelled, vacated, disallowed, annulled, made void and invalid, and be altogether had and held for nothing; and also that the enrolment thereof be cancelled, and that the said letters patent be restored into her said majesty's Court of Chancery at Westminster, aforesaid, there to be cancelled." *Bynner v. the Queen*, 15 L. J. (N. S.) 414; Q. B. in error.

[2] Rules and Regulations under the Act 15 & 16 Vic. c. 83, for the Passing of Letters Patent for Inventions.

First Set of Rules and Regulations.

By the Right Honourable, &c.

Whereas a commodious office is forthwith intended to be provided by the Crown as the Great Seal Patent Office; and the Commissioners of her Majesty's Treasury have, under the powers of the said act, appointed such office as the office also for the purposes of the said act:

All petitions for the grant of letters patent, and all declarations and provisional specifications, shall be left at the said commissioners' office, and shall be respectively written upon sheets of paper of twelve inches in length by eight inches and a-half in breadth, leaving a margin of one inch and a-half on each side of each page, in order that they may be bound in the books to be kept at the said office.

The drawings accompanying provisional specifications shall be made upon a sheet or sheets of parchment, paper, or cloth, each of the size of twelve inches in length by eight inches and a-half in breadth, or of the size of twelve inches in breadth by seventeen inches in length, leaving a margin of one inch on every side of each sheet.

Every provisional protection of an invention allowed by the law officer shall be forthwith advertised in the *London Gazette*, and the advertisement shall set forth the name and address of the petitioner, the title of his invention, and the date of the application.

Every invention protected by reason of the deposit of a complete specification shall be forthwith advertised in the *London Gazette*, and the advertisement shall set forth the name and address of the petitioner, the title of the invention, the date of the application, and that a complete specification has been deposited.

Where a petitioner applying for letters patent after provisional protection, or after deposit of a complete specification, shall

give notice in writing at the office of the commissioners of his intention to proceed with his application for letters patent, the same shall forthwith be advertised in the *London Gazette*, and the advertisement shall set forth the name and address of the petitioner and the title of his invention; and that any persons having an interest in opposing such application are to be at liberty to leave particulars in writing of their objections to the said application at the office of the commissioners, within twenty-one days after the date of the *Gazette* in which such notice is issued.

The Lord Chancellor having appointed the Great Seal Patent Office to be the office of the Court of Chancery for the filing of specifications, the said Great Seal Patent Office and the office of the commissioners shall be combined; and the clerk of the patents for the time being shall be the clerk of the commissioners for the purposes of this act.

The office shall be open to the public every day, Christmas-day and Good Friday excepted, from ten to four o'clock.

The charge for office or other copies of documents in the office of the commissioners shall be at the rate of twopence for every ninety words.

(Signed.)

Dated the 1st day of Oct. 1852.

By the Right Honourable, &c.

ORDERED, That there shall be paid to the law officers and to the clerks the following fees:—

By the Person Opposing a Grant of Letters Patent.

To the law officer	£2	12	6
To his clerk	0	12	6
To his clerk for summons	0	5	0

By the Petitioner on the Hearing of the case of Opposition.

To the law officer	£2	12	6
To his clerk	0	12	6
To his clerk for summons	0	5	0

By the Petitioner for the Hearing, previous to the Fiat of the Law Officer allowing a Disclaimer or Memorandum of Alteration in Letters Patent and Specification.

To the law officer	£2	12	6
To his clerk	0	12	6

By the Person Opposing the Allowance of such Disclaimer or Memorandum of Alteration on the Hearing of the Case of Opposition.

To the law officer	£2	12	6
To his clerk	0	12	6

By the Petitioner for the Fiat of the Law Officer allowing a Disclaimer or Memorandum of Alteration in Letters Patent and Specification.

To the law officer	£3	3	0
To his clerk	0	12	6

(Signed.)

Dated the 1st Oct. 1852.

Ordered by the Right Honourable, &c.

All specifications in pursuance of the conditions of letters patent, and all complete specifications accompanying petitions and declarations before grant of letters patent, shall be filed in the Great Seal Patent Office.

All specifications in pursuance of the conditions of letters patent, and all complete specifications accompanying petitions for the grant of letters patent, shall be respectively written bookwise, upon a sheet or sheets of parchment, each of the size of twenty-one inches and a-half in length by fourteen inches and three-fourths of an inch in breadth; the same may be written upon both sides of the sheet, but a margin must be left of one inch and a-half on every side of each sheet.

The drawings accompanying such specifications shall be made upon a sheet or sheets of parchment, each of the size of twenty-one inches and a-half in length by fourteen inches and three-fourths of an inch in breadth, or upon a sheet or sheets of parchment, each of the size of twenty-one inches and a-half in breadth by twenty-nine inches and a-half in length, leaving a margin of one-inch and a half on every side of each sheet.

The charge for office or other copies of documents in the Great Seal Patent Office shall be at the rate of twopence for every ninety words.

(Signed.)

Dated the 1st Oct. 1859.

NOTE.—*It is recommended to applicants and patentees to make their elevation drawings according to the scale of one inch to the foot.*

Second Set of Rules and Regulations.

By the Right Honourable, &c.

The office of the Director of Chancery in Scotland, being the office appointed by the act for the recording of transcripts of letters patent, shall be the office of the commissioners in Edinburgh for the filing of copies for specifications, disclaimers, memoranda of alterations, provisional specifications, and certified duplicates of the register of proprietors.

All such transcripts, copies, and certified duplicates, shall be bound in books, and properly indexed; and shall be open to the inspection of the public at the said office every day from ten to three o'clock.

The charge for office copies of such transcripts, copies, and certified duplicates, recorded and filed in the said office, shall be at the rate of twopence for every ninety words.

The Enrolment Office of the Court of Chancery in Dublin, being the office appointed by the act for the enrolment of transcripts of letters patent, shall be the office of the commissioners in Dublin for the filing of copies for specifications, disclaimers, memoranda of alterations, provisional specifications, and certified duplicates of the register of proprietors.

PATRON. *See* Advowson, vol. i. p. 219.

PAUPER.

I. Settlement of. *See post*, Poor, p. 160.

II. Suing in Formâ Pauperis.

(A) *Who may be Admitted, and When.*[1] (B) *How Admitted.*[2]

All such transcripts, copies, and certified duplicates shall be bound in books, and properly indexed, and shall be open to the inspection of the public at the said Enrolment Office every day, Christmas-day and Good Friday excepted, from ten to three o'clock.

The charge for office copies of such transcript, copies, and certified duplicates, enrolled and filed as aforesaid, shall be at the rate of twopence for every ninety words.

No warrant is to be granted for the sealing of any letters patent which contains two or more distinct substantive inventions.

A provision is to be inserted in all letters patent, in respect whereof a provisional and not a complete specification shall be left on the application for the same; requiring the specification to be filed within six months from the date of the application.

No amendment or alteration, at the instance of the applicant, will be allowed in a provisional specification after the same has been recorded, except for the correction of clerical errors or of omissions made *per incuriam*.

The provisional specification must state distinctly and intelligibly the whole nature of the invention, so that the law officer may be apprised of the improvement, and of the means by which it is to be carried into effect.

The fee to be paid for every duplicate of such letters patent as may have been destroyed or lost shall be one pound.

Where the applicant desires his letters patent to extend to any of the colonies, he must specify in his petition for the same the particular colony or colonies to which he desires it to extend; and when the applicant shall give notice of his intention to proceed with his application for letters patent, the law officer to whom such application is referred shall hear him or his agent upon such extension; and the said law officer shall make his report to the Lord Chancellor thereon. And no warrant for letters patent containing such extension shall be made, unless the Lord Chancellor shall allow the same. (Signed.)

Dated the 15th of Oct. 1852.

Ordered by the Right. Hon. &c.

Every application to the Lord Chancellor against or in relation to the sealing of letters patent shall be by notice, and such notice shall be left at the commissioners' office, and shall contain particulars in writing of the objections to the sealing of such letters patent.

(Signed.)

Dated the 15th of Oct. 1852.

[1] By 11 Hen. 7, c. 12, "every poor person who may have cause of action shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attornies, who, together with the officers of the court, shall act *gratis*. The courts also at common law have power to admit plaintiffs to sue *in formâ pauperis*. *Brunt v. Woodle*, 3 Man. & G. 534. *Parkinson v. Chambers*, 24 L. J. Ch. 47. This may be done before the action is commenced, or at any stage after it shall have commenced. *Casey v. Tomlin*, 7 Mee. & W. 189. *Brant v. Wardell*, 3 Man. & G. 534. *Doe v. Roberts*, 12 L. J. Q. B. 178. Even after verdict and a new trial obtained. *Hall v. Ives*, 2 D. & L. 610. But the order is not retrospective. *Doe v. Owen*, 10 Mee. & W. 514; 2 Dowl. N. S. 426. And a person may be admitted by *prochein amy*. *Briant v. Wagner*, 7 Dowl. 676.

The court will not grant the application in a vexatious action; nor in a second ejectment, when the costs of the prior one are unpaid. *Goodtitle v. Mayo*, Tidd, 9th ed. 98. *Weston v. Withers*, 2 T. R. 511. In civil actions it is confined to plaintiffs. *Anon.* Barnes, 328; but *see* 2 Stra. 1041. But it seems that if a defendant, in an indictment for a misdemeanor, swears that he is not worth 5*l.* in the world beyond his necessary wearing apparel and tools of trade, he may be admitted to sue *in formâ pauperis*, although the indictment was removed from the sessions at his instance. *Reg. v. Nicholson*, 8 Dowl. P. C. 489. So, to an indictment in the King's Bench, a defendant will be allowed to plead *in formâ pauperis* on making an affidavit that he is not worth 5*l.*, &c. *Rex v. Page*, 1 id. 507. *See* also *Attorney-General v. Dummie*, 2 C. & M. 393. In every case the party applying must swear that he is not worth 5*l.* above his wearing apparel and the subject-matter in the cause. R. H. 3 & 4 J. 2, v. 1; Tidd, 9th ed. 98. In courts of equity defendant may appear in *formâ pauperis*.

[2] By r. 121, H. T. 1853, "no person shall be admitted to sue *in formâ pauperis* unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his attorney, that the same case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the court or judge to whom application may be made."

The application will not be granted without certificate of counsel. *Stockdale v. Hansard*, 1 Jur. 355.

The admission was formerly by motion in court, but now on petition to the chief justice or chief baron of the respective courts.

(C) *Effect of Admission.*[1]

(*a*) *When Dispaupered or compelled to pay Costs.*[2]

PAWNBROKER. *See* Bailment, vol. i. p. 98.

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[1] After admission the plaintiff is at liberty to carry on the proceedings without paying fees to the officers of the court, or to his counsel or attorney; but he is liable to the costs up to the time of his admission (*Casey v. Tomlin*, 7 Mee. & W. 182. *Jones v. Peers*, 1 M'Clel. & Y. 282. *Blood v. Lee*, 3 Wils. 24); nor after admission is he in any case obliged to pay costs from that time to the defendant, whether interlocutory or otherwise (*Pratt v. Delarue*, 10 Mee. & W. 509); nor can interlocutory costs be set off. *Gougenheim v. Lane*, 4 Dowl. 482. But this exemption does not extend to amending (*Foster v. Bank of England*, 2 D. & L. 791; 6 Q.B.), or to steps collateral to the cause (*Bell v. London Assurance Co.* 1 P. R. 641), or from paying his at'orney for paper and parchment necessary for carrying on the suit (*Holmes v. Penny*, 9 Ex. 584), but not for copying. (Id.)

By r. 121, H. T. 1853, "no fees shall be payable by a pauper to his counsel or attorney, nor at the offices of the masters or associates, or at judges' chambers, or elsewhere, by reason of a verdict being found for such pauper exceeding 5*l*." And in such case he can only recover from the other side such costs as he has paid, or is legally liable to pay; and therefore fees to counsel or attorney will not be allowed in taxation (*Dewley v. Great Northern Railway Co.* 24 L. J. Q. B. 25), nor can be allowed for witnesses, unless he have actually paid them. *Freeman v. Rosher*, 6 D. & L. 517.

By r. 28, T. T. 1853, "a person admitted to sue *in formâ pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge." *Derby v. Gt. Northern Railway*, 4 E. & B. 341.

Notwithstanding the 11 Hen. 7, c. 12, the attorney may recover his costs out of pocket. *Holmes v. Penney*, 23 L. J. Ex. 132.

[2] If a pauper has no meritorious cause of action, as when it is brought to recover a penalty, the court will discharge the order. *Hawes v. Johnson.* 1 Y. & J. 11.

The only punishment which a court will inflict, and this only in cases where the pauper has been guilty of very gross laches, or other misbehaviour, is to dispauper him (*Winter v. Slow*, 2 Stra. 878, 983. *Doe d. Leppingwell v. Trussell*, 6 East, 505); and when thus dispaupered he is not liable for costs previously incurred. *Sloman v. Aynell*, Fortesc. 320. *Manford v. Pait*, 1 Sid. 261. *Pratt v. Delarue*, 10 Mee. & W. 512.

By r. 122, H. T. 1853, "where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid."

As to when he will be ordered to pay costs under the above rule, see *Facer v. French*, 5 Dowl. 554. *Lindsay v. Edwards*, 2 id. 471. *Hodges v. Toplis*, 15 L. J. C. P. 195. *Gore v. Morphew*, 8 Dowl. P. C. 137. *Bedwell v. Couldstring*, 3 D. & L. 767.

Where a plaintiff, suing *in formâ pauperis*, will be absent from England a considerable time, as eighteen months, the court will compel him to give security for costs, or stay the proceedings until his return. *Foss v. Wagner*, 2 Dowl. P. C. 499.

The court have stayed proceedings in a second action by a pauper, until the costs of a nonsuit in a former action for the same cause were paid. *Weston v. Withers*, 2 T. R. 511. *Goodtitle v. Mayo*, Tidd. 98. *Hoare v. Dickenson*, 18 L. J. C. P. 158. But see *Brittain v. Greenville*, 2 Stra. 1121. *Winter v. Stow, supra. Butler v. Inneys*, 2 Stra. 891. *Blood v. Lee*, 3 Wils. 24.

The costs of an action may be set off against the costs of an action in which the plaintiff sues *in formâ pauperis. O'Hare v. Reeves*, 18 L. J. Q. B. 231.

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XVII. As to Prosecutions, p. 117.

I. Who deemed to be Pawnbrokers.[1]

II. Rates of Interest which a Pawnbroker may Take.[2]

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[1] The 19 & 20 Vic. c. 27, amends the 25 Geo. 3, c. 48; 55 Geo. 3, c. 184 (as to stamp-duty on licenses); and 39 & 40 Geo. 3, c. 99 (relating to pawnbrokers); and by sect. 1 the following shall be deemed to be persons using and exercising the trade or business of a pawnbroker within the meaning of those acts, and in addition to the persons declared by those acts; (that is to say), every person who shall keep a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and shall purchase or receive, or take in, any goods or chattels, and pay or advance, or lend thereon, any sum of money not exceeding 10*l.*, with or under any agreement or understanding, express or implied, or from which, from the nature or character of the dealing, it may reasonably be inferred that such goods or chattels may be afterwards redeemed or repurchased on any terms whatever.

By sect. 2, a person neglecting or omitting to take out the proper license forfeits 50*l.*, which is recoverable by information before a justice of the peace.

[2] By 39 & 40 Geo. 3, c. 99, ss. 2, 3, rates of profit are allowed to pawnbrokers; viz. for every pledge upon which they shall have lent not exceeding 2*s.* 6*d.*, one halfpenny is allowed as interest, &c., for any time during which the said pledge shall remain in pawn, not exceeding one calendar month; and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired. For 5*s.*, one penny; 7*s.* 6*d.*, one penny halfpenny; 10*s.*, twopence; 12*s.* 6*d.*, twopence halfpenny; 15*s.*, threepence; 17*s.* 6*d.*, threepence halfpenny; 1*l.*, fourpence; and so on progressively and in proportion for any sum not exceeding 40*s.* And for any intermediate sum between 2*s.* 6*d.* and 40*s.*, at the rate of fourpence for 20*s.* And for every sum exceeding 40*s.* and not exceeding 42*s.*, eightpence; and for every sum exceeding 42*s.* and not exceeding 10*l.*, at the rate of threepence, and no more, for the loan of every 20*s.* of such money lent by the calendar month; and so in proportion for any fractional sum.

And by sect. 5, a party applying for the redemption of goods pawned within seven days after the expiration of any month, may redeem them without paying anything for the seven days; and applying after seven, and within fourteen days, pays the profit for one month, and a half of another month: but after the expiration of the first fourteen days the pawnbroker may take for the whole month.

The taking a greater rate subjects the pawnbroker to the penalties imposed by sect. 26. *Rex v. Beard*, 12 East, 673.

In *Cowie v. Harris*, M. & M. 141, *Lord Tenterden* held, that if a pawnbroker, upon one contract or bargain of loan, advance more than 10*l.*, viz. 100*l.*, and pretend to divide the same, as if there were ten different loans, and for that purpose gives several tickets dated on different days, the transaction is a mere contrivance to conceal usury, and is illegal and void. And where a pawnbroker advanced 200*l.* to a trader in distress, upon a deposit of silks, and entered the transaction in his books as several advances, each at less than 10*l.*, but amounting in the whole to 200*l.*, the trader having become bankrupt, and his assignee having sued in trover for the silks, the court refused to disturb a verdict found for the plaintiff, upon a direction to the jury to find whether the goods had been deposited upon a contract to pay more than 5*l.* per cent interest. *Tregoning v. Attenborough*, 7 Bing. 97. So, in trover by assignees of a bankrupt against a pawnbroker for certain goods, the defendant pleaded that the bankrupt had pledged the goods with him; to which the plaintiff replied, that it was corruptly agreed between the defendant and the bankrupt, that the defendant should advance him a sum exceeding 10*l.*, to wit, 77*l.*, and that the defendant should give day of payment for a year, redeemable in the meantime, contrary to the statute. It appeared at the trial that the goods were deposited with the defendant to secure more than 10*l.* at one time. It was held that it sufficiently appeared upon the pleadings that the con-

III. Must give Farthings in Change.[1]

IV. Pawns to be Entered in Books, and Duplicates given.[2]

V. Punishment for Improperly Pawning, or Altering Duplicate.[3]

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tract was within the statute, and that this was proved at the trial. *Nickisson v. Trotter*, 3 Mee. & W. 130. *Turquand v. Moseden*, 7 id. 504.

With regard to all loans above 10*l.*, a pawnbroker is in the same position as any other person, and may avail himself of the provisions of the 2 & 3 Vic. c. 37, for the purpose of obtaining a higher rate of interest than 5*l.* per cent. And a loan exceeding 10*l.* by a pawnbroker, upon the security of goods deposited, is not a pawnbroking transaction merely on account of the character of the lender, nor because the agreement entered into reserves interest at threepence a-month for every 20*s.* lent, and stipulated that, in case the goods are sold, the surplus shall be kept by the lender, if not claimed within three years, and that the goods may be delivered up to any party who produces the duplicate of the agreement and pays the debt, although these are the usual stipulations in pawnbroking transactions. *Fitch v. Rochfort*, 1 Hall & T. 255; 1 Mac. & G. 184. *Pennell v. Attenborough*, 4 Q. B. 868; 12 L. J. Q. B. 868. *Turquand v. Moseden, supra.*

The 17 & 18 Vic. c. 90, which abolishes the usury laws, expressly provides that the rate of interest to be taken by law by pawnbrokers is to remain unaffected by the repeal.

[1] By 39 & 40 Geo. 3. c. 99, s. 4, "pawnbrokers must give farthings in change." And where a pledge is redeemed after several months, and the interest according to the terms of the act is a sum which is not an exact number of farthings, the pawnbroker is not entitled to calculate the interest on each month separately, taking upon each month the benefit of the fraction of the farthing. *Reg. v. Goodburn*, 8 Ad. & E. 508.

[2] By 39 & 40 Geo. 3, c. 99, s. 6, "pawns are to be entered in books, and duplicates given by the pawnbroker to the person pawning." For this duplicate the pawnbroker may, by 23 Vic. c. 2, s. 1, charge one halfpenny for things pawned under 10*s.*; and by the before-mentioned statute, for things pawned between 10*s.* and 20*s.*, one penny; between 20*s.* and 5*l.*, twopence; and from 5*l.* and upwards, fourpence and no more.

If the pawnbroker makes the inquiries required by the 39 & 40 Geo. 3, c. 99, s. 6, and delivers to the party pawning a note or memorandum drawn up in accordance with the information thus supplied, he does not lose his right to the pledge or money advanced if that information proves untrue, unless the pawnbroker knew it to be so at the time when he made the note. *Attenborough v. London*, 8 Ex. 661; 17 Jur. 419; 22 L. J. Ex. 251. But a pawnbroker who, in taking pledges, omits to pursue the course required by this section, acquires no property in the pledges, and cannot maintain a lien on them against the assignee of a pawnor. *Fergusson v. Norman*, 5 Bing. N. C. 76.

[3] By 39 & 40 Geo. 3, c. 99, ss. 8–10, "any person fraudulently pawning the goods of another, and convicted before a justice, shall forfeit from 5*l.* to 20*s.*, and also the value of the goods pawned, which is to be ascertained by the justice; and on failure of payment, may be committed to the House of Correction for not more than three months, and be publicly whipped: the forfeitures, when paid, to be applied towards making satisfaction to the party injured, and defraying the costs; the surplus, if any, to the poor of the parish. Any person counterfeiting or altering a duplicate may be seized and taken before a justice, who is to commit the party to the House of Correction for not more than three months, nor less than one."

By sect. 10, "if any person shall offer to pawn any goods, refusing to give a satisfactory account of himself and the goods, or if there shall be a reason to suspect that such goods are stolen, or if any person not entitled shall attempt to redeem goods pawned, he may be taken before a justice, who shall commit him for his farther examination; and if it appear that the goods were stolen or illegally obtained, or that the person offering to redeem the same has no title or pretence to them, the justice is to commit him, to be dealt with according to law, where the nature of the offence shall authorise such commitment by any other law, or otherwise, for not more than three months."

By 7 Geo. 4, c. 16, s. 34, a penalty not exceeding 20*l.* is imposed upon any Chelsea pensioner or other person pawning, and upon any pawnbroker or other person taking in pawn, buying, exchanging, or receiving any clothes, linen stores, or other goods or articles marked "Chelsea Hospital," and not previously crossed out, obliterated or defaced, by branding the said words "Chelsea Hospital" reversed over and upon the said words before marked; and upon any pensioner or other person taking out or defacing the marks, and upon any pawnbroker taking in pawn or secreting clothes, linen, stores, or other goods, knowing the said words to have been taken out, &c.

The 10 Geo. 4, c. 25, s. 40, contains similar provisions as to persons pawning, or taking in pawn, property belonging to Greenwich Hospital, which is marked with an anchor surmounted with a naval crown, with two flags over the crown, and the letter "G" on one side the device, and "H" on the other.

And the 55 Geo. 3, c. 137, s. 2, imposes a

VI. Penalty for Taking in Unfinished Goods.[1]

VII. Pawnbroker must Restore Goods Unlawfully Pawned.[2]

VIII. Penalty for not Delivering up Goods to the Pawnor.[3]

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penalty not exceeding 5*l.* on pawnbrokers taking in pawn property provided for the poor by parish officers, and marked by them.

A person who utters a forged pawnbroker's duplicate may be indicted for uttering a forged accountable receipt of goods under the 11 Geo. 4 and 1 Wm. 4, c. 66, s. 10. *Reg. v. Fitchie*, 1 Dears. & B., C. C. R. 175; 3 Jur. N. S. 419; 26 L. J. M. C. 90.

A party induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A" (a known class of plated spoons), and that the foundations were of the best material. The spoons were plated with silver, but were, to the party's knowledge, of very inferior quality, and not worth the money advanced on them:—*Held*, that obtaining the money by the false representation as to the quality of the spoons was not an indictable offence within the statute against false pretences, as the article by the party delivered to the pawnbroker was the same in specie as he had professed it to be, though of inferior quality to what he had stated. *Reg. v. Boyan*, 1 Dears. & B., C. C. R. 265; 3 Jur. N. S. 620; 26 L. J. M. C. 90. But if a man asks a pawnbroker to advance money on a chain, which he pretends to be silver, but which he knows to be of other metal, and of value inferior to silver, he is guilty of the misdemeanor of attempting to obtain money by false pretences. *Reg. v. Roebuck*, 2 Jur. N. S. 597; 25 L. J. M. C. 101.

[1] By 39 & 40 Geo. 3, c. 99, s. 11, persons buying or taking in pledge unfinished goods, or any linen, &c. entrusted to be washed, shall forfeit double the sum lent, and restore the goods. And the 6 & 7 Vic. c. 40, s. 2, imposes a penalty not exceeding 10*l.* upon persons pawning materials intrusted to them in the woollen, worsted, linen, cotton, flax, mohair, or silk manufacture.

By the 39 & 40 Geo. 3, c. 99, s. 12, a justice may grant a search-warrant, in executing which a peace-officer may break open doors; and the goods, if found, shall be restored to the owner.

[2] By 39 & 40 Geo. 3, s. 13, pawnbrokers refusing to deliver up goods pledged within one year, on tender of money lent and interest, on conviction a justice is empowered to commit the offender till the goods be delivered up or reasonable satisfaction made. This enactment does not, it seems, take away the common-law remedy of trover or detinue, and the real owner is not bound to tender the duplicate. *Peet v. Baxter*, 1 Stark. 472. *Packer v. Gillies*, 2 Camp. 336.

There is no market-overt for pawning. *Hartop v. Hoare*, 3 Atk. 44; 1 Wils. 8. *Parker v. Patrick*, 5 T. R. 175.

By the Metropolitan Police-Court Act (2 & 3 Vic. c. 71, s. 28) any magistrate may order "that any goods unlawfully pawned, pledged, or exchanged, which shall be brought before him, and the ownership of which shall be established to the satisfaction of such magistrate, shall be delivered up to the owner by the party with whom they were so unlawfully pawned, pledged, or exchanged, either without compensation or with compensation to the party in question, as the magistrate may think fit."

[3] 39 & 40 Geo. 3, c. 99, s. 14, imposes a penalty on pawnbrokers who will not deliver up goods to the pawnor; but it seems it would be a good answer to show that the pledgor was not the true owner (*Cheesman v. Exall*, 6 Ex. Rep. 341); and the former is entitled to a reasonable time to ascertain the actual facts. *Vaughan v. Watt*, 6 Mee. & W. 492.

A. summoned a pawnbroker under sect. 14 of 39 & 40 Geo. 3, c. 99, for neglecting or refusing, without reasonable cause, to deliver back a watch pawned for a sum under 10*l.*, which had been stolen in consequence of the pawnbroker's negligence. The justices made an order that, the watch being lost by the negligence of the pawnbroker, and he having failed to show reasonable cause why he should not return the watch, he should forthwith restore it, or pay the value and costs:—*Held*, that the order was bad, as being made under the 14th sect., although a valid order might have been made under the 24th sect.; and as any amendment would prejudice the pawnbroker, by depriving him of his appeal under sect. 35, the court refused to amend, and remitted the case back to the justices. *Shackell v. West*, 1 L. T. (N. S.) 28, Q. B.; 29 L. J. M. C. 45.

Under 39 & 40 Geo. 3, c. 99, s. 24, the injury done to goods pawned by an accidental fire on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect, or wilful misbehaviour of the pawnbroker, does not authorise a justice to give satisfaction to the pawnor, there being no *primâ facie* presumption that such fire is owing to the default, neglect, or misbehaviour of the owner on the premises. *Syred v. Carruthers*, E. B. & E. 469; 27 L. J. Q. B., M. C. 273.

Leaving valuable goods in a pawnbroker's house during the night, without any person on the premises, is not a careful dealing with the goods by the pawnbroker, and will justify justices in making an order on the pawnbroker for satisfaction under sect. 24 of 39 & 40 Geo. 3, c. 29; for, being a bailee for reward, he was bound to take reasonable care of the goods. *Healing v. Cattrell*, 6 Jur. N. S. 96, n.

IX. Duplicates, Ownership of; Loss of, &c.[1]
X. Sale of Forfeited Pledges.[2]
XI. Penalty on Pawnbroker for Taking Goods from Person apparently under Sixteen.[3]
XII Must Exhibit Table of Profits.[4]
XIII. Names of Pawnbrokers to be placed over Door.[5]
XIV. Hours between which Pledges may be Taken.[6]
XV. Pawnbrokers must Produce their Books, when, &c.[7]
XVI. Penalties for Infringing 39 & 40 Geo. 3, c. 99.[8]

[1] By 39 & 40 Geo. 3, c. 99, ss. 15, 16, persons producing notes or memorandums are to be deemed owners, unless on notice to the contrary from the real owner.

Duplicates being lost, the owners, on oath (5 & 6 Wm. 4, c. 62, s. 12, substitutes declarations in lieu of oaths) before a justice, shall be entitled to others from the pawnbroker. Where duplicates are pretended to be lost, and memorandums given, the pawnbroker is entitled to a reasonable time before he gives up the articles. *Vaughan v. Watt*, 6 Mee. & W. 492. As to property in duplicate, see *Turber v. Sturmy*, 5 Jur. N. S. 45. The pawnor retains an interest in the pledge (qualified by the right in the pawnee), which he may sell, and confer a title to the chattel in the payer. *Franklin v. Neate*, 13 Mee. & W. 481; 14 L. J. Ex. 59.

A pawnbroker's duplicate is the subject of larceny (*Reg. v. Morrison*, 1 Bell, C. C. R. 158; 28 L. J. M. C. 210), and is a warrant for the delivery of goods within 7 & 8 G. 4, s. 29, id.

[2] By 39 & 40 Geo. 3, c. 99, ss. 15–20, goods pawned to be sold by public auction after the expiration of one year, being exposed to public view, and catalogues thereof published, and two advertisements of sale by the pawnbroker, to be inserted in some newspaper, two days at least before the first day's sale, under a penalty of 10*l.* to 40*s.* to the owner. Pictures, prints, books, statues, &c. shall be sold only four times in a year. Pawnbrokers receiving notice from the owners of goods before the expiration of a year, shall not dispose of them until after the expiration of three months from the end of the said year. Pawnbrokers to enter an account of sales in their books of all goods pawned for upwards of 10*s.*; and in case of any overplus by the sale, upon demand within three years, it shall be paid to the owner, the necessary costs, principal and interest, being deducted. Persons possessing duplicates, entitled to the inspection of the book on a penalty of 10*l.*, and treble the sum lent on pawn. But a pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner, before sale, tender him the interest and principal due. *Walter v. Smith*, 5 B. & A. 439.

A pawnbroker who sells a chattel as forfeited, merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognisant of any defect of title to it. *Morley v. Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148; 13 Jur. 282.

By 39 & 40 Geo. 3, c. 99, s. 24, pawnbrokers selling goods before the time limited, or injuring them, &c., shall make compensation on penalty of 10*l.* But under this section the justices have no power to commit in default of satisfaction being made where loss not the fault of the pawnbroker (*Ex-parte Cording*, 4 B. & Adol. 198); and they have no jurisdiction unless a charge be substantiated. *Tate v. Chambers*, 3 Nev. & M. 523.

By 39 & 40 Geo. 3, c. 99, pawnbrokers may not themselves purchase goods while in their custody.

[3] By the Metropolitan Police Act (2 & 3 Vic. c. 47, s. 50), "a penalty not exceeding 5*l.* is imposed upon any pawnbroker within the metropolitan police district purchasing or taking goods in pawn of or from any person apparently under the age of 16 years."

[4] By 39 & 40 Geo. 3, c. 99, s. 22, pawnbrokers must place in conspicuous parts, and in legible letters, the rate of profit allowed to be taken, and the prices of the duplicates.

[5] By 39 & 40 Geo. 3, c. 99, s. 23, pawnbrokers' names must be placed over the door on penalty of 10*l.* And if a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to to do that which is illegal and punishable by this act. *Armstrong v. Armstrong*, 3 Mylne & K. 45. So, an agreement between two for carrying on the trade of a pawnbroker, that one only should carry on the business, and his name only be painted over the door and appear on the tickets, the other being permitted to inspect the books, and draw a percentage on his share of the capital out of the profits, is void, as being in contravention of this act. *Gordon v. Howden*, 12 Clark & Fin. 237. *Armstrong v. Lewis*, 2 C. & M. 274; 4 Moore & S. 1.

[6] By 9 & 10 Vic. c. 98, the hours between which pawnbrokers may take pledges are eight a.m. and seven p.m. between the 29th of September and the 25th of March, and between seven a.m. and eight p.m. the rest of the year, excepting on Saturdays and the evenings preceding Good Friday and Christmas-day, and fast and thanksgiving days, when the time is extended to eleven p.m., under a penalty to be levied by distress.

[7] By 39 & 40 Geo. 3, c. 99, s. 26, justices may order pawnbrokers to produce their books, on penalty from 10*l.* to 5*l.*

[8] The 39 & 40 Geo. 3, c. 99, s. 26, im-

XVII. As to Prosecutions.[1]

PAYMENT. *See* Accord and Satisfaction, vol. i. p. 88.

I. By and to Whom Payment may be made, p. 117.

II. Different Modes of Payment, p. 118.

III. Payment of Part of Liquidated Sum no Payment of Whole, though agreed to be taken as such. *See* Accord and Satisfaction, vol. i. p. 97.

IV. Payment by Bill or Note. *See* Bills and Notes, vol. ii. p. 446; and *Stewart v. Cawse*, 28 L. J. C. P. 193. *Bottomley v. Nuttall*, 28 id. p. 110.

V. Of Payments once made being Recovered back. *See* Money Had and Received, vol. v. p 491.

VI. Presumption of Payment, p. 118.

VII. Appropriation of Payments. *See* vol. i. p. 419; and *Thayer v. Lester*, 30 L. J. Ch. 427.

VIII. Payment, how Pleaded, p. 119.

IX. Form of Plea, p. 119.

X. Payment after Action, p. 119.

I. By and to Whom Payment may be made.[2]

poses penalties on pawnbrokers for infringing the act. A common informer may proceed against a pawnbroker for an offence against this section, and is entitled to a moiety of the penalty imposed by sect. 27. *Caswell v. Morgan*, 5 Jur. N. S. 1252; 28 L. J. M. C. 208, Q. B.; S. C. *Reg. v. Morgan*, 7 W. R. 463; El. & El. 809.

If a pawnbroker takes a greater rate of interest than that prescribed in the 2d and 3d sections, it is an offence against the act, and as no particular penalty is provided for that transgression, it falls within the general words of this section. *Rex v. Beard*, 12 East, 673.

[1] The 39 & 40 Geo. 3, c. 99, s. 27, limits the time of prosecuting to twelve months. Information to be made before a justice near the place.

By sect. 28, churchwardens, &c., are to prosecute.

By sect. 29, convicted persons, &c., cannot prosecute or inform against persons, &c.

By sect. 35, an appeal is given.

[2] Where a party is bound to pay a sum of money, it is obligatory upon him to seek the payee and pay it, if he can find him, and the mere readiness to pay is not sufficient (see *Cranley v. Hillary*, 2 M. & S. 120; Co. Litt. 340. *Saward v. Palmer*, 2 Moore, 276); for it is a general rule, that the person to be discharged is bound to do the act which is to exonerate him, and not the other party, unless in the case of rent, in which it suffices if the tenant be ready to pay on the land on the day of payment. *See* Bac. Abr. Rent.

If one of several plaintiffs, or a nominal plaintiff suing for another person beneficially interested, fraudulently and by collusion with the defendant give him a receipt for the debt, and yet no money pass between them, the court will, on application, preclude the defendant from availing himself of such a receipt. *See* Tidd, 7th ed. 705; id. 8th ed. 730, 741; 1 Chitty's Rep. 321; 1 Camp. 392); and if one of two plaintiffs fraudulently give a receipt without consideration, this shall not, even upon the trial, affect his co-plaintiff. 3 B. & C. 421; 5 D. & R. 290; S. C.

Payment to the plaintiff's attorney is as effectual as payment to the plaintiff himself. 1 Esp. 115; 1 Bl. Rep. 85. But payment to an agent of plaintiff's attorney is not. *Yates v. Frickleton*, 9 Ves. 234. So is payment to an agent in the ordinary course of business, although known to be an agent, if such payment be made before the countermand of the principal. 1 Camp. 444; Cowp. 251; 11 East, 36; 2 Camp. 24. But an agent cannot receive a bill of exchange of discharge unless authorised so to do. 2 Ld. Raym. 728; Salk. 442.

A creditor may release his debtor by taking the security of the agent of the latter, and giving him a receipt, and inducing the principal (the debtor) to treat the demand as satisfied, whereby he is injured, by dealing differently with his agent. 3 East, 147.

Payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is good payment to the merchant, though it turns out that the person was

never employed by him. *Barrett v. Deere*, 1 M. & M. 200.

If one allow another to trade in his own name, and as carrying on the business for himself, a payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade the person so carrying it on may recover, unless the person for whom it is carried on assert his own right to the sum due. *Gardener v. Davis*, 2 C. & P. 49.

Where an auctioneer is employed to conduct a sale, his authority to receive payment depends, in the absence of proof of a general authority, upon the conditions of the sale. *Sykes v. Giles*, 5 Mee. & W. 645, 651. And payment to a broker will not in general bind his principal. *Jackson v. Jacob*, 5 Scott, 79, 86. *Mynn v. Jolliffe*, 1 M. & Rob. 326. But it may do so by the custom of the trade, or because such payment is warranted by the course of dealing between the parties. *Baring v. Corrie*, 2 B. & A. 137; Russell on Factors, 68. So, possession by an agent of a mortgage-deed, and an authority by him to receive payment of the interest reserved thereby, do not *per se* authorise him to receive payment of the principal. *Wilkinson v. Chandlish*, 5 Ex. 91. But payment to an agent will not bind the principal, unless it is made in the usual course of business. *Sanderson v. Bell*, 2 C. & M. 304. *Kaye v. Brett*, 5 Ex. 269, 274.

Payment to one of several partners is payment to the firm. *Porter v. Taylor*, 6 M. & S. 156. And so payment is good to one of several trustees (*Husband v. Davis*, 10 C. B. 645; 20 L. J. C. P. 118. *Wallace v. Kelsall*, 7 Mee. & W. 272); or executors (*Case v. Read*, 3 Atk. 695); or assignees of a bankrupt. *Smith v. Jamesons*, 1 Esp. 114. *Bristow v. Eastman*, id. 174.

Payment to an administrator before the will is found (*Pond v. Underwood*, 2 Ld. Raym. 1210), or to a person who has obtained probate of a forged will (*Allen v. Dundas*, 3 T. R. 125), is a good defence to an action by the executor.

Where money is paid into a bank in which several persons are jointly interested, such persons not being a firm, the banker cannot pay one without the consent of the others. *Stone v. Marsh*, R. & M. 369. *Innes v. Stephenson*, 1 M. & R. 147. *See* Grant's *Law of Bankers*, 138. And payment by a banker to the holder of a forged note is no payment to the customer. *Roberts v. Tucker*, 16 Q. B. 560.

[1] A cheque (see *ante*, vol. ii. p. 119) operates as payment, until it has been presented and refused. *Pearce v. Davis*, 1 M. & Rob. 365, 366. *Egg v. Barnett*, 3 Esp. 197. *Mountford v. Harper*, 16 L. J. Ex. 184. But the mere fact of the plaintiff having in his hands, at the time the action was brought, a cheque drawn in his favour by the defendant, on account of the debt sued for, will not operate as payment of that debt, unless the cheque be unconditional. *Hough v. May*, 4 Ad. & E. 954.

If money be sent by post, in a letter properly directed, to the creditor (*Walter v. Haynes*, R. & M. 149), and be lost, the debtor is discharged, if he were directed so to transmit the money; or if that were the usual course between the parties. *Kington v. Kington*, 11 Mee. & W. 233. *Warwick v. Noakes*, Peake, 67. *Hawkins v. Rutt*, id. 186. Remitting half bank-notes is not payment. *Smith v. Mandy*, 6 Jur. N. S. 977; 29 L. J. Q. B. 172.

A debtor is not discharged by the delivery of the letter to a bellman in the street, or by transmission through the post of a letter addressed to the creditor at some large town, without any specification of the street or number of the house in which the latter resides, unless it be shown that the letter and money came safe to hand, or that the address was given by the creditor himself. *Warwick v. Noakes, supra.* And where the defendant, in answer to a letter demanding payment, sent a post-office order to the plaintiff, in which the latter was described by a wrong Christian name, and the plaintiff kept the order, but did not cash it, although he was informed at the post-office that he might receive the money at any time, by signing it in the name of the payee; it was held that this was no evidence of payment. *Gordon v. Strange*, 1 Ex. 477.

An actual transfer of the amount of a debt in a banker's books, from the account of the debtor to that of the creditor, with the assent of both, is equivalent to payment. *Eyles v. Ellis*, 4 Bing. 112. But where a debtor directed his bankers, who had a balance in his favour in their hands, to place a certain sum to the credit of his creditor, who was a customer of and debtor to the banker, so *as to make the same as a bill at one month*, and the bankers consented to this, and communicated their assent to the creditor, who also acquiesced; it was held that this did not amount to a payment, and that, on the bankruptcy of the bankers before the expiration of the time when credit was to have been given, the creditor might sue for his demand. *Pedder v. Watt*, Peake, Add. Ca. 41; S. C. 2 Chit. 619.

Money of a third party coming to a plaintiff's hands applied by arrangement to the payment of a debt, is a good payment. *Hills v. Mesnard*, 10 Q.B. 266, 271. And by agreement between the parties, payment may be made in goods as well as in money. *Cannan v. Wood*, 2 Mee. & W. 465, 467. *Hooper v. Stevens*, 4 Ad. & E. 71. *Hart v. Nash*, 2 C., M. & R. 337. And see *Blair v. Ormond*, 20 L. J. Q. B. 444, 452.

[2] Any great lapse of time without demand of payment, or acknowledgment of the debt, affords presumption of payment having been made. *Cooper v. Turner*, 2 Stark. 497.

VIII. Payment, how Pleaded.[1]

IX. Form of Plea.[2]

X. Payment after Action.[3]

PAYMENT into Court.

I. In what Actions by C. L. P. Act, 1852, s. 70, p. 120.

II. „ Replevin by C. L. P. Act, 1860, s. 23, p. 120.

III. On Money Bonds, and for Detainer by C. L. P. Act, 1860, s. 25, p. 120.

Where servants are in the habit of being paid weekly or monthly, and supporting themselves by their week's or month's wages, the presumption is in favour of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any demand of payment on the part of the workman, or any admission or acknowledgment on the part of the employer, of arrears being due. *Lucas v. Novosilieski*, 1 Esp. 295. And so when bills, proved to have been once in circulation after having been accepted, get back again into the hands of the acceptor, and are produced by him, the presumption is that he has got them back by having paid them. *Gibbon v. Featherstonhaugh*, 1 Stark. 225. But circulation after acceptance must be proved. *Pfiel v. Vanbatenberg*, 2 Camp. 439.

Receipts on the bills, to be evidence of payment, must be shown to be in the handwriting of the plaintiff, or some other person authorised to receive payment of the bills. (Id.) But see *Phillips v. Warren*, 14 Mee. & W. 380. *See* also *Evans v. Birch*, 3 Camp. 10. *Topham v. Proddick*, 1 Taunt. 572.

[1] By r. 14, T. T. 1853, "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." And this rule is so strictly followed that, in an action on a bill of exchange, payment cannot be given in evidence without a plea, though only to show that no interest is due. *Adams v. Palk*, 3 Q. B. 2. *Speck v. Phillips*, 5 Mee. & W. 279, 282.

By r. 13, however, "payment need not be pleaded when credited in the particulars of demand, except where the plaintiff, seeking to recover a balance, does not state the particular sums credited."

When payment is pleaded generally to an *indebitatus* count, it means a payment to any amount which the plaintiff can prove; and upon issue joined on the plea, the plaintiff is entitled to recover for any excess which he can establish above the payments proved, up to the full amount of his claim. *Freeman v. Crafts*, 4 Mee. & W. 4. *James v. Lingham*, 5 Bing. N. C. 553. *Alston v. Mills*, 9 Ad. & E. 248. *Moses v. Levy*, 4 Q. B. 213.

Where a transaction is for ready money, and the article bought is paid for *eo instante* on the purchase being made, no debt accrues, and, therefore, there is no occasion to plead payment. *Bussey v. Barnett*, 9 Mee. & W. 312. *Wood v. Bletcher*, 4 W. R. Ex. 566. *Littlechild v. Banks*, 7 Q. B. 739. *Timmins v. Gibbons*, 18 Q. B. 722, 726. So, where there has been a prepayment, or where an antecedent debt from the defendant to the plaintiff was by agreement taken as part of the price of the goods sold, or work done, such defence may be proved under the general issue. *Smith v. Winter*, 12 C. B. 487.

By the C. L. P. Act, 1852, s. 75, "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved, shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered." And see *Treherne v. Gardner*, 8 El. & Bl. 161; 26 L. J. Q. B. 259.

If there be a doubt as to whether a transaction amounts to a payment or a set-off (*Fidgett v. Penny*, 1 C., M. & R. 108. *Thomas v. Cross*, 7 Ex. 728), it is better to plead both pleas, for evidence under the one is not admissible under the other. *Cooper v. Morecraft*, 3 Mee. & W. 500.

The court will not compel a defendant to give particulars of his payments. *Phipps v. Sothern*, 8 Dowl. 208. *Ireland v. Thompson*, 4 Bing. N. C. 716.

[2] The form of plea of payment, as given by the C. L. P. Act, 1852, sched. B, 40, is as follows:—"That, before action, he satisfied and discharged the plaintiff's claim by payment." See *Page v. Meek*, 32 L. J. Q. B. 4.

[3] Payment after action brought is not a complete defence, unless made in satisfaction of all damages and costs of the action, as well as of the debt. *Goodwin v. Cremer*, 18 Q. B. 757. *Nosotti v. Page*, 10 C. B. 643. *Thorne v. Bast*, 12 Q. B. 808. *Cook v. Hopewell*, 11 Ex. 555; 25 L. J. Ex. 71. But if pleaded only to the debt, it is a good plea to so much as it purports to be pleaded. *Henry v. Earl*, 8 Mee. & W. 228.

IV. No Rule or Judge's Order requisite, p. 120.
V. Form of Plea, p. 120.
VI. How Plaintiff may Reply, p. 121.
VII. Plaintiff entitled to the Money in any Event, p. 121.
VIII. Effect of Paying Money into Court as an Admission, p. 121.
(A) *To Common Counts*, p. 121.
(B) „ *Special Counts*, p. 121.
IX. Particulars will not be Granted, p. 122.

I. In what Actions by C. L. P. Act, 1852, s. 70.[1]
II. „ Replevin by C. L. P. Act, 1860, s. 23.[2]
III. On Money Bonds, and for Detainer by C. L. P. Act, 1860, s. 25.[3]
IV. No Rule or Judge's Order requisite.[4]
V. Form of Plea.[5]

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[1] By the C. L. P. Act, 1852, s. 70, "it shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), and, by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends."

By this section it is provided that nothing therein contained is to affect the 6 & 7 Vic. c. 96, which gives power to newspapers, in cases of libel, to pay money into court. *See* Libel, vol. v. p. 373.

The exception in this enactment does not extend to an action for an assault and battery on the plaintiff's son. *Newton v. Holford*, 6 Q. B. 921; 2 D. & L. 554; 14 L. J. Q. B. 9. When to abide event, bankruptcy supervening, *Murray v. Arnold*, 32 L. J. Q. B. 11.

[2] By the C. L. P. Act, 1860, s. 23, "the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions."

[3] By id. s. 25, "in any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case, to the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of 'The Common-Law Procedure Act, 1852,' and the like proceedings may be had and taken thereupon as to costs and otherwise." But in actions on bonds within 8 & 9 Wm. 3, c. 11, payment into court cannot be pleaded, the plaintiff being entitled to judgment on the bond as security for further breaches. *Bishop of London v. M'Neil*, 9 Ex. 490. *See* Bond, vol. ii. p. 525.

[4] By the C. L. P. 1852, s. 72, "no rule or judge's order to pay money into court shall be necessary, except in the case of one or more of several defendants, but money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff, or to his attorney, upon a written authority from the plaintiff, on demand."

[5] By id. s. 71, when money is paid into court, such payment shall be pleaded in all cases, as near as may be, *mutatis mutandis*, as follows:—

"The defendant, by his attorney [*or* in person, *and if the plea be pleaded to part of the declaration, say,* as to the count of the declaration, *or* as to £ parcel of the money claimed, *or* as to the residue of the money claimed, *or as the case may be*] brings into court the sum of £ and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to."

Care must be taken to pay into court a sum sufficient to satisfy the full claim to damages to the time of plea pleaded. *Kidd v. Walker*, 2 B. & Adol. 705.

The defendant will not, in general, be ordered to deliver particulars of the items to which the money is paid. *Thames Ironworks Co. v. Royal Mail Steam-packet Co.* 10 C. B. (N. S.) 375; 30 L. J. C. P. 265. But see *Baxendale v. Great Western Railway Co.* 6 H. & N. 95; 30 L. J. Ex. 63.

One plea of payment into court may be pleaded to all the counts collectively, or to

VI. How Plaintiff may Reply.[1]

VII. Plaintiff entitled to the Money in any Event.[2]

VIII. Effect of Paying Money into Court as an Admission.

(A) *In Common Counts.*[3]

(B) „ *Special Counts.*[4]

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one count containing several breaches, without stating how much of the payment is applied to each count or breach. *Jourdain v. Johnson*, 2 C., M. & R. 564. *Marshall v. Whiteside*, 1 Mee. & W. 188. See *Cresswell v. Hedge*, 31 L. J. Ex. 497; 8 Jur. 767. It cannot be pleaded with other pleas directed to the same cause of action. *Gales v. Holland*, 7 E. & B. 336; 4 Jur. N. S. 22.

One of several defendants cannot pay money into court without leave of the court or a judge, and the usual terms on allowing him to do so are, that he shall pay the costs as against all the defendants if the money is taken out of court in satisfaction. *See* C. L. P. Act, 1852, ss. 70, 72. *Kay v. Panchiman*, 2 W. Black. 1029.

[1] By the C. L. P. Act, s. 73, "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same, by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and to sign judgment for his costs of suit so taxed; or the plaintiff may reply, that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."

Under the issue of damages *ultra*, the defendant cannot give evidence of any matter which might have been pleaded as a defence to the cause of action admitted by payment into court. He is restricted to such evidence in reduction of damages as is admissible for that purpose under the general issue. *Goldy v. Goldy*, 26 L. J. Ex. 29. *Speck v. Phillips*, 5 Mee. & W. 279. *Robinson v. Harman*, 18 L. J. Ex. 202.

By r. 12, H. T. 1853, "when money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, is entitled to the costs of the cause in respect of that part of his claim so satisfied up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for Plea,' but not before." *Harold v. Smith*, 29 L. J. Ex. 141. See *Sparrow v. Paris*, 7 H. & N. 594; 31 L. J. Ex. 137.

[2] The plaintiff, whether he accepts the money paid into court in full satisfaction or not, may immediately take it out of court; and he is entitled to it, though he be nonsuited (*Elliott v. Callow*, 2 Salk. 597); and though defendant die during the action. *Knapton v. Drew*, Pr. Reg. 251. *Palmer v. Reippenstein*, 1 Man. & G. 94. And if the plaintiff dies, the executors will be entitled to it (*Crockray v. Martin*, Barnes, 279); or the plaintiff become lunatic. *Gliddon v. Treble*, 9 C. B. (N. S.) 367; 30 L. J. C. P. 160. But not so if money paid in under a mistake. Chit. Arch. Pr. 1306.

[3] When pleaded to common *indebitatus* counts, it admits that defendant was indebted on the causes of action, as described in those counts, to the extent of the money paid in on them (*Kingham v. Robins*, 5 Mee. & W. 94); but no further, though the plaintiff prove a single contract exceeding in value the amount paid into court (*Stevenson v. Corporation of Berwick*, 1 Q. B. 154. *Goff v. Harris*, 5 Man. & G. 573). It admits also the validity of every *species* of claim mentioned in the particulars accompanying the counts on which it is paid in, and that *some* damages are due on *each*. *Elgar v. Watson*, 1 Car. & M. 494. And it admits the plaintiff's character in which he sues (*Lipscombe v. Holmes*, 2 Camp. 441), and his sole right to the money sued for (*Walker v. Rowson*, 1 M. & Rob. 250; S. C. 5 C. & P. 486); and that the defendants are properly sued jointly (*Ravenscroft v. Wise*, 1 C., M. & R. 203), if the plea be pleaded by all the defendants (*Stapleton v. Nowel*, 6 Mee. & W. 9; S. C. 8 Dowl. 196); *aliter* if pleaded by only one defendant (*Elliott v. Morgan*, 7 C. & P. 334). It also admits that the action is not brought too soon (*Harrison v. Douglas*, 3 Ad. & E. 396): but all these admissions only operate to the extent of the amount paid into court. *Archer v. English*, 1 Man. & G. 873.

[4] When pleaded to special counts, it admits the contract as laid, and, therefore, that it is properly stamped, &c. (*Israel v. Benjamin*, 3 Camp. 40); and that nominal damages are due on it (*Archer v. English*, *supra*. *M'Cance v. London and North-Western Railway Co.* 31 L. J. Ex. 65), and this the defendant cannot give evidence to controvert (*Lloyd v. Walkey*, 9 C. & P. 771), still less will he be allowed to give evidence of facts under this plea, even in mitigation of damages, which, if pleaded before, would have been a bar to the action (*Speck v. Phillips*, 5 Mee. & W. 279; S. C. 7 Dowl. 470); and it admits all the material, but not the immaterial, averments in the declaration, as sums of money laid under a videlicet. *Cooper v. Blick*, 2 Q. B. 915.

In use and occupation it admits plaintiff's title, and his sole title. *Dolby v. Iles*, 11 Ad. & E. 335. And see *Atwood v. Taylor*, 1 Man. & G. 280. If paid in on a promissory

IX. Particulars will not be Granted.[1]

PEACE, Articles of the. *See post*, Sureties to keep the Peace.

PEDIGREE. *See* Evidence, vol. iv. p. 317.

PEER.[2] *See* Parliament, *ante*, p. 48.

PENAL Statutes. *See post*, Statutes, Actions on.

PENALTY. *See* Bond, vol. ii. p. 509; Liquidated Damages, vol. v. p. 401; *post*, Statutes, Actions on.

PENDENCY of Suit. *See* Abatement, vol. i. p. 23.

PERFORMANCE. *See* Bond, vol. ii. p. 504; Condition, vol. iii. pp. 170, 171, 172; Covenant, vol. iii. p. 521.

PERJURY.

I. Definition of, p. 123.

II. Who may be Guilty of, p. 123.

III. Of the Requisites to Constitute, p. 123.

(A) *It must be False*, p. 123.

(B) „ *taken in a Judicial Proceeding*, p. 123.

(C) „ *before a Competent Authority*, p. 123.

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note payable by instalments, it only admits the amount of instalments as due, which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others. *Reid v. Dickons*, 5 B. & Ad. 499. *Jourdain v. Johnson*, 2 C., M. & R. 566.

[1] On a plea of payment into court generally, particulars showing the appropriation will not be ordered. *Baxendale v. Great Western Railway Co.* 6 H. & N. 95; 30 L.J. Ex. 63.

[2] Peers, besides their capacity as members of parliament, and as hereditary counsellors of the Crown, have certain general privileges which are attached to their persons in their individual character. As in criminal cases, that is to say, on indictments for treason and felony, and misprision thereof, a nobleman shall be tried by his peers; and the stat. 20 Hen. 6. c. 9, declares the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm (*see* Moore, 769; 2 Inst. 50; 6 Rep. 52; Staundf. P. C. 152); but in all misdemeanors, as libels, riots, perjuries, conspiracies, &c., he is to be tried like a commoner, by a jury. 3 Inst. 30; 2 Hawk. P. C. c. 44, s. 3.

The peers of Scotland and Ireland had no privilege in this kingdom before the Union; but by clauses in the respective articles of Union, the elected peers have all the privileges of peers in parliament; and all the rest of the peers of Scotland and Ireland (with the exception of those Irish peers who are members of the House of Commons) are entitled to all the privileges of the peerage of England, excepting only that of sitting and voting in parliament. *See* 8 Ves. 601; 4 Taunt. 668. The right of trial by their peers, it seems now generally admitted, does not extend to bishops, though the reason given for this exception, viz. that they are not ennobled in blood, and consequently not peers with the nobility, does not seem sufficiently satisfactory. *See* 1 Bl. Com. 401; Sulliv. Lect. 21, 202. A peer or peeress (either in her own right or by marriage) cannot be arrested in civil cases. Finch, L. 355; 1 Vent. 298. They have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer sitting in judgment gives not his verdict upon oath, like an ordinary juryman, but upon his honour. *See* 2 Inst. 49. He answers to bills in Chancery upon his honour, and not upon his oath (*see* 1 P. Wms. 146); which, however, places him in the same situation as another defendant answering on oath (18 Ves. 469): but when he is examined as a witness, either in civil or criminal cases or on interrogatories in Chancery, he must be sworn, whether in inferior courts or in the high court of parliament; for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim that in *judicio non creditur nisi juratis*. *See* Salk. 512; Cro. Car. 64. A peer, also, cannot become bail. *Burton v. Atherton*, 2 Marsh. 232; *et vide* 1 Ves. & B. 208. A countess and a baroness are peers of the realm, and shall be tried by their peers, &c.; but, in respect of their sex, they cannot take a seat in parliament, nor sit in judgment on a peer. Neither can they now communicate their dignity to their husbands. *See* Watk. Gilb. Ten. 357; Attachment, vol. i. p. 575; Bail, vol. ii. p. 85; Outlawry, *ante*, p. 26; Parliament, id. p. 48; *post*, Summons, Writ of.

(D) *It must be Intentional*, p. 124.
(E) „ *Material to the Matter in Question*, p. 124.
IV. Indictment for Perjury; Form of, p. 124.
V. Practice as to Trial of, p. 124.
VI. Evidence of, p. 125.
VII. Certificate of Trial of Indictment on which Perjury was committed, p. 126.
VIII. Punishment for Perjury, p. 126.
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(A) *What it is*, p. 127.
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(D) *Punishment for*, p. 127.

I. Definition of.[1]
II. Who may be Guilty of.[2]
III. Of the Requisites to Constitute.
(A) *It must be False.*[3]
(B) „ *taken in a Judicial Proceeding.*[4]
(C) „ *before a Competent Authority.*[5]

[1] Perjury is a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully and falsely in a matter material to the issue or point in question.

An oath or affirmation to amount to perjury must be taken in a judicial proceeding before a competent jurisdiction. It must also be material to the question, depending and false. *R. v. Aylett*, 1 T. R. 69.

[2] All persons, except idiots, lunatics, and other persons who labour under similar disabilities, may be guilty of this offence; hence an infant may. *See* Sid. 253; 3 Bac. Ab. 573. And the false affirmation of a Quaker, Moravian, or Separatist, or of a person who shall have been a Quaker or a Moravian, or of any person who by law is authorised to make an affirmation or declaration in lieu of an oath, is punishable in the same manner as perjury. *See* 22 Geo. 2, c. 46, s. 36; 9 Geo. 4, c. 32, s. 1; 3 & 4 Wm. 4, c. 49; id. c. 82; 1 & 2 Vic. c. 77; 24 & 25 Vic. c. 66. *See* 5 & 6 Wm. 4, c. 62, as to false declarations in lieu of oaths; 8 & 9 Vic. c. 48, as to declarations in lieu of oaths before Commissioners in Bankruptcy. *See* Oath, *ante*, p. 19.

[3] *The oath or affirmation taken must be false, or if true, the defendant must not have known it to be so. R. v. Aylett, supra;* 1 Hawk. c. 69, s. 6; 3 Ins. 166; Hetley, 97. And a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false. *R. v. Pedley*, 1 Leach, 327; 1 Hawk. c. 69, s. 7.

[4] It must be taken *in a judicial proceeding* (*R. v. Aylett, supra*), as by a witness at a trial, or in a court of equity (5 Mod. 348. *R. v. Thoms*, 1 Leach, C. L. 50); or in an affidavit in any of the courts of Westminster and Chancery (5 Mod. 348; 1 Show. 335, 397; 1 Rol. Rep. 79); or on a commission for the examination of witnesses (Cro. Car. 99; 1 B. & P. 248); or upon an examination before a magistrate, or in a judicial proceeding in a court baron (5 Mod. 348); or any other court, whether of record or not. 1 Hawk. 69, s. 3. And though it was formerly held that a false oath taken before a surrogate, with a view to marriage, is not perjury (*Rex v. Forster*, 1 Russ. & Ry. 459; and see *Rex v. Alexander*, 1 Leach, C. L. 63. *Rex v. Woodman*, id. 64), yet now, by 6 & 7 Wm. 4, c. 85, s. 38, such false declaration is made subject to the penalties of perjury; and perjury may be assigned upon the oath against simony. *Rex v. Lewis*, 1 Stra. 70. But the oath must be taken in a court having jurisdiction. Hence an oath taken in the Court of Requests, in a matter concerning lands, is not indictable. *Buxton v. Gouch*, 3 Salk. 269. *R. v. Crossley*, 7 T. R. 315; 1 Hawk. 69, ss. 3, 4. *See* Affiliation, vol. i. p. 256; Arbitration, id. p. 443; Bankruptcy, vol. ii. p. 222. A master extraordinary in Chancery has no power to administer an oath in a suit in the Court of Admiralty. *R. v. Stone*, Dear. C. C. 251.

[5] It must be taken *before competent authority* (*R. v. Aylett, supra*); and not

(D) *It must be Intentional.*[1]

(E) „ *Material to the Matter in Question.*[2]

IV. Indictment for Perjury; Form of.[3]

V. Practice as to Trial of.[4]

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merely colourable. *R. v. Verelst*, 3 Camp. 432. He must have competent powers to administer the oath. And, therefore, no false swearing before individuals acting merely in a private capacity, or before officers who have no legal jurisdiction to administer the particular oath in question, will amount to the offence of perjury. 3 Inst. 166; Cro. C. C. 7th ed. 626.

It seems, indeed, that he who administers an oath without warrant of law is punishable, though he may happen to be a magistrate. *See* 4 Bl. Com. 137; Wood's Inst. 433.

[1] The false oath must be taken deliberately and intentionally, for, if done from inadvertence or mistake, it cannot amount to perjury. 1 Hawk. c. 69, s. 2; 1 Sid. 419; Com. Dig. Jus. Peace, b. 102.

[2] The matter sworn to must be material, for if it be of no importance, though false, it is not perjury. It is, however, sufficient if it effect the ultimate decision; hence, to swear falsely to the character or credit of a witness is sufficiently material (*Rex v. Griepe*, 1 Ld. Raym. 256. *R. v. Gibbons*, 31 L. J. M. C. 98); and it is not necessary that the evidence be sufficient alone for the plaintiff to recover on. *Rex v. Rhodes*, 2 Ld. Raym. 887. It always lies on the prosecutor to prove the materiality (Hawk. b. 1, c. 69, s. 8, n. 3), which is a question for the jury. *R. v. Lavey*, 3 C. & Kir. 26.

[3] By 14 & 15 Vic. c. 100, s. 20, "in every indictment for perjury, or for unlawfully, wilfully, falsely or fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant; and by what court, or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, affirmation, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed."

The indictment must show a proceeding pending so as to give jurisdiction to the person administering the oath. *R. v. Dowlin*, 5 T. R. 318. *R. v. Pearson*, 8 C. & P. 119. *R. v. Kasps*, 6 Ad. & E. 198. *R. v. Bishop*, C. & M. 302. *Overton v. Reg.* 4 Q. B. 83. And generally it must expressly state the requisites to constitute perjury; considered *supra*. *R. v. Nicholl*, 1 B. & Adol. 21. *R. v. Stevens*, 5 B. & C. 246. It must also state that the defendant was duly sworn. *R. v. M'Arthur*, Peake, 115. But in an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken before the sheriffs, though in fact the trial was had before the secondary. *R. v. Schlesinger*, 10 Q. B. 670. The oath must be set out, together with such innuendos as may be necessary to render the matter of it intelligible, and to connect it clearly with the assignments of perjury subsequently set out. *R. v. Verrier*, 4 Per. & D. 161. *R. v. Aylett*, 1 T. R. 70. But an innuendo cannot add to or extend the sense, and where improperly introduced it is fatal, and cannot be rejected (*R. v. Griepe*, 1 Ld. Raym. 256; 2 Salk. 513), unless it, together with the matter introduced by it, are immaterial. *Roberts v. Camden*, 9 East, 95. In assigning the perjury, the indictment must directly negative the oath, or some material part of it. *R. v. Perrott*, 2 M. & S. 379. *R. v. Harris*, 8 D. & R. 578. *R. v. Wheatland*, 8 C. & P. 238. *See* Arch. C. P. 706; Indictment, vol. v. p. 105.

[4] It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil action, until that action is determined, unless the civil action be postponed by the court, that the indictment may be tried first. *R. v. Ashburn*, 8 C. & P. 50. The offence of perjury, and subornation of perjury, &c. are not triable at any quarter sessions (*see* 5 & 6 Vic. c. 38, s. 1); nor, as it seems, had justices of the peace cognisance of the offence of perjury at common law, so as to apprehend or commit a person charged with it, until the stat. 11 & 12 Vic. c. 42, s. 1, gave them power to grant a warrant for any indictable offence. *Reg. v. Bartlett*, 1 D. & L. 95; 2 Hawk. c. 8, s. 64; 1 B. & B. 548; 3 Gale & D. 210.

Where the defendant, on a charge of perjury, had neither been in custody nor on recognisance, nor given notice to the prosecutor:—*Held*, that the latter could not be compelled to try at the same assizes at which the bill was found. *Reg. v. Trenfield*, 9 C. & P. 284.

An indictment for perjury was found at the spring assizes of 1838, and at the summer assizes of 1838 the defendant entered it for trial as a traverse, he having been on bail more than twenty days. The defendant had not given the prosecutor any notice of trial, and when the case was called on the counsel for the prosecution stated that the prosecutor was not prepared to try, as he had received no notice:—*Held*, that although the defendant had been on bail more

VI. Evidence of.[1]

than twenty days, he still could not force the prosecutor to try, as he had given him no notice of trial. The case therefore stood over to the next assizes. *Reg. v. Minshall*, 8 C. & P. 576.

The prosecutor in a case of perjury, who has included his name in a subpœna, is entitled to his costs as prosecutor, though he is bound over to prosecute by a magistrate, and he is not limited to his expenses incurred as a witness only. *Rex v. Sheering*, 7 id. 440.

A judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common law, found at the quarter sessions and removed by *certiorari* into the Queen's Bench, an indictment so found being void. *Rex v. Haynes*, 1 R. & M. 298.

[1] Some one or more of the assignments of perjury upon a part of the matter sworn which was material, must be proved by two witnesses, or by one witness, and proof of other material and relevant facts confirming his testimony. *R. v. Boulton*, 2 Den. C. C. 396; 3 C. & Kir. 236. *R. v. Webster*, 1 F. & F. 515.

On an indictment for perjury, committed on the trial of a cause, it is sufficient to go to the jury if a witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *Rex v. Rowley*, 1 Moo. C. C. 111. So, to support an indictment for perjury committed on a trial at the quarter sessions, three witnesses, who heard the party examined, stated what he swore on the trial, and the party was convicted, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave. *Rex v. Munton*, 3 C. & P. 498. Where the perjury was assigned on matters deposed to in reply to the evidence of a defendant in the original proceeding, who had been acquitted and examined, but the indictment did not state the acquittal, nor did it in fact appear:— *Held*, that it was sufficient to show the fact that he was examined. *Rex v. Browne*, 1 M. & M. 315; S. C. 3 C. & P. 572.

The matter sworn must be proved (*R. v. Jones*, Peake, 37, 38), and substantially as set out. *R. v. Leefe*, 2 Camp. 134. Any variance in substance between the indictment and evidence in this respect will be fatal. *R. v. Taylor*, 1 id. 404. So if it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will be fatal. *R. v. M'Arthur*, Peake, 155. If the perjury was in court, the affidavit, &c. must be produced (*R. v. Hudson*, 1 F. & F. 56), unless on proof of its loss or destruction, in which case secondary evidence may be given. *R. v. Milnes*, id. 10.

It is sufficient to prove, in the first instance, that the person before whom the oath was taken acted in the capacity of an officer, to raise a presumption that he had competent authority to receive it; for it is the general presumption of law that an individual acting in a public capacity is duly authorised so to do (3 Camp. 433; 4 T. R. 366); but the defendant is at liberty to rebut this *primâ facie* inference by positive testimony that the appointment was defective, and if he succeed in so doing he will be entitled to an acquittal. 3 Camp. 345. See *ante*, vol. v. p. 24.

In an indictment for perjury, in answer to a bill in Chancery, it is sufficient proof of identity of the person, or the party who actually took the oath in question, if his handwriting be proved, as well as that of the master before whom he was sworn. *R. v. Morris*, 1 Leach, C. L. 50, 51. But proof of the defendant's signature, or some other evidence of identity, is indispensable. *R. v. Brady*, id. 327. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or copy of it (*R. v. Laycock*, 4 C. & P. 326) to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is of the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. *R. v. Morris*, 2 Burr. 1189. *R. v. Benson*, 2 Camp. 508. And the same as to depositions in equity, and other similar cases, so at least as to throw upon the defendant the *onus* of proving that he was personated. 2 Burr. 1189.

On an indictment for perjury in the usual form, setting forth, with proper innuendos, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition signed by him is the substance. *Reg. v. Thomas*, 2 C. & Kir. 806.

On an indictment for perjury in deposing in an affidavit that A. B., a defendant in a suit in which the party indicted was plaintiff, owed him 50*l.*, the assignment is not proved by evidence that the cause, after the making of the affidavit, was referred to an arbitrator, who made an award that A. B. owed the defendant nothing. *Reg. v. Fontaine Moreau*, 11 Q. B. 1028. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. 1 Hawk. c. 69, s. 6; 3 Ins. 166; Palmer, 294.

VII. Certificate of Trial of Indictment on which Perjury was committed.[1]

VIII. Punishment for Perjury.[2]

IX. Prosecution by Direction or Consent of Judge.[3]

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[1] By 14 & 15 Vic. c. 100, s. 22, a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of 6*s*. 8*d*., and no more, shall be demanded or taken), shall, upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

[2] Perjury is punishable at common law with fine and imprisonment (to hard labour, 3 Geo. 4, c. 114), at the discretion of the court. By stat. 2 Geo. 4, c. 22, s. 2, the judge may order the party to be transported, or to be imprisoned and kept to hard labour in the House of Correction for any term not exceeding seven years; and by 20 & 21 Vic. c. 3, a sentence of penal servitude for any term not exceeding seven years, nor less than three, is substituted for the sentence of transportation. The judge may also require the offender to find sureties to be of good behaviour for a further period. *R. v. Hart*, 30 St. Tr. 1344. *Dunn v. Reg.* 12 Q. B. 1026.

[3] By 14 & 15 Vic. c. 100, s. 19, "it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or of any of her majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy-recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court, or any court of record, or for any of the justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy, before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county, or other district within which such perjury was committed, unless such person shall enter into a recognisance, with one or more sufficient surety or sureties conditioned for the appearance for such person at such next session of oyer and terminer and gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognisance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried, in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland, such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

And by 22 & 23 Vic. c. 17, s. 1, "no indictment for perjury or subornation of perjury (amongst other offences therein named), shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her majesty's attorney-general or solicitor-general for England; or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of her majesty's attorney-general or solicitor-general for Ireland, or (in case of an

X. Subornation of Perjury.

(A) *What it is.*[1]

(B) *Of the Indictment.*[2]

(C) *Evidence.*[3]

(D) *Punishment for.*[4]

PERPETUITY.[5]

indictment for perjury) by the direction of any court, judge, or public functionary, authorised by an act, 14 & 15 Vic. c. 100, to direct a prosecution for perjury." It is a matter for the discretion of a judge to whom the application is made, to decide what materials ought to be before him, and that it is not necessary to summon the party accused, or to bring him before the judge in any way. Therefore where, some time after the trial of an action, upon which perjury was alleged to have been committed, the accusing party appeared before the judge who tried the action, and producing a newspaper report of the trial applied for a consent to a prosecution being commenced, and the judge wrote upon the newspaper report, "I consent to a prosecution in this case;" it was held, that he had rightly exercised the jurisdiction given by the above section. *Reg. v. Bray*, 32 L. J. M. C. 11.

By 22 & 23 Vic. c. 17, s. 2, in certain cases where prosecutor desires to prefer an indictment, justice to take his recognisance to prosecute.

[1] Subornation of perjury, at common law, is the procuring another to commit legal perjury, who, in consequence of the persuasion, takes the oath, to which he has been incited. Hawk. b. 1, 3, c. 69, s. 10. By 5 Eliz. c. 9, the operation of which as to perjury itself we have already considered, it is enacted, that "whoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or case whatsoever, depending in suit by any writ, action, bill, complaint, or information, in anywise concerning any lands, tenements, or hereditaments, goods, chattels, debts, or damages, in any of the king's courts, &c. (as enumerated), or shall unlawfully and corruptly procure or suborn any witness or witnesses, who shall be sworn to testify *in perpetuam rei memoriam*, shall forfeit 40*l.*, and if he has not that sum, or property to its amount, he shall be imprisoned one year, and stand in the pillory one hour, in the town next adjoining the place where the perjury was committed." To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit will bring the offender within its penalties. 3 Mod. 122; 1 Leach, 455, in notes. But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law, punishable not only by fine and imprisonment, but by corporal and infamous punishment. 2 East, Rep. 17; Hawk. b. 1, c. 69, s. 10; 6 East, 464.

[2] By 14 & 15 Vic. c. 100, s. 21, "in every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person, unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence in manner and form aforesaid to do and commit; and wherever such perjury or other offence as aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful or corrupt perjury." *See* Form of Indictment, Arch. C. P. 718. The indictment must show that the intention of the defendant was consummated. *R. v. Rhodes*, 2 Ld. Raym. 889. Though it does not seem to be necessary to set forth the means used by the defendant to effect his design, but it is sufficient to state that he, by sinister and unlawful means and labours, procured the commission of the perjury. 2 Ld. Raym. 886; 2 Leach, 796.

By 23 Geo. 2, c. 11, s. 2, in an indictment for subornation it is "sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

[3] Prove the perjury committed; for unless this be proved the defendant cannot be found guilty of the subornation (1 Hawk. c. 69, s. 10); and the mere production of the record of J. N.'s conviction for the perjury (if he were convicted), would not, it seems, be sufficient evidence of the perjury having been committed. *R. v. Reilly*, 1 Leach, 454.

[4] Subornation of perjury is punishable in the same manner as perjury. See *ante*, p. 126.

[5] The quality of indefinite duration without change. In a legal sense a future li-

PERSONAL Actions.[1]

Assets.[2] *See* vol. iv. p. 366.

Representatives.[3]

PETITIONS of Right.[4]

PETROLEUM. Regulations as to its Safe Keeping, *see* 25 & 26 Vic. c. 76.

PETTY Average.[5]

PEW.

I. Right to, p. 129.

II. Erection and Repairs of, p. 129.

mitation restraining the owner of an estate from alhening the fee-simple of the property discharged of such future use or estate before the event is determined, or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity (*see* Uses and Trusts), a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation. Lewis on Perpetuity, p. 164.

[1] Lat. *Actio personalis.* In practice, an action against the person [*actio in personam*]; an action founded on personal obligation. An action by which a person claims a debt or personal duty, or damages in lieu thereof, or by which a person claims satisfaction in damages for some injury done to his person or property. 3 Bl. Com. 117.

[2] Personal property in the hands of an executor or administrator chargeable with the debts or legacies of the testator or intestate, and applicable to that purpose. Williams on Exec. 1408. *See* Assets.

[3] "Personal representatives" has sometimes been construed to mean "administrators or executors," and sometimes to mean the "next of kin." 2 Story's Eq. Jur. s. 1065 b, and note. *See* 2 Williams on Exec. 966. The term "legal representatives" is, in its ordinary sense, synonymous with "executors or administrators." (Id.)

[4] A petition of right, or form of proceeding to obtain restitution from the Crown of either real or personal property, being of use where the Crown is in possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself. 3 Bl. Com. 256. *See* 8 Ad. & E. 208; 2 F. & F. 634.

The proceedings on petitions of right have been greatly simplified, and made readily available to suitors to obtain justice from the Crown, by 23 & 24 Vic. c. 34. The act provides, 1. Petitions of right may be instituted in any of the superior courts at Westminster. The form, nature, and contents of the petition as in schedule (No. 1). 2. Petition to be left with the Secretary for the Home Department for her Majesty's fiat. 3. Upon fiat being obtained, petition, &c. to be left at office of Solicitor of the Treasury, indorsed as in schedule (No. 2). 4. Time for answering by the Crown. Power to change the court or venue. 5. Time for answering by other persons, parties to the petition. 6. The answer or plea to such petition. 7. The practice and course of procedure in action and suit between subject and subject shall extend to petitions of right, so far as applicable. 8. Decrees or judgments by default. 9. Form of judgment or decree. 10. Effect of judgment of *amoveas manus.* 11. Costs recoverable by the Crown, and any other person party to the petition. 12. The suppliant to be entitled to costs against the Crown, and other parties to the proceedings. 13. Decree or judgment in favour of the suppliant to be certified to the Treasury, or treasurer of the household, in form of schedule (No. 5). 14. Satisfaction of the judgment and costs. 15. Power to judges to make rules and regulations, &c. 16. Interpretation of terms. 17. Short title. 18. Nothing to prevent suppliant proceeding as before. *See* valuable Suggestions and elaborate inquiry on this subject by T. D. Archbold, Esq. *See* Chancellor's Orders, 1 Sched. 1862; 8 Jur. N. S. 283. The act does not give jurisdiction to the court as to lands vested in the queen under a colonial act. 31 L. J. Ch. 58. The suppliant may give the Crown notice to assign errors. *Reg. v. Dixon*, 11 W. R. 68.

[5] In maritime law, a term used to denote such charges and disbursements as, according to occurrences and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage; such as the hire of a pilot for conducting a vessel from one place to another (formerly called lodemanage), towage, light-money, beaconage, anchorage, bridge-toll, quarantine, and such-like. Park on Ins. 100. The particulars belonging to this head depend, however, entirely upon usage. Abbott on Ship. 604: Maude and Pollock.

III. Distribution, p. 129.
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(B) *Renting or Purchasing*, p. 129.
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I. Right to.[1]

II. Erection and Repairs of.[2]

III. Distribution.

(A) *In General.*[3]

(B) *Renting or Purchasing.*[4]

[1] Pews in churches were not in use in England till long after the Reformation, about the middle of the seventeenth century. The earliest reading-pew, with a date, is one at Geddington St. Mary, Northamptonshire, dated 1602.— Hook.

The right must exist by prescription or a faculty (*Griffith v. Mathews*, 5 T. R. 298: *per Buller, J.*), and it must be annexed to a particular messuage. Mere user of a pew, however long, if unconnected with a particular house, is not sufficient evidence of a right (*Stocks v. Booth*, 1 T. R. 428. *Mainwaring v. Giles*, *post*, p. 131); and even where the occupiers of a certain house had used a pew for many years, it was held that the jury were not bound to presume a faculty (*Moryan v. Curtis*, 3 M. & Rob. 389); but they may be justified in presuming one; and uninterrupted possession of a pew for thirty years, without proof of the actual origin of it, will be evidence of a prescriptive right to the pew as against a wrongdoer. *Griffith v. Mathews*, *supra*. *Rogers v. Brooke*, 1 T. R. 431. A faculty to a man and his heirs is bad, because it professes to give the right, whether the man and his heirs continue resident or not. Gibs. 221; 1 Hag. Cons. 321; 2 Add. 427. *Byerly v. Wyndus*, 5 B. & C. 18: *per Bayley, J.* A seat cannot be claimed either by faculty or prescription as appurtenant to land, because, in respect of inhabitancy, it is to be used. (Id.) Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title. *Byerly v. Windus*, 5 B. & C. 1. See *Pym v. Gorwin*, Moo. 878; and *Hallack v. University of Cambridge*, 1 Q. B. 593.

[2] The general charge of erecting seats in churches, and of keeping them in repair, lies upon the parishioners, unless they be relieved by any particular persons being chargeable by prescription to rebuild or repair the same. Degge, part i. c. 12. The churchwardens are to keep the pews in repair out of the church-rates. (Id.)

No pew can be built, or pulled down, or heightened, without the consent of the minister and churchwardens, or by faculty (Sir J. Nicoll, 3 Phil. 169; Wats. c. 39); and if a seat be taken away by a stranger, the churchwardens (not the minister) may bring an action against him. (Id.)

A faculty is necessary to repair a church or erect galleries (*Cardinall v. Mollineux*, 7 Jur. N. S. 254); but trifling alterations may be made without faculty or license.

[3] The distribution of seats, in the absence of any prescription by custom, or any faculty, and excepting the chief seat in the chancel, which belongs to the rector or vicar, in practice generally rests with the churchwardens, but only as the officers, and subject to the control of the ordinary (Steer, p. 30; Rog. Ecc. 179), who has the primary and sole authority. The minister and vestry have no authority in the matter. 2 Add. 425. By custom (as in London) the churchwardens may alone have the ordering of the seats. Wats. c. 39.

All persons, *whilst parishioners*, are at common law entitled to accommodation in the parish church, without payment. Steer, p. 31. The pews being the common property of the parish, non-parishioners, we have seen, have no right to sittings, unless by prescription, and *quære* even then. (Id. p. 31.) The right to sit in a pew may be apportioned. *Harris v. Drewe*, 2 B. & Adol. 164.

[4] The churchwardens cannot let or sell the pews unless under an act of parliament; nor can a private person do so, unless his pew is attached to a house in the parish, which it may be, either by faculty from the ordinary or by prescription (which presupposes a faculty), evidenced by enjoyment and repairing time out of mind. In which case the pew goes with the house (1 Hagg. Cons. 314, 323); but then it can only be let to a resident in the parish. (Id.) *Quære*,

(C) *Under Church Building Acts* [1]

IV. Remedy for Disturbance.[2]

(A) *Forms of, and Pleadings.*[3]

whether the 2 & 3 Wm. 4, c. 71, for shortening the period for prescription to twenty years, applies to pews? Mart. *Convey.* vol. iii. p. 274, n.

In any parish, district parish, or extra-parochial place, the bishop may order a third service, if there is not otherwise sufficient accommodation; and in such case he may also require the churchwardens to let for such service pews not held by faculty or prescription, at rates sufficient to provide a curate's salary thereout. 58 Geo. 3, c. 45, ss. 65, 66.

[1] In modern churches and chapels, under the Church Building Acts, pew-rents are to be taken according to scale fixed by the commissioners (these scales may be altered, 59 Geo. 3, c. 134, s. 21, by the churchwardens, with the consent of the patron and incumbent, and the direction of the bishop; and in case of patronage districts, by the trustees and the bishop), or, in case of patronage districts, by the trustees and bishop. These are to be collected by the churchwardens, and the stipend of the minister and clerk is generally provided for out of them. This stipend may be afterwards augmented. 3 & 4 Vic. c. 60, s. 5.

Sittings are appropriated for the minister and churchwardens, and not less than one-third of the whole sittings are to be free. 58 Geo. 3, c. 45, s. 75.

Subscribers, if parishioners, are to have choice of pews at fixed rates (sect. 76) in churches built under that act, and pews may be let or assigned to parishioners only. 59 Geo. 3, c. 134, s. 32, and 3 Geo. 4, c. 72, s. 23.

Pews may be assigned without rent to subscribers under the 1 & 2 Wm. 4, c. 38, s. 21.

Surplus pew-rents, after payment of the minister's and clerk's stipend, and other expenses, may be charged with the payment of any loan raised towards the building by the churchwardens, with the consent of the commissioners. 59 Geo. 3, c. 134, s. 27.

When a permanent provision is made in lieu of pew-rents, in whole or in part, the Ecclesiastical Commissioners may direct such pew-rents to cease. 14 & 15 Vic. c. 97, s. 1.

In case of churches to which districts may be assigned under the New Parishes Acts by the Ecclesiastical Commissioners after the 29th July, 1856 (the passing of Lord Blandford's Act) one-half of the sittings must be free; for "if it shall appear to them that sufficient funds cannot be obtained from other sources," they may, with the bishop's consent, declare that annual rents be taken in respect of any pews or sittings in the church, according to a specified scale, the proceeds to be applied to the repair of the church, and the maintenance of the minister, and the services, and the endowment thereof; but one-half (the power of the Church-Building Commissioners to require a less proportion of the sittings to be free is vested in the Ecclesiastical Commissioners, and it is understood that, wherever expedient, they will exercise that power, upon a proper representation being made, which should be done in every stage of the proceedings — from one-fifth to one-third is the usual proportion) of the sittings are to be free, and are to be as advantageously situated as the others. 19 & 20 Vic. c. 104, s. 6.

And by sect. 7, "upon a permanent endowment being provided for any church, a proportionate number of the rented sittings shall be free, or the scale reduced in proportion; but if any loan has been raised on the pew-rents, that is to be first repaid." *See* also 14 & 15 Vic. c. 97, s. 1.

And by sect. 5, "the right of persons residing in the new parish or district to sittings in the old church is not to be retained after they have claimed and had assigned to them sittings in the new church.

The right of Peel districts and Peel parishes, formed prior to the 29th July, 1856, to pew-rents, is being acquired by means of a grant from the Church-Building Commissioners (under the 6 & 7 Vic. c. 37, s, 24).

Parishioners of new parishes who held sittings in the old parish church retain the right to them until they get sittings assigned to them in the new church. Other parishioners of the new parish, it is conceived, have no right to sittings in the old church, unless, perhaps, by faculty or prescription, they are entitled to pews attached to an ancient messuage within the remaining limits of the original parish. *See* sect. 14 of 6 & 7 Vic. c. 347.

By 43 Geo. 3, c. 108, s. 5, in all parochial churches or chapels thereafter to be erected, ample provision is to be made for the decent and suitable accommodation of all parties unable to pay for the same.

Where a new church is substituted for an old church, inquiry is to be made as to pew rights in the old church, and sittings in the new one to be assigned accordingly. 8 & 9 Vic. c. 70, s. 1, and 59 Geo. 3, c. 134, s. 40.

[2] An action lies for disturbance in the enjoyment of a pew to which a man is entitled by faculty or prescription. 5 B. & Adol. 361. And if a parishioner require to be seated, his remedy is to cite the churchwardens to the Ecclesiastical Court to show cause why they have not seated him. 1 Hagg. 317.

[3] An action on the case is the proper remedy for disturbance of a party in the possession of a pew in a church, but the pew must be annexed to a house in the parish.

(D) *Evidence in Actions for Disturbance.*[1]

PHARMACEUTICAL Society. *See* Apothecary, vol. i. p. 377.

PHYSICIANS. *See* Medical Practitioners, vol. v. p. 483.

I. Relative to the College of, p. 131.

II. Penalties for Practising, not being of the College, p. 132.

III. Privileges of Members of, p. 132.

IV. Suing for their Fees, p. 132.

I. Relative to the College of.[1]

Mainwaring v. Giles, 5 B. & A. 356. *Bryan v. Whistler*, 8 B. & C. 294. Perhaps trespass might be maintained, if the pew to which the plaintiff is entitled as appurtenant to his messuage be broken. *See* 2 Roll. 140; Palm. 46. *Spooner v. Brewster*, 3 Bing. 137: *per Best, C. J.*

The declaration states the possession of the messuage, the right by reason thereof to use the pew in the parish church during service, and the disturbance of the right by the defendant.

Where a party claims a right against the ordinary, he ought to show a title by repairing, building, &c., but need not against a mere tort feasor. *Bunton v. Bateman*, 1 Lev. 71. *Kenrick v. Taylor*, 1 Wils. 326. *Ashley v. Frickleton*, 3 Lev. 74.

[1] The proof required in an action for disturbance must necessarily be regulated by the nature of the right, as stated in D. 1. If any repairs have been required within memory, they must be proved to have been made at the expense of the party setting up the prescriptive right. The *onus* and *beneficium* go together. Mere occupancy does not prove the right; for, though in country parishes the same families occupy the same pews for a long time, they still belong to the parish at large, unless the inhabitants of a particular house, not the owners of particular lands, have repaired the pew. What might be the effect of a very long occupancy, where no repairs have been necessary, seems undecided. *Pettman v. Brulger*, 1 Phil. Ecc. R. 325.

An old entry in a vestry-book, signed by the churchwardens, stating that a pew had been occupied by A. in consideration of his using it, is evidence for a person claiming the pew under A. *Price v. Littlewood*, 3 Camp. 288. But see *Cooke v. Banks*, 2 C. & P. 478.

Repairing one of several pews used under the same claim is evidence as to all. *Pepper v. Barnard*, 12 L. J. Q. B. 361.

[2] By the charter, confirmed by stat. 14 & 15 Hen. 8, c. 5, incorporating the College of Physicians, they have power to choose a president, and have perpetual succession, a common seal, ability to purchase lands, &c. Eight of the chiefs of the college are to be called elects, who, from among themselves, shall choose a president yearly; and if any practise physic in the city of London, or within seven miles of it, without license of the college, under their seal, he shall forfeit 5*l.* Also persons practising physic in other parts of England are to have letters testimonial from the president and three elects, unless they be graduate physicians of Oxford or Cambridge, &c. Stat. 14 & 15 Hen. 8, c. 5, confirmed and enlarged by stat. 1 Mary, stat. 2, c. 9.

By 17 & 18 Vic. c. 114, it is provided that every bachelor of medicine and doctor of medicine of the University of London shall, by virtue of his degree, and without the necessity of undergoing any further examination, or obtaining any further authority or license, be entitled to practise physic as fully in all respects as may be done by any bachelor of medicine or doctor of medicine of either of the universities of Oxford or Cambridge: Provided, however, that the privileges thereby conferred shall not be construed so as to extend to the practice of surgery, pharmacy, or midwifery.

The stat. 32 Hen. 8, c. 40, ordains that four physicians, called censors, shall be yearly chosen by the college to search apothecaries' wares, and have an oath given them for that purpose by the president; apothecaries denying them entrance into their houses, &c., incur a forfeiture of 5*l.*; and physicians refusing to make the search are liable to a penalty of 40*s.*; and every member of the College of Physicians is authorised to practise surgery.

In the case of *Dr. Bonham*, 7 Jac. 1, is shown the power of the College of Physicians in punishing persons for practising physic without license. They imprisoned the Doctor for practising without license; but it was adjudged that they could not lawfully do it, for in such case they had no power by the statute to commit, but they ought to sue for the penalty of 5*l.* per month, *qui tam*, &c. But in case of mal-practice the censors have power to commit, for they may in such case

II. Penalties for Practising, not being of the College.[1]

III. Privileges of Members of.[2] As to Registering, *see* vol. v. p. 483.

IV. Suing for their Fees.[3]

PIEPOUDRE Court.[4]

PILOT. *See* also *post*, Ship and Shipping.

I. Pilotage Authority.[5]

II. Obligation to receive Pilot.[6]

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fine and imprison, by their charter; and they are judges of record, and not liable to an action for what they do by virtue of their judicial power. 8 Rep. 107; Carth. 494.

No person can practise as a physician in London, or within seven miles thereof, without a license from the College of Physicians. Nor can any, except graduates of one of the universities, practise in the country without a license. *College of Physicians v. West*, 10 Mod. 354; Cro. Jac. 121. And even a graduate of Oxford cannot practise in London without a license of the college. *College of Physicians v. Levett*, 1 Ld. Raym. 472.

A doctor of medicine, by virtue of a diploma given by a Scottish university, cannot lawfully practise in England, beyond seven miles from London, without a license from the College of Physicians (*Collins v. Carnegie*, 1 Ad. & E. 698); nor can one licensed by the college to practise in London and seven miles round, compel the college to examine him, that he may be admitted. *Rex v. College of Physicians*, 7 T. R. 282. *Rex v. Same*, 5 Burr. 2740.

Candidates to be admitted to the college are examined by the *com. min.*, then proposed to the *com. maj.*, and elected by them, before they can claim to be admitted. *Reg. v. Askew*, 4 Burr. 2186.

[1] The college may bring an action on the 14 Hen. 8, c. 5, in the name of the president and fellows, to recover penalties for practising contrary to the statute. And in such action, the printed statute-book is evidence of the charter of the college. *College of Physicians v.* ——, 2 Show. 167.

An apothecary visiting a patient, judging of his disease, and sending in medicines for his cure, is not a practising of physic contrary to the 14 & 15 Hen. 8, c. 5, provided he only charge for the medicines. *College of Physicians v. Roffe*, 6 Mod. 44. *Rose v. College of Physicians*, 5 Bro. P. C. 553.

[2] Members and licentiates of the Royal College of Physicians in London, and actually practising, are exempt from serving the office of constable. 5 & 6 Vic. c. 109, s. 6. They are not, however, exempt from serving in the militia. *Sir Hans Sloane v. Pawlett*, 8 Mod. 11.

[3] Before the Medical Act, a physician could not recover his fees by action without a special contract for payment. *Veitch v. Russell*, 3 Q. B. 928. *Chorley v. Bolcot*, 4 T. R. 317. See *Attorney-General v. College of Physicians*, 30 L. J. Ch. 757. If duly registered, he is entitled to sue for his fees. *See* Medical Practitioners, vol. v. p. 483.

[4] The Piepoudre Court was anciently attached to markets for the settlement of disputes. The appointment of inspectors of weights and measures has superseded the necessity for such a court. *See* 4 Steph. Com. 403.

[5] All pilotage authorities within the United Kingdom now derive their jurisdiction from the Merchant Shipping Act, 1854, p. 5, ss. 330 to 388.

A pilot called upon, under sect. 352 of the Merchant Shipping Act, 1854, to deliver up his license, cannot set up as an excuse that the pilotage authority has acted in an arbitrary or capricious way. *Henry v. Newcastle Trinity-House Board*, 8 El. & Bl. 723.

[6] A penalty is imposed by sect. 353 of the Merchant Shipping Act, 1854, upon the master of an unexempted ship (*Reg. v. Stanton*, 8 El. & Bl. 445) for piloting the ship himself, being unqualified, or by an unqualified pilot, after a qualified pilot has offered himself. Under a similar provision of a prior act, it was held that this prohibition did not preclude the master from applying to his vessel any moving power which he might select; and that, although the employing a steam-tug to tow a ship up the river necessarily involves the selection of the course and management of the ship, yet, the object being solely the employment of the moving power, the party so employed is not within the meaning of the 6 Geo. 4, c. 125, s. 70, as a pilot, and that he could not be deemed to have the charge or conduct of the vessel, and that no penalty was, therefore, incurred under sect. 70. *Beilby v. Scott*, 7 Mee. & W. 93. See *Peake v. Carrington*, 2 B. & B. 399. *Reg. v. Chaney*, 6 Dowl. P. C. 281. *Chaney v. Payne*, 1 Q. B. 712.

A commitment is defective if it does not allege the offer by a licensed pilot to have been made to the defendant, or in his presence; stating the offer in the words of the act is insufficient. *Reg. v. Chaney*, *supra*.

The penalty imposed on a master of a ship refusing to employ a pilot is not incurred unless the pilot, upon offering himself, produce his license. *Hammond v. Blake*, 10 B. & C. 424.

The penalty is "double the amount of pilotage demandable for the conduct of the

III. While Ship under Direction of Pilot the Owner is not Responsible.[1]

PIRACY.[2]

ship." 17 & 18 Vic. c. 104, s. 353.

The amount of pilotage on which the penalty is to be paid, is that which would accrue on all the remaining voyage during which the master was bound to have a pilot on board. *Mackie v. Landon*, 6 Taunt. 256.

It was held under the 6 Geo. 4, c. 125, that the master of a vessel who navigated her himself, though liable to double the amount of pilotage under sect. 58, was not liable to the penalty imposed by sect. 70. *Beilby v. Shepherd*, 3 Ex. 40.

As to the exemption from compulsory pilotage of ships not carrying passengers in the London district, and in the Trinity House Outport districts, &c., see 17 & 18 Vic. c. 104, s. 379. *Peak v. Screech*, 7 Q. B. 603. *Williams v. Newton*, 14 Mee. & W. 747. *Reg. Stanton*, 8 El. & Bl. 445. *The Agricola*, 2 W. Rob. 10. *Thornton v. Boland*, 2 Bing. 219. *M'Intosh v. Slade*, 6 B. & C. 657.

[1] By the Merchant Shipping Act, 1854, s. 388, no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of the ship within any district where the employment of the pilot is compulsory by law. See *Ritchie v. Bowsfield*, 7 Taunt. 309. *Attorney-General v. Case*, 3 Price, 802. *Carruthers v. Sidebotham*, 4 M. & S. 77. *Dodds v. Embleton*, 9 D. & R. 27. *Beilby v. Scott*, 7 Mee. & W. 93. *Bennett v. Moita*, 7 Taunt. 258. *The Agricola*, 2 W. Rob. 10. *The Montreal*, 17 Jur. 538. *The Eden*, 10 id. 296. *The Fama*, 2 W. Rob. 184. *The Duke of Sussex*, 1 id. 270. *The Batavier*, 10 Jur. 19. *Netherlands Steamboat Co. v. Styles*, 9 Moore, 286.

The object of the statutory exemption in favour of owners is to protect them in those cases only in which the pilot alone is the author of the injury; and the *onus* lies on the owner of the ship to prove that the damage was occasioned by the fault of the pilot. *The Protector*, 1 W. Rob. 54. *Pollock v. M'Alpine*, 7 Moo. 427. The exception, therefore, does not extend to instances where the master or any of the crew are *in pari delicto* with the pilot, and the damage is occasioned in part by their negligence or misfeasance. See *The Mobile*, 1 Swab. 69; 10 Moore, 467. *The Borussia*, 1 Sw. A. R. 94. *The General de Caen*, id. 9. *The Girolamo*, 3 Hagg. 176. *Stuart v. Isemonger*, 4 Moore, 11. *The Massachusetts*, 1 W. Rob. 371. *The George*, 9 Jur. 672. *The Diana*, 1 W. Rob. 131.

[2] The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. 1 Hawk. P. C. c. 37, s. 4; 4 Bl. Com. 72; 2 East, P. C. c. 17, s. 3, p. 796. But it is no felony at common law, and it was only punishable by the civil law before the stat. 28 Hen. 8, c. 15; and this statute, though it made the offence capital, and provides for the trial of it according to the course of the common law, by the king's special commission, does not make it a felony: therefore, a pardon of all felonies does not extend to it. 1 Hawk. P. C. c. 37, s. 12; 3 Inst. 112; 2 East, P. C. c. 17, s. 3, p. 796.

The taking, to be piracy, must be without authority from any prince or state. If a party making a caption at sea do so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates: fixed domain, public revenue, and a certain form of government, exempt a people from that character.

Even a capture by authority of the states of Algiers, Tunis, or Tripoli, cannot be treated as piracy. 2 Sir L. Jenk. 790; Grot. 2, c. 18, s. 2. Also, at common law, if a subject of this realm committed acts of hostility against another subject under the authority of a commission from a foreign prince, it was not piracy (2 Sir L. Jenk. 754); but the law has since been altered in this respect by 11 & 12 Wm. 3, c. 7, and 18 Geo. 2, c. 30, s. 1.

If the subjects of the same state commit robbery upon each other upon the high seas, it is piracy.

If the subjects of different states commit robbery upon each other upon the high seas, if their respective states be in amity, it is piracy; if at enmity, it is not: for it is a general rule that enemies never can commit piracy on each other, their depredations being deemed mere acts of hostility. 1 Sir L. Jenk. 94; 4 Inst. 154. But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it without damage into port for condemnation, this is not piracy. 1 Sir L. Jenk. 94.

If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is a piracy. 3 T. R. 783; *see* 28 Hen. 8, c. 15, s. 4. But if a pirate attack a vessel, and before he obtains possession of her the captain, in order to redeem her, give an oath to pay a sum certain, this is no piracy, for there was no taking. Molloy, 64, s. 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. 1 Sir L. Jenk. 98.

The offence of piracy is provided against by the enactments of several statutes. The 11 & 12 Wm. 3, c. 7, s. 8, enacts, "that if any of his majesty's natural-born subjects,

or denizens of this kingdom, shall commit any piracy or robbery, or any act of hostility against others his majesty's subjects, upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers;" and being duly convicted thereof, according to that act, or the stat. 28 Hen. 8, c. 15, shall suffer such pains of death, and loss of lands, goods, and chattels, as pirates, &c. upon the seas ought to suffer. And the 18 Geo. 2, c. 30, enacts, "that all persons being natural-born subjects, or denizens of his majesty, who, during any war, shall commit any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against his majesty's subjects, by virtue or under colour of any commission from any of his majesty's enemies, or shall be any other ways adherent or giving aid or comfort to his majesty's enemies, upon the sea, or in any haven, river or creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be tried as pirates, felons, and robbers, in the said Court of Admiralty, on ship-board or upon the land, in the same manner as persons guilty of piracy, felony, robbery, are by the said act directed to be tried.

The 9th section of the statute enacts, that "if any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral has jurisdiction, betray his trust, and turn pirate, enemy, or rebel, or consult, combine, or confederate with, or attempt, or endeavour to corrupt any commander, master, officer, mariner, to yield up or run away with any ship, goods, or merchandises, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, thereby to hinder him from fighting in defence of his ship and goods committed to his trust; or shall confine his master, or make or endeavour to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber."

By the stat. 8 Geo. 1, c. 24, s. 1, "in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, will throw overboard or destroy any part of the goods or merchandises belonging to such ship or vessel, the person or persons guilty thereof shall in all respects be deemed and punished as pirates as aforesaid."

The same stat. of Geo. 1, s. 1, enacts also, that "if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate, by track, barter, or exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with or supply, or correspond with any pirate, felon, or robber, upon the seas, or if any person or persons shall in any way consult, combine, confederate, or correspond with any pirate, felon, or robber, upon the seas, knowing him to be guilty of any such piracy, felony, or robbery, every such offender and offenders shall be deemed and adjudged guilty of piracy, felony, and robbery."

The stat. 32 Geo. 2, c. 25, s. 12, provides, that in case any commander of a private ship or vessel, who was duly commissioned by the 29 Geo. 2, c. 34, or that act, shall agree with any commander or other person belonging to any neutral or other ship or vessel (except those of his majesty's declared enemies), for the ransom of any such neutral or other ships or vessels, or the cargo, after the same has been taken as a prize, and shall, in pursuance of such agreement, quit, set at liberty, or discharge any such prize, instead of bringing it into some port of his majesty's dominions, such offender shall be deemed and adjudged guilty of piracy, felony, and robbery.

By 5 Geo. 4, c. 113, dealing in slaves upon the high seas, or in any haven, &c., where the admiral has jurisdiction, except as by that act is permitted, is made piracy, felony, and robbery, and the offenders made punishable as pirates, felons, and robbers upon the seas.

By 7 Wm. 4, & 1 Vic. c. 88, s. 2, "whosoever with intent to commit, or at the time of, or immediately before, or immediately after, committing the crime of piracy in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act whereby the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

If the crew rise upon the captain, and take the ship into their own hands, this is piracy, notwithstanding their object may have been, not to run away with the ship, but to have certain grievances redressed. *R. v. Hastings*, 1 Moo. C. C. 82. *R. v. M'Gregor*, 1 C. & Kir. 429. *R. v. Rose*, 2 Cox, 329.

Adhering to the queen's enemies, or hostilely cruising in their ships, is piracy. *Evans's case*, 1 East, P. C. 798.

The 7 Wm. 4, & 1 Vic. c. 88, s. 1, repealed so much of the above earlier acts as related to the punishment of piracy, and enacts, "that whosoever shall be convicted of any offence which, by any of the acts hereinbefore referred to, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported for the term of the natural life of such offender,

PLAYS.

I. License for. *See post*, Theatre.

II. Copyright in. *See* Copyright, vol. iii. p. 251.

PLEADING.[1]

I. The Nature, Object, and Classification of Pleadings, p. 136.

II. With reference to the Facts necessary to be stated in Pleading, p. 138.

(A) *Presumptions and Inferences of Law need not be stated*, p. 139.

(B) *Nor Matters peculiarly within the Knowledge of the Opposite Party*, p. 139.

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(*a*) *They must be stated with Certainty*, p. 139.

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(*c*) *And ought not to contain Superfluous or Unnecessary Matter*, p. 141.

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(*e*) *And where Equivocal, they will be taken in the sense Hostile to the Party pleading*, p. 142.

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(*g*) *Averments of a merely formal Character ought not to be made, and Pleadings are judged of according to their Substance*, p. 142.

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VI. Pleadings in Particular. *See* Action, vol. i. p. 133; Declaration, vol. iii. p. 570; *post*, Pleas, p. 143; Replications; and the appropriate titles for the pleadings in particular actions.

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or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." *See* 9 & 10 Vic. c. 24, s. 1. By sect. 4 of the same statute, "every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

[1] *See* Chit. on Pleading; Steph. on Pleading; Saunders on Pl. & Ev.; B. & L. Precedents.

I. The Nature, Object, and Classification of Pleadings.[1]

[1] Pleadings in general signify the allegations of the parties to suits, when they are put into a proper and legal form; and are distinguished, in respect to the order of pleading them, by the names of declarations or counts, avowries or cognisances, pleas, replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters, &c., to which may be added, demurrers, and joinders in demurrer; for, though declarations or counts do not properly come under the name of pleadings, yet, being often comprehended in the extended sense of the word, they are here considered as falling within it. Pleading, in this sense, signifies all that either party to a suit at law alleges for himself in court, with respect to the subject-matter of the cause, and the mode in which it is carried on, including the demand which is made by the plaintiff; but, in strictness, it is no more than setting forth, according to the prescribed form and order, those facts which show the justice or legal sufficiency of the plaintiff's demand and defendant's defence.

The science of pleading was designed only to render the facts of each party's case plain and intelligible, and to bring the matter in dispute between them to judgment, with a convenient precision. It is, as has been well observed, admirably calculated for analysing a cause, and extracting, like the roots of an equation, the true points in dispute, and referring them, with all possible distinctness, to the court or jury. Hale, C. L. 301.

The greatest lawyers in all ages have spoken in praise of this science. Sir William Jones, who so very happily united the talents of a scholar and a lawyer, observes, that our rules of special pleading are founded on exquisite logic. Jones on Bailments. And the great and enlightened Lord Mansfield has declared that the substantial rules of pleading are founded in strong sense, and in the strongest and closest logic, and so appear when well understood and explained; though, by being misunderstood and misapplied, they are made use of as instruments of chicane. 1 Burr. 319.

Perhaps no science ever underwent more changes and alterations than that of pleading. A cursory view of its history may be desirable, in order that the student may be acquainted with its original state, and competent to trace the more important changes it has undergone, from thence to the present time. We have very little or no account of pleading before the Conquest; all that we can learn about it is, that the proceedings were much more simple and unembarrassed at that time than they were during a long interval between the end of 1852 and 1854. It is clear that pleading was then used, though in a very different manner to what it is at present; as, notwithstanding what is said by Mr. Reeve, in his *History of the Law*, we read of trials by jury having existed before the Conqueror's invasion: and this mode of trial could only be carried on by hearing the parties, or their witnesses, in court. It does not appear, indeed, but that the suitors might have been their own pleaders, as pleading was carried on *ore tenus*, and required no science or nicety of expression, and there was no fear of demurrers or pleas in abatement; so that, as long as a party could tell his own story, and make it understood by the bishop and alderman, or sheriff, who at that time sat together in the same county court (the ecclesiastical and civil jurisdiction not then being separated), it seems to have been sufficient.

After the Conquest, instead of the plain and easy method of determining suits in the county courts being continued, the chicaneries and subtleties of Norman jurisprudence were substituted in the king's courts. The pleading continued to be *ore tenus*, and if a mistake was perceived, and objected to by the opposite party or the court, the pleader instantly acknowledged his error and rectified his plea. From the time of William I. to the reign of Henry II., little or nothing seems to have been done. When the latter prince came to the throne, an attempt at method was first introduced in Glanville's excellent treatise, which, when compared with the code of Henry I., indicates a manifest superiority.

We now approach the period when Edward I. reigned, who is universally styled "the English Justinian;" for, in his time, to use the words of Sir Matthew Hale, the law, *quasi per saltum*, obtained a very great perfection.

The pleadings were then short, but clear and perspicuous; neither loose nor uncertain, nor intricate, verbose, or obscure. They were pleaded and digested methodically and systematically, and by that means answered the important business for which they were intended. This conciseness of pleading may well account for the quaint and logical judgments which were given at this period, many of which remain as precedents for posterity, and a careful perusal of them will produce a much higher panegyric than any terms of encomium could supply.

The introduction of the Latin tongue into law proceedings occurred in the reign of Edward III.; from which it continued in use till the subversion of the constitution under Cromwell, when the language of the records was changed from Latin into English; but, on the restoration of King Charles II. to the throne, we find that the lawyers, not being able to express themselves so concisely or significantly in any other language as the Latin, their pleadings were again enrolled in that tongue. This practice continued till the 4 Geo. 2, c. 36, which directs that all law proceedings should be in English.

The pleadings are at present drawn up in writing by those who are versed in the science of pleading; and copies of them are made out and delivered to the adverse parties, or filed in the offices of the court in

which the action is depending; and, previous to the argument of a point of law or the trial of a question of fact, they are opened or explained to the court or jury, who thereupon determine the dispute between the parties, according to the law and justice of the case.

The entire system of pleading has recently been essentially varied, simplified, and improved. These highly important amendments owe their origin to the suggestions to the Commissioners for inquiring into the process, practice, and system of pleading in the superior courts of common law. They have been effected at intervals by the Common-Law Procedure Acts of 1852 and 1856, and the contemporaneous rules of court promulgated by the judges.

The result of these alterations has not been to destroy the ancient system of pleading, or to extinguish or change its fundamental principles. The primary object has been to make critical technicality subservient to justice, form, substance, and amendments, a remedy for technical defects or variances.

The learned editors of Smith's L. C., in a note to *Taylor v. Slade* (3 T. R. 292), vol. i. p. 560, 5th ed., say, "It must be remembered that the accurate statement of such of the facts and circumstance of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant, on the other, to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice upon merely formal grounds may be arrested by the provisions already referred to, no legislative enactment can, in all cases, prevent the expense and delay which result from the necessity for amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care, in the first instance, to make the pleadings true and perspicuous — adopting the known and understood formulæ, used for the sake of brevity in cases of frequent occurrence; and where there is no such formula, stating the material facts as they can be proved to exist in intelligible language."

Pleadings are divided into: — 1. The declaration; 2. The plea; 3. The replication; 4. The rejoinder; 5. The sur-rejoinder; 6. The rebutter; and 7. The sur-rebutter; which being words of art, it will be necessary to explain under the present title. In one particular form of action, which is called an action of replevin, an avowry, or cognisance most commonly, though not always, comes in the place of the plea; and each of the two former being in the nature of a declaration, the plea becomes in that case the third division of the pleadings, the replication the fourth, and the subsequent pleadings are in like manner postponed.

The word "declaration" is derived from the Latin *declaro*, and signifies that part of the pleadings in which the plaintiff declares or states his complaint, or cause of action, against the defendant. *See* Declaration, vol. iii. p. 570.

The "plea," from the old French word, *plaid*, signifies the defendant's answer to the plaintiff's declaration, or the plaintiff's answer to the defendant's avowry or cognisance. Pleas are variously distinguished, but the most general division of them is into dilatory and peremptory, the latter of which are mostly called pleas in bar. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy rather than by answering the complaint. Peremptory plea, or pleas in bar, answer to the merits (3 Bl. Com. 303); and, in general, put a final end to the action; so that it cannot be afterwards prosecuted, or any action brought for the same cause.

After the plea follows the "replication," which, says Lord Coke, comes from *replicando*, and is the answer made by the plaintiff to the defendant's plea. In the replication, or any of the subsequent pleadings, either party may plead in denial or avoidance, &c., according to the nature of the previous pleading, or the matter to be offered in answer to it.

Next in order is the "rejoinder," which, according to Lord Coke, is from the Latin *rejungendo*, but it seems more likely to have been taken from the French *rejoindre*, and is the answer of the defendant to the plaintiff's replication. This is followed by the sur-rejoinder, from *sur* and *joindre*, which is the plaintiff's answer upon the defendant's rejoinder, and like a second defence, as the replication is said to be the first defence of the plaintiff's declaration.

The "rebutter" is the next proceeding. This word comes from the French *rebouter*, to put back or avoid, and signifies the defendant's answer to the plaintiff's sur-rejoinder. To this the plaintiff may again reply by a sur-rebutter, from *sur* and *rebouter*, which is the plaintiff's answer upon the defendant's rebutter, and may be called a third defence of the plaintiff's declaration.

The pleadings are frequently determined by one of the pleaders demurring, or objecting to something alleged by his opponent. A "demurrer" is therefore said to be an irregular or collateral part of pleading. The word comes from the Latin *demorari*, or the French *demeurer*, to abide or stay; and therefore it is said, that he who demurs in law abides or rests his cause on the law, *moratur*, or *demoratur in lege;* and whenever the counsel of either party is of opinion that the declaration or plea, &c. of his adversary is insufficient in law, he demurs or relies on the law, and refers the same to the judgment of the court.

Now, as there is no issue upon the fact until it is joined between the parties, so there is no issue in law, but when they have joined or agreed upon it; and therefore, where a demurrer is offered by one party, the adverse party joins with him in demurrer, and the answer which he makes is called a "joinder in demurrer."

Pleas, replications, sur-rejoinders, rebut-

II. With reference to the Facts necessary to be stated in Pleading.[1]

ters, and sur-rebutters in our law, as Judge Blackstone has remarked, are either to the *exceptio*, *replicatio*, *duplicatio*, *triplicatio*, and *quadruplicatio*, of the Romans. And in analogy to the pleadings at law, it may be observed, that formerly in Chancery, if the defendant by his plea or answer offered new matter, the plaintiff replied specially; the consequence of which was, that the defendant rejoined, and if the parties were not then at issue by reason of some new matter disclosed in the rejoinder, which required an answer, the plaintiff might sur-rejoin to the rejoinder, and the defendant might, in like manner, add sur-rejoin, or rebut, to the sur-rejoinder: but special replications, with all their consequences, are now out of use in Chancery; and if the plaintiff conceives, from any matter offered by the defendant's plea or answer, that the bill is not properly adapted to his case, he may obtain leave to amend his bill and suit it to his case, as he shall be advised; to which amended bill the defendant may make such defence as he shall think proper, whether required by the plaintiff to answer it or not.

The science of pleading has, we have seen (*ante*, p. 137), been stripped of many technical niceties which the ingenuity of pleaders had introduced; and is, by the effect of several statutes, adopting the recommendations of commissioners appointed for investigating the subject, brought nearer to the primitive simplicity, a departure from which had greatly impaired its extreme utility.

[1] It is observed by Mr. Justice Buller (Dougl. 159), as one of the first principles of pleading, that there is only occasion to state facts; which must be done for the purpose of informing the court of their existence, whose duty it is to declare the law arising upon these facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it.

The facts which constitute the cause of action or ground of defence should be stated logically in their natural order; as, on the part of the plaintiff, his right, the injury, and the consequent damage, and these with certainty, precision, and brevity. *See* Dougl. 666, 667; Sir Wm. Jones, vol. iv. 34. *Swinfen v. Chelmsford*, 5 H. & N. 890. *Dutton v. Powles*, 30 L. J. C. P. 169. With regard to the language to be adopted, as observed by Lord Chief Justice De Grey, there are cases where a direct and positive averment is necessary to be made in specific terms; as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary, and others: but, except in particular cases, where precise technical expressions are required to be used, there is no rule of law that other words should be employed than such as are in ordinary use. Cowp. 683; 5 East, 259, 260; 2 id. 33; 2 Bl. Rep. 843. Thus, though in a declaration for slander, it is usual to state that the words were "maliciously" spoken, the word "falsely," has been held to be sufficiently expressive of a malicious intent. 1 Saund. 242, a. n. 2. However, where there has been a long-established form of pleading, applicable to the facts of the particular case, it should in general, for the sake of certainty and uniformity, be adopted, and the courts censure any unnecessary deviation from it (6 East, 35; 8 Co. Rep. 48, b); and, as observed by Lord Coke, it is safer to follow good precedents, for *nihil simul inventum est et perfectum*. Co. Litt. 230.

There are certain general rules equally applicable to the several divisions of pleading, as well as special ones, which are peculiarly applicable to some or one of them only. Some of these general rules contain the requisites of good pleading, and others of them point out the defects to be avoided therein. The law requires in every pleading that it be in matter sufficient.

Formerly certain formal requisites were also exacted, a default in compliance with which vitiated the pleading; but these are no longer necessary; and so long as the pleading states with sufficient perspicuity that which is a cause of action, or good matter of defence or answer in law, it cannot be objected to merely on the ground that it is not in accordance with the customary form.

The general requisites of good pleading are—first, that it contain all the facts necessary to support the case of either party; secondly, that these facts be stated with truth, certainty, and brevity. As to the first, it is a general rule in pleading that you have only to state facts and conclusions drawn from them, which must be done for the purpose of informing the court, whose duty it is to declare the law arising thereon, and to apprise the adverse party of what is meant to be proved, in order to give him an opportunity to answer it; but conclusions of law need not be stated, for they are not traversable, viz. capable of being denied. If the pleading be sufficient on the face of it, the court cannot intend or presume facts inconsistent thereto, for the purpose of making it bad, but they must consider the facts as truly alleged, if nothing appears to contradict them; nor can they, except in the case of estoppels, &c., presume anything which, though not inconsistent with the record, would, if expressed, have made the pleading objectionable. Dougl. 159. However, express repugnancy in pleading is always a fault, being a contradictory statement, or one which is inconsistent and cannot be true with what is previously alleged.

New and subtle devices and inventions in pleading should in all cases be avoided (1

(A) *Presumptions and Inferences of Law need not be stated.*[1]

(B) *Nor Matters peculiarly within the Knowledge of the Opposite Party.*[2]

(C) *Or mere Matter of Evidence.*[3]

(D) „ *of Practice.*[4]

(E) *Of the Mode of stating Facts.*

(*a*) *They must be stated with Certainty.*[5]

Hale's C. L. 301, 302); nor ought they to be suffered to alter any principle of law.

All necessary circumstances implied by law in pleadings need not be expressed; as, in the plea of a feoffment of a manor, livery and attornment of the tenant. So that which is apparent to the court by necessary collection out of the record need not be averred. And that which the parties have agreed to in pleading shall be admitted, though the jury find otherwise. 4 Bac. Abr. 2. Nothing should be stated in pleading as a part of the plaintiff's or defendant's title, but what is capable of legal proof, for either party is at liberty to traverse or deny, and put the other on proof, of any part of his pleading which is material to the case. So, though a matter be alleged unnecessarily, it may sometimes be traversed. In short, any fact which appears to be material, is in general traversable, though it be only suggestion. The number, quantity, species, price, or value of a thing, is only required to be stated according to the truth, when it is to be proved by a *written instrument*, or to ascertain the extent of a contract, though it be not in writing; in which cases, the true number, &c. must be stated, otherwise there will be a variance. And when the number, &c. is immaterial, care should be taken always to lay more than the fact; for, although a lesser number, &c. may be proved under the allegation of a greater, more can never be proved than is laid, for every one is supposed to make the best of his own case. Co. Litt. 303, b.

In general, whatever circumstances are essential to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings, and all beyond is surplusage (Cowp. 683; 1 Ld. Raym. 171): facts are only to be stated, and not arguments, or inferences, or matter of law.

Since the Common-Law Procedure Act, 1852, objections on the ground of argumentativeness, want of particularity, repugnancy, duplicity, &c., when not amounting also to matter of substance, are no longer grounds of demurrer, and are to be remedied, if necessary, by application to strike out or amend the pleading under the 52d section. *See* Bull. & L. Pl. 690, 2d ed. A departure in pleading is matter of substance and ground of general demurrer. *Brine v. Great Western Railway Co.* 31 L. J. Q. B. 101. *Bartlett v. Wells*, id. 57. *Thames Iron Works, &c. Co. v. Royal Mail Steam-Packet Co.* 31 L. J. C. P. 169. *De Roo v. Foster*, 12 C. B. (N. S.) 272.

[1] Where the law presumes a fact, it need not be stated in pleading; and as it is an intendment of law that a person is innocent of fraud, or any other imputation affecting his reputation, the party insisting upon the contrary must state it. Co. Litt. 78, b. So, where any act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. 3 East, 192. And, as before observed, necessary circumstances implied by law need not be expressed; as in the plea of a feoffment of a manor, livery and attornment are implied; and in pleading the assignment of land for dower, it is not necessary to say that it was by metes and bounds. But great care must be taken in the application of this rule to ascertain that the law intends the fact proposed to be admitted: thus, in pleading a devise of land, it must be stated to have been in writing, though, in point of law, it could not otherwise be a will.

[2] It is a rule, that matter which would come more properly from the adverse party need not be stated (*Irish Society v. Needham*, 1 T. R. 485. *Mitchell v. Broughton*, Ld. Raym. 673), except in some instances of pleas not favoured by the courts, as a plea of alien-enemy. 4 E. & B. 217; 8 T. R. 167; 8 East, 80; 23 L. J. C. P. 140. *See* vol. i. p. 295; vol. iv. p. 266.

If the plaintiff allege a condition subsequent to his estate, he need not aver performance, but the breach must be shown by the defendant; and matter in defeasance of the action need not be stated; and wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action *primâ facie* well founded, whether called by the name of a proviso or a condition subsequent, it must in its nature be matter of defence, and ought to be shown in pleading by the opposite party. 1 T. R. 645, 646. In pleading statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, that is matter of defence, and the other party must show it to exempt him from the penalty.

[3] The evidence by which an averment is to be proved need not be stated in pleading. *Pooley v. Freeman*, 3 T. R. 60.

[4] Mere matter of practice cannot in general be pleaded, unless where the very merits of the case depend upon the practice of the court. *Dudlow v. Watchorn*, 16 East, 39.

[5] It is quaintly said, in Hobart, that truth is

(*b*) *Pleadings ought not to be Double.*[1]

the goodness and virtue of pleading, and certainty the beauty and grace of it; but though the law requires certainty, we have no precise idea of the signification of the word, which is as indefinite in itself as any that can be used. Cowp. 682. It may, however, be defined, a clear and distinct setting down of facts, so that they may be understood both by the party who is to answer the matters stated against him, the counsel who are to argue them, the jury who are to decide upon their existence, and the court who are the judges of the law arising out of them. Certainty in pleading has been stated by Lord Coke to be of three sorts: viz. to a common intent; secondly, to a certain intent in general; and, thirdly, to a certain intent in every particular. Co. Litt. 383, a. Which distinctions, *Buller, J.*, in the case of *Dovaston and Payne,* said, he "remembered to have heard Mr. Justice Ashton treat as a jargon of words without any meaning; they have, however," said he, "long been made, and ought not altogether to be departed from." 2 H. Black. 530. "By 'a common intent,'" he proceeds, "I understand that, when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail: it is simply a rule of construction, not of addition; common intent cannot add to a sentence words which are omitted." But where greater certainty is necessary, viz. to "a certain intent in general," it seems, that if the words used have a natural and an artificial sense, they may be taken in the latter; and if general terms are used where a particular species is intended to be expressed, and must be proved, it is not sufficient. Hawk. Co. Litt. 803. However, even where this sort of certainty is requisite, it is enough if the words are such as, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear. Dougl. 158, 159. Certainty of the last description precludes all argument, inference, or presumption (Co. Litt. 352, b); and is only contained in a precise allegation, not spoken impersonally, or by way of recital or supposal: in short, that technical accuracy which is not liable to the most subtle and scrupulous objection. So that it is not merely a rule of construction, but of addition; for, when this certainty is necessary, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary. "Certainty to a common intent," according to Lord Coke, is sufficient in a bar, which is to defend or excuse the party; a certain intent in general is necessary in counts, replications, and other pleadings of the plaintiff that are to charge the defendant with debts or other matters of a civil nature, as well as in indictments, &c., which charge him with crimes or misdemeanors; and a "certain intent in every particular" applies to the case of estoppels (Id. 303); notwithstanding Lord Chief Justice De Grey, in delivering the opinion of the court in the case of *The King v. Horne,* Cowp. 682, said, that the last sort of certainty is rejected in all cases, as partaking of too much subtlety, and this is because estoppels conclude a man to allege the truth. Co. Litt. 352, b. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (2 H. Black. 530); or such-like pleas, which are odious in the eye of the law. 8 T. R. 167. Certainty in pleading is, either of the parties to the suit, the thing demanded, or injury complained of, or of time, place, or other circumstances. As to the first of these particulars, the parties, plaintiff and defendant, must be properly named in the beginning of the pleadings; and when their names are afterwards mentioned, they must be referred to with such precision that they may not be mistaken.

Whether a thing be demanded or claimed in specie or damages, it ought in all cases to be described with convenient certainty as to its number, quantity, quality, or nature, &c. 2 B. & P. 265. However, where the thing demanded or claimed lies within the defendant's notice, or is ascertained by being contained in or belonging to something else, or other circumstances, general words are sufficient in describing it. If a thing be charged to have been done, whereby the plaintiff has sustained an injury, the manner how it was done should be shown; as in debt upon a contract to pay a certain sum for waste done, if the plaintiff shows that the defendant committed waste, without stating how it was committed, it is not sufficient. The rules relating to certainty, and according to which every traversable allegation of a fact was required to be stated in connexion with a place where and a time when it happened, notwithstanding any other place and time could be proved, are now much relaxed by the effect of the procedure acts and pleading rules; and it is only now necessary to state time and place, where it is the essence of the pleading. *See* 15 & 16 Vic. c. 76, s. 49.

[1] It is convenient to the parties, judge and jury, that all pleadings be single (Hob. 295), as well as apt; therefore, the plea that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto several answers (admitting each of them to be good) are required, is not allowable in law. Co. Litt. 304, a. The reason why duplicity in pleading is not in general permitted, though all the matters stated may be true, is, because it would involve the judgment of the court, instead of confining it to one single point (Hob. 295), which is the great end and object of pleading. Duplicity in pleas or subsequent pleadings, pleaded without leave of the court or a judge, may sometimes amount to a violation of

(*c*) *And ought not to contain Superfluous or Unnecessary Matter.*[1]

(*d*) *Or Repugnant Statements.*[2]

sect. 81 of the 15 & 16 Vic. c. 76, and entitle the other party to sign judgment.

Anciently great certainty and exactness was required in setting forth all the particulars in a declaration, as likewise in pleading the performance and conditions of covenants; but this rule has in the modern practice received a relaxation, and it is now settled that where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls would be encumbered, general pleading is allowed. Although in general the plaintiff may declare in several counts, and the defendant may plead several pleas, yet if the different counts or pleas are precisely the same, or there is only a formal difference between them, and it cannot be made appear that any evidence can be produced to prove one which will not prove the other, and they appear to be put in for vexation, the court or a judge, upon application, will order all but one of them to be struck out. Reg. Gen. (Pl.) H. T. 1853, rr. 1, 2, 3. See *post*, p. 143. But, though the court can see what evidence may be produced to prove one count or plea, which will not equally prove the other, it would be in some instances to shut out the party from laying his case in his own way, when it does not appear that he intends to be vexatious. Cas. Temp. Hard. 129.

If either party in any particular count or plea states what is impertinent, though the count or plea itself be proper, that is an injury to the other party, the impertinent matter will be ordered to be struck out, or referred to the master; as, if an action be founded on a deed, and the plaintiff sets forth parts of it which do not relate to the cause of action, and are not necessary to be stated. Cowp. 665, 727.

[1] Surplusage will not vitiate the pleadings, and therefore, if in a declaration a man make an imperfect statement of a thing, which need not be mentioned, it is not prejudicial. Hob. 23; Plow. Com. 30, a; 32, b; Cro. 377; 3 Bulst. 82; Carth. 95; 1 Show. 28. As, when an action is given by statute to the informer only, and the declaration states the action to have accrued to the king, the poor of the parish, and the informer, this has been deemed surplusage, and the declaration holden good notwithstanding. Andr. 6. So, if the plaintiff declare *quod cum ipse idem def.* &c.; for *ipse* is surplusage. So, in debt for rent, if a devise of the reversion to the plaintiff be alleged, and that *postea*, viz. such a day, the devisor died, being a day before the making of the lease. Hard. 4. So, in a declaration in covenant, where it was stated that before the exhibiting of the bill, viz. on the 1st Nov. 1797, 900*l.* of the rent reserved, for two years and three months, was due and in arrear; it was holden, that as this referred to a time before the lease was made, and was therefore impossible in respect of the subject-matter, the date here mentioned might be rejected as surplusage. 10 East, 139. So, when the defendant agreed to pay the plaintiff 1500*l.* in two months, in consideration of which the plaintiff promised to give him a release of certain claims; in an action for the money, the plaintiff having averred that he was ready and willing to give a release, and an objection being made on account of a variance between the release mentioned in the averment and that in the agreement, the court held the variance to be immaterial, for the plaintiff need not have made averment at all, and, therefore, it might be rejected altogether as surplusage. 2 N. R. 233. But if a man, by the allegation of a thing not necessary, show that he has no cause of action, this, though surplusage, will vitiate; as, if the plaintiff make title, which he need not, and the title be not good, the whole shall abate. Plowd. Com. 84, b; 202, b. So, in an action against a disturber, where possession is a sufficient title for the plaintiff, yet, if the plaintiff, instead of declaring generally upon his possession, show an interest that is insufficient, the declaration is bad. 1 Salk. 363; 2 Ld. Raym. 1230; 1 Saund. 346, n. 2. So, formerly in an action against the sheriff for taking goods without leaving a year's rent, the plaintiff having set forth the particulars of the demise (which was unnecessary), and not proving them as laid, was nonsuited. 1 T. R. 236, n. So, in the abolished proceeding of partition, if the plaintiff showed that he and the defendant both held in fee, whereas the defendant was seised in tail, this shall abate the writ, although it was not necessary to show the defendant's title. R. Cro. Eliz. 760; Com. Dig. Plead. C. 29.

Where a replication stated that the plaintiff, before a *distringas* had issued against him, appeared to a writ issued out against him in the same action, to wit, a *clausum fregit*, issued out of C. B., the court held that these words after the *scilicet* being material could not be rejected as surplusage, and consequently that a record of an appearance to a *clausum fregit* issued out of Chancery would not support the replication. 2 N. R. 463. And, lastly, it is a general rule that allegation in pleading, which is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation subsequent. 5 East, 244.

Words may be rejected as surplusage, though not repugnant to the preceding words, if by their omission that which was insensible may be made sensible. *Wyat v. Aland*, 1 Salk. 325.

[2] If superfluous allegation be repugnant to what was before alleged it is void, and will be rejected; and whatever is redundant,

(*e*) *And where Equivocal, they will be taken in the sense Hostile to the Party pleading.*[1]

(*f*) *Performance of Conditions precedent may be alleged generally.*[2]

(*g*) *Averments of a merely formal Character ought not to be made, and Pleadings are judged of according to their Substance.*[3]

(*h*) *But if calculated to Embarrass, they may be amended or struck out.*[4]

(*i*) *Pleading Documents.*[5]

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and which need not have been put into the sentence, and contradicting to what was before alleged, will not in general vitiate the pleadings (Gilb. C. P. 131, 142; Co. Litt. 303, b; 10 East, 142); for, *per Holt, C. J.*, where matter is nonsense, by being contradictory and repugnant to something precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows; but that which is contradictory shall be rejected, as formerly in ejectment, where the declaration was of a demise the 2d of January, and that the defendant *postea, scilicet*, on the 1st of January, ejected him: here the *scilicet* may be rejected, as being expressly contrary to the *postea* and the precedent matter (5 East, 255; 1 Salk. 324, 325); but a material allegation, sensible and consistent in the place where it occurs, and not repugnant to any antecedent matter, cannot be rejected, merely on account of there occurring afterwards in the same pleading another allegation inconsistent with the former, and which latter allegation cannot itself be rejected (5 East, 254); and if by the rejection of the repugnant matter the pleading would be left without an allegation of material matter, though in some instances they might be aided by verdict, yet it would be defective on special demurrer. Gilb. C. P. 132, 133; 10 East, 142.

[1] It is a maxim in pleading, that everything shall be taken most strongly against the party pleading (1 Saund. 259, n. s.; 2 B. & P. 155; 4 East, 343); or rather that, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them (2 H. Black. 530); for it is to be intended that every person states his case as favourably to himself as possible (Co. Litt. 302, b): but in applying this maxim, the other rules must be kept in view, and particularly those relating to the facts, of which the courts will, *ex officio*, take notice, without their being stated in pleading (2 Camp. 139). And the maxim itself must be received with some qualification; for the language of the pleading is to have a reasonable intendment and construction (2 Lev. 190; 5 East, 257); and where an expression is capable of different meanings, that should be taken which will support the declaration, &c., and not the other, which would defeat it. But the matter must be capable of different meanings; for the court cannot, in order to support the proceeding in which the particular term occurs, arbitrarily give it a meaning at which the use, habits, and understanding of mankind would plainly revolt.

[2] By 15 & 16 Vic. c. 76, s. 57, "it shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally; but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest."

[3] By the 15 & 16 Vic. c. 76, s. 49, "all statements which need not be proved, such as the statement of time, quality, quantity, and value, where these are immaterial; the statement of losing and finding, and bailment in actions for goods or their value; the statement of acts of trespass having been committed, with force and arms and against the peace of our Lady the Queen; the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements, and all statements of a like kind, shall be omitted."

And by sect. 50, "either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form."

By sect. 51, "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer." *See* vol. iv. p. 41.

[4] "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such a pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit." 15 & 16 Vic. c. 76, s. 52. *Taylor v. Smith*, 3 F. & F. 91, 94.

[5] It was formerly necessary to set forth material documents mentioned in pleadings, or to excuse the omission to do so. But now by 15 & 16 Vic. c. 76, s. 55, "it shall not be necessary to make profert of any deed or other document mentioned or relied on in

III. Time for Pleading, and Notice.[1]

IV. Date of Pleadings.[2]

V. Of Pleadings being Founded on the same Subject-matter.[3]

PLEAS. *See* also Pleadings, *ante*, p. 135.

I. Time for Pleading, and of the Notice to Plead, p. 144.

(A) *Form of Notice to Plead*, p. 145.

II. Of the Order for further Time to Plead, p. 145.

(A) *Order, how Obtained; its Operation, and of the Terms upon which it is usually Granted*, p. 145.

(B) *Of the Effect of its requiring the Defendant to "Plead Issuably,"* p. 146.

III. Of the Forms of Pleas, p. 148.

(A) *Title of Pleas*, p. 149.

(B) *Commencement of Plea*, p. 149.

(*a*) *Forms of Pleas prescribed by Common-Law Procedure Act*, 1852, *Schedule*, p. 150.

(C) *Effect of General Issue, &c. under Rules relating to Pleading*, p. 150. General issue by statute, *see* Not Guilty, vol. v. p. 561.

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any pleading; and if profert shall be made, it shall not entitle the other party to crave oyer of, or to set out upon oyer, such deed or other document." *See* Oyer, *ante*, p. 41.

And by sect. 56, "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material; and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

[1] By 15 & 16 Vic. c. 76, s. 53, "rules to declare, or declare peremptorily, and rules to reply and plead subsequent pleadings, shall not be necessary, and instead thereof a notice shall be substituted, requiring the opposite party to declare, reply, rejoin, or as the case may be, within four days, otherwise judgment; such notice to be delivered separately, or indorsed on any pleading to which the opposite party is required to reply, rejoin, or as the case may be."

[2] "Every declaration and other pleading shall be entitled of the proper court, and of the day of the month and the year when the same was pleaded, and shall bear no other time or date; and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment-roll, under the date of the day of the month and year, when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge." 15 & 16 Vic. c. 76, s. 54.

[3] "Several pleas, replications, or subsequent pleadings, or several avowries or cognisances founded on the same ground of answer or defence, shall not be allowed: Provided that, on an application to the court or a judge to strike out any count, or on an objection taken before the judge on a summons, to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognisances, on the ground of such counts or other pleadings being in violation of this rule, the court or a judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognisances, founded on the same ground of answer or defence, as may appear to such court or judge to be proper for determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit." Reg. Gen. (Pl.) H. T. 1853, r. 2. When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognisance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading, in respect of which he has failed to establish a distinct cause of action, or distinct ground of answer or defence, including those of the evidence as well as those of the pleading.

(D) *Plea of Matter subsequent to Action*, p. 152.

(E) *Plea* Puis darrein Continuance, p. 152.

(F) *Pleas not Objectionable on ground of treating Declaration as in Tort or on Contract*, p. 153.

(G) *Pleas to be construed Distributively*, p. 153.

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(K) *Pleas founded on same Matter are Prohibited*, p. 153.

(L) *Plea to a New Assignment*, p. 153.

(M) *Equitable Pleas. See* vol. iv. p. 242.

IV. Of the Pleading of several Matters, and of Pleading and Demurring, p. 153.

(A) *What Pleas may be pleaded together, and in what cases Leave is necessary*, p. 153.

(B) *Of the Mode of obtaining Leave to Plead several Matters*, p. 156.

(C) *Appeal from Order to Plead several Matters*, p. 156.

(D) *Judgment for Pleading several Pleas without Leave*, p. 156.

(E) *Of Pleading and Demurring together*, p. 157.

V. How Pleas are Pleaded and Delivered, p. 157.

(A) *Particulars of Set-Off must be delivered with Plea of Set-Off*, p. 157.

VI. Judgment for want of a Plea, p. 157.

VII. Striking out or Setting aside Pleas, p. 158.

VIII. Amendment and Adding of Pleas, p. 158.

(A) *Amendment of Pleas*, p. 158.

(B) *Adding of Pleas*, p. 158.

IX. Withdrawal and Waiver of Pleas, p. 159.

X. Joinder or Severance in Pleading in the case of several Defendants, p. 159.

XI. Subject-matter of Pleas, and Form of Particular Pleas. *See* appropriate titles; as, Never Indebted, vol. v. 535; New Assignment, id. 536; Non-Assumpsit, id. 540; Not Guilty, id. 560; *ante*, Payment, p. 117; *post*, Set-Off.

I. Time for Pleading, and of the Notice to Plead.[1]

[1] In cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, is eight days. (C. L. P. Act, 1852, s. 63.) The time for pleading in abatement is four days. Those days are reckoned exclusive of the day of giving the notice to plead, and inclusive of the last day, unless it fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time is reckoned exclusive of that day also. (*See* Reg. Gen. (Pr.) H. T. 1853, r. 9, 174, 175.) After amendment of any pleading, no new notice to plead thereto is necessary, but the party must plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the court or a judge; and in case the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the court or a judge shall allow, the pleading originally pleaded thereto will stand, and be consi-

(A) *Form of Notice to Plead.*[1]

II. Of the Order for further Time to Plead.

(A) *Order, how Obtained; its Operation, and of the Terms upon which it is usually Granted.*[2]

dered as pleaded in answer to such amended pleading. (C. L. P. Act, 1852, s. 90.) After delivery of particulars under a judge's order, the defendant has the same time to plead that he had at the return of the summons for such order. (Reg. Gen. (Pr.) H. T. 1853, r. 21.) After judgment of *respondeat ouster* on a plea in abatement, the defendant has only four days to plead. *Cantwell v. Earl of Stirling*, 1 Dowl. 265. In all cases where there has been no proceeding for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, must give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereupon, is not deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, is a proceeding within it. (Reg. Gen. (Pr.) H. T. 1853, r. 176.) Neither a rule to plead nor a demand of plea is now required in any case (C. L. P. Act, 1852, s. 62); but a notice to plead is necessary in all cases before the plaintiff can sign judgment for want of a plea. It is usually indorsed on the declaration when the declaration is delivered; but the notice to plead may be delivered separately. Id.; and sect. 63.

[1] The form is as follows:—

"The defendant is to plead hereto in eight days, otherwise judgment."

Where a blank was left for the number of days, it was held, after judgment signed for want of a plea, that it should be understood to mean the period allowed according to the practice of the court (*Hifferman v. Langelle*, 2 B. & P. 363; and see *Collins v. Rose*, 5 Mee. & W. 194); but such a notice, or one giving less time than the defendant is entitled to, would probably be set aside as irregular, or amended at the plaintiff's cost, upon application promptly made for that purpose. See *Braty v. Baldock*, Barnes, 302. If the notice gives the defendant more than the requisite time to plead, he is entitled to the whole period mentioned. *Solomonson v. Parker*, 2 Dowl. 405.

[2] If further time to plead is required, it may be obtained upon summons, if the judge think proper to grant it. In this, as in all other cases of proceeding by judge's summons, it must be taken out and served on the opposite party's attorney or agent, and the order, if granted, must be drawn up and served in the same manner.

Where a defendant, having obtained an order for further time to plead upon certain terms, did not draw up the order, but, on the same day, took out a summons for better particulars, with a stay of proceeding, and also a summons for further time to plead; after the delivery of such particulars, and on the following day, the plaintiff's attorney delivered the particulars, and signed judgment as for want of a plea, the original time for pleading having then expired; it was held that the judgment was irregular. *Daley v. Arnold*, 1 Dowl. N. S. 938.

The summons is a stay of proceedings, not from the time of its service, but only from the time when it is attendable; care must, therefore, be taken to make the summons attendable at or before the time when the plaintiff is at liberty to sign judgment: if, however, the plaintiff, although entitled to sign judgment, omit to do so before the summons is attendable, he cannot sign judgment afterwards, until the summons has been disposed of. *Morris v. Hunt*, 2 B. & A. 355. *Abernethy v. Paton*, 6 Scott, 586.

The summons is a stay of proceedings, if it is attendable at or before the time the judgment office opens (11 o'clock: *see* Reg. (Pr.) H. T. 1853, r. 173) on the day after the time for pleading expires. *Wells v. Secret*, 2 Dowl. 447. *Spenceley v. Shouls*, 5 id. 562. It cannot, in strictness, be made attendable before the time appointed by the judge for attending at chambers; but if made so attendable, as it may be, by leave of the judge, it operates as a stay of proceedings. *Byles v. Walter*, 5 Dowl. 232. *Bebb v. Wales*, id. 458.

The time to be given is entirely in the discretion of the judge. A month is the extreme limit in ordinary cases; but under special circumstances, even a longer period may be allowed. 1 Chit. Arch. by Prentice, 244.

Where the captain of a ship was served with process on the eve of his departure for a foreign voyage, the court allowed him twelve months' time to plead. *Hunt v. Barclay*, 3 Dowl. 647. But the court will not in any instance grant an indefinite period (*Clark v. Allbutt*, 1 Tyr. & Gr. 71), except it be contingent on an act to be done by the plaintiff, as to deliver particulars. Lush. Pr. 394.

Where a plaintiff who was indicted for felony sued for money supposed to be the produce of the felony, the defendant was allowed time to plead until a month after the trial of the indictment. *Deakin v. Praed*, 4 Taunt. 825. *Sibson v. Nivin*, Barnes, 224. But an indefinite time was refused, although it was sworn that a rule was pending in another court involving the same matter of defence, and that defendant could not safely plead until it was disposed of. Time to plead, however, was granted until a fixed day. *Clark v. Allbutt*, 4 Dowl. 684. The court refused to grant time to plead until the first day of next term, upon a suggestion that in the interim it was expected an act of

(B) *Of the Effect of its requiring the Defendant to "Plead Issuably."*[1]

parliament would pass that would have the effect of relieving the defendant from the penalties sued for in the action. *Grant, q. t. v. Ridley*, 6 Scott, N. R. 176.

The time is reckoned exclusively of the date of the judge's order, and inclusively of the last day, unless the days given are expressed to be "clear days," in which case they are reckoned exclusively of both days. Reg. Gen. (Pr.) H. T. 1853, r. 174. If a month is given, it is considered a lunar month, consisting of four weeks. *Tullet v. Linfield*, 3 Burr. 1455. *Soper v. Curtis*, 2 Dowl. 237. If the time given does not expire before the 10th of August, the defendant will have the same number of days after the 24th of October, as if the declaration had been delivered or filed on the 24th of October. Reg. Gen. (Pr.) H. T. 1853, r. 9. If the summons is dismissed after the time for pleading is out, the defendant has the whole of the day on which it is dismissed. *Evans v. Senior*, 4 Ex. 818; and see *Mengens v. Perry*, 15 Mee. & W. 537.

As to the terms upon which leave is granted. —The order is usually drawn up upon the terms of the defendant "pleading issuably, rejoining gratis, and taking short notice of trial (or inquiry) if necessary;" and when an order is drawn up on "usual terms," it means these terms. Sometimes the defendant is required to take such notice of trial as the plaintiff can give. If the defendant be an executor or administrator, it is not unusual for the judge to order that he shall not plead any judgment which may be obtained against him since the time for pleading expired. If the further time will extend to or beyond the 10th of August, the judge sometimes orders that the pleadings may be delivered between that date and the 24th October. *See supra.* If the defendant desires to change the venue he should not take an order upon the usual terms, unless it is expressed to be made "without prejudice to any application by the defendant to change the venue herein," for otherwise the order upon usual terms would preclude him from making such application. *Notts v. Curtis*, 1 Dowl. 319. An application to compel the plaintiff to give security for costs may be made after an order for time to plead on the usual terms. *Dowling v. Harman*, 6 Mee. & W. 131. Before serving the order it may be abandoned by the defendant, but after it has been served he must abide by its terms, unless they are varied by the court or the judge who made the order. *Griffin v. Dickenson*, 7 Dowl. 860.

The meaning of "rejoining gratis" is, that the defendant shall rejoin within four days after the replication has been delivered without a notice to rejoin. *Adkins v. Anderson*, 10 Mee. & W. 12. *Winterbottom v. Lees*, 3 Ex. 325; C. L. P. Act, 1852, s. 53.

"Short notice of trial," or "short notice of inquiry," means in all cases four days. Reg. Gen. (Pr.) H. T. 1853, r. 35.

[1] The condition to plead issuably is in effect an agreement by the defendant to speed the cause to a conclusion, and bring it to an issue on the substantial issues of law or fact, without regard to any formal inaccuracies in the plaintiff's statement. *Barker v. Gleadow*, 5 Dowl. 134: *per Coleridge, J.* Hence it obliges the defendant to plead in such a way as to bring to issue the substantial merits of the case. The plea must be one which, if true, must be a bar not only to that, but to any other action founded on the same state of facts. Lush. Pr. 394.

The meaning of "pleading issuably" is, that the plea should go to the merits of the action, or, in other words, that it should be one upon which an issue in fact or in law may be taken, so that the case may be decided on the merits. *Humphreys v. Earl of Waldegrave*, 6 Mee. & W. 622: *per Parke, B. See* also *Zulueta v. Miller*, 4 D. & L. 186–192. *Steele v. Harmer*, 14 Mee. & W. 136. Therefore, any dilatory or sham plea, or one clearly bad on general demurrer, is a non-issuable plea. See *Bousfield v. Edge*, 1 Ex. 90. *Parrett v. Goddard*, 1 Dowl. N. S. 874. A plea which has been already decided to be bad by the judgment of a court is non-issuable. *Beauclerk v. Hook*, 20 L. J. (N. S.) 485, Q. B.

The following have been held to be non-issuable pleas:—

A plea in abatement. *Kilwick v. Maidman*, 1 Burr. 59.

A plea of "alien-enemy" (*Simeon v. Thompson*, 8 T. R. 71); and see *Shepeler v. Durrant*, 14 C. B. 582. *Alcenius v. Nygren*, 24 L. J. (N. S.) 19, Q. B.

Bankruptcy of one of several plaintiffs after action brought. *Staples v. Holdsworth*, 4 Bing. N. C. 144.

To an action on a bill of exchange, that the defendant did not accept the bill, nor did the plaintiff give greater value for it than 10*l*. *Myers v. Lazarus*, 1 Dowl. N. S. 316.

To a similar action by indorsee against indorser, that the plaintiff, after the bill had been accepted, induced the acceptor not to pay the bill. *Bateson v. Lee*, 1 D. & L. 224.

To an action by the holder of a cheque, that the consideration for the making of it was money won by a third party of the defendant at hazard in a gaming-house. *Humphreys v. Earl of Waldegrave, supra.*

To an action on a bond that defendants were in partnership, and in consideration that they would dissolve partnership at the plaintiff's request, he agreed to forbear proceedings in the action, and the partnership was dissolved accordingly. *Blackburn v. Edwards*, 10 Ad. & E. 21.

In an action against an administrator, a plea of defendant's own bankruptcy pleaded together with *plene administravit*. *Searle v. Bradshaw*, 2 Dowl. 289.

In an action against a member of a joint-stock company, it was not imperative to sue

by its secretary or one of its directors, a plea that the action was brought against the defendant for a debt of the company, and that he was not secretary nor director. *Blewitt v. Gordon*, 1 Dowl. N. S. 815. *See*, as to a plea of a deed being a charge on a benefice with cure of souls, contrary to the stat. 13 Eliz. c. 20, *Sloane v. Packman*, 11 Mee. & W. 770. As to pleading *non assumpsit* to a count on a bill of exchange, see *Eddison v. Peagram*, 4 D. & L. 277. *Robeson v. Ellis*, 5 id. 403. *Kelly v. Villebois*, 3 Jur. 1172. *Sewell v. Dale*, 8 Dowl. 309. *Hughes v. Pool*, 6 Man. & G. 271. And *see*, where a plea intended to raise the defence of want of consideration was held non-issuable, *Hunter v. Wilson*, 7 D. & L. 221. *See* also *Besant v. Cross*, 2 L. M. & P. 351. As to a plea of bankruptcy of sole plaintiff before action, see *Willis v. Hallett*, 5 Bing. N. C. 465. *Wettenhall v. Graham*, 4 id. 714.

To an action against a company which had been amalgamated with and made liable to the debts of another company upon a bond of such other company, a plea that the bond was not the deed of the defendants, see *Selby v. East-Anglian Railway Co.* 2 L. M. & P. 595.

The following have been held to be issuable pleas:—

Tender. *Noone v. Smith*, 1 H. Black. 369.

Statute of Limitations. *Rucker v. Hannay*, 3 T. R. 124.

Plea in bar of defendant's coverture. *Birch v. Leake*, 2 Dowl. & L. 88.

Infancy of defendant. *Delafield v. Tonner*, 5 Taunt. 856.

Bankruptcy. *Evans v. Gill*, 1 B. & P. 52. *Willis v. Allen*, 5 Bing. N. C. 465. See *Wettenhall v. Graham*, *supra*.

To an action on an attorney's bill, that no signed bill was delivered. *Wilkinson v. Page*, 1 D. & L. 913.

The Spirituous Liquor Act, 24 Geo. 2, c. 40, s. 12. *Gaitskill v. Greathead*, 1 D. & R. 359.

The statute 23 Hen. 6, c. 8, that a bail bond was given for ease and favour. *Dearden v. Holden*, 1 Burr. 605.

To an action against bail, no *ca. sa.* against principal. *Hartley v. Hodgson*, 1 Moore, 420–430.

To an action by indorsee against acceptor of a bill, that before the making of it the drawer had been twice bankrupt, and his estate had not paid 15*s.* in the 1*l.* under the second fiat. *Mackay v. Wood*, 7 Mee & W. 420.

That the drawer, before he indorsed the bill, petitioned the Insolvent Debtors' Court, whereby the right to the bill vested in his assignees. *Watkins v. Bensusan*, 9 Mee. & W. 422.

Action against surety under 4 Geo. 3, c. 33:—*Plea*, of writ of error pending on the judgment against the principal. See *Curling v. Innes*, 2 H. Black. 372.

Action against father on apprenticeship-deed:—*Plea*, that covenants were made with plaintiffs as partners, and, before breach, they dissolved partnership. *Lloyd v. Blackburn*, 1 Dowl. N. S. 647.

Action for wrongfully refusing to allow plaintiff to appraise goods distrained:—*Plea*, that plaintiff was tenant to the defendant, and that the goods were taken as a distress for rent. *Sealey v. Harris*, 7 Dowl. 195. See also *Hudson v. Haslam*, 7 D. & L. 162. *Linwood v. Squire*, 5 Ex. 234. *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 618, 826.

To an action on an agreement for not furnishing by a specified time a steam-engine, which was to be paid for by instalments:—*Plea*, that the second instalment, though due, had not been paid. *Zulueta v. Miller*, 4 D. & L. 186. That after the accruing of the debt the defendant obtained his final order for protection as an insolvent, and that the debt was omitted from the schedule with the consent and through the connivance of the plaintiff. *Wilkin v. Manning*, 18 Jur. 44 Ex.

A judge's order allowing several pleas does not determine whether they are issuable or not (*Humphreys v. Earl of Waldegrave*, 6 Mee. & W. 622); but if the plaintiff consent to the order, he cannot afterwards object to any of the pleas on the ground that they are non-issuable.

The term "pleading issuably," applies only to the stage of the action at the time when the term is imposed, and not to subsequent pleadings (*Barker v. Gleadow*, 5 Dowl. 134); nor to cases where the declaration is afterwards amended, and the defendant has liberty to plead *de novo*. *Children v. Mannering*, 8 id. 120.

The condition goes to the whole of the declaration, so that if one of many pleas be not issuable, all may be treated as a nullity. *Waterfall v. Glode*, 3 T. R. 305. So if each plea be addressed to a different count, or a different part of the same count, so as to be in effect but one plea, the plaintiff may reject the whole; but the defendant may omit to plead to one count or part of a count, and then, if the pleas put in be good, the plaintiff can only take judgment for such part (*Cuming v. Sharland*, 1 East, 411); but in such a case the plea must profess to be limited to that part which it answers. *Macdonnell v. Macdonnell*, 3 B. & P. 174.

Consequences of Non-issuable Plea.—Where the defendant is under terms, and pleads a non-issuable plea, it may be treated as a nullity, and judgment may be signed as for want of a plea, when the full time for pleading has expired; and this, although it is issuable to some counts of the declaration (*Sewell v. Dale*, 8 Dowl. 309), and although there may be other pleas which are issuable pleaded with it (*Humphreys v. Earl of Waldegrave*, *supra*), it is only in clear cases, however, that the plaintiff will be safe in signing judgment: if he has any doubt upon the matter, he should demur to the plea, or apply to a judge to set it aside, or to have it amended at the defendant's expense.

The plaintiff, as we have seen, by consenting to an order allowing several pleas, precludes himself from afterwards objecting

III. Of the Forms of Pleas.[1]

that one or more of them are non-issuable: he is also precluded if he reply or demur to the pleas, or even obtain time to reply. *Trott v. Smith*, 9 Mee. & W. 765. *Stead v. Carey*, 13 L. J. 176, C. P.

[1] Pleas are either dilatory or peremptory: the former of which are either to the jurisdiction of the court, or in abatement of the suit; the latter are general or special pleas in bar. *See* vol. i. p. 13.

Pleas in avoidance are such as confess the matters contained in the declaration, and avoid the effect of them by some new matter which shows that the plaintiff is not entitled to maintain his action, as by admitting cause of action declared upon, but showing that it was void or voidable on account of the inability of one of the parties to make it; as by coverture, infancy, or the like, or by the mode in which the contract was executed, or by duress, or that it was contrary to law, as being within the statutes against tippling or gaming: which circumstances are sufficient to prevent the plaintiff from recovering anything.

Pleas in discharge, as distinguished from those in avoidance, are such as admit the demand; but, instead of avoiding the payment or satisfaction of it, show that it has been discharged by some matter of fact, as by having been actually paid or satisfied, or that it has been ascertained and settled by legal means, though it may not have been paid or satisfied, and may yet remain to be so, as by having been made the subject of an arbitrament, foreign attachment, or former recovery; or that the plaintiff has given up his right to claim his demand by a release; or, though he may not have given up his right, that he cannot recover the amount of it on account of the defendant having a right to set off against him a counter-demand; so the defendant may avail himself of any discharge of the plaintiff's claim by matter of law, as the alienage, outlawry, or bankruptcy of the plaintiff; or its being too late, by reason of the Statute of Limitations.

Pleas in excuse also admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all in his power to satisfy the former; or not having been the culpable author of the latter. Thus where, after tender of a debt by the debtor, and refusal by the creditor, if the latter harasses the former with an action, it becomes necessary for the defendant to acknowledge the debt and plead the tender, adding that he has always been and still is ready to pay it, which is called a plea of tender; for a tender and refusal of a debt will, in all cases, discharge the costs of the action, though not the debt itself. 3 Bl. Com. 303. So, where an action is brought for an assault and battery, the defendant may plead that the plaintiff assaulted him first, which obliged him to defend himself, and that if any harm happened to the plaintiff from such defence, the same was occasioned by his own assault first made upon the defendant, which is called a plea of *son assault demesne*. In like manner the defendant may excuse an assault in defence of a husband, wife, parent, child, master or servant. 1 Ld. Raym. 62.

Another plea of excuse is that of amicable contest, where an action is brought for an assault, and the defendant pleads that he and the plaintiff wrestled amicably together, and that if any hurt was received by the plaintiff it was accidental. So, the defendant in actions for trespasses of this or any other nature may plead that they happened by inevitable accident, and without any fault in him.

Pleas of justification differ from those last-mentioned in this respect, that the defendant in those pleas always relies upon the plaintiff's conduct as an apology for his doing, or omitting to do, the thing in question; but in pleas of justification, the defendant professes purposely to have done the acts which are the subject of the plaintiff's suit; not on account of his negligent or culpable conduct, but in order to exercise that right which he considers he might in point of law exert, and in the exercise of which he conceives himself not merely excused, but justified: in short, such pleas proceed upon the idea that he acted not merely without blame, but by legal and established right. They seem principally to consist of matter of title or interest in or respecting land, or matter of authority, either mediately or immediately derived from the plaintiff, or the general operation of law upon the particular circumstances of the case.

Pleas in estoppel, which happen where the plaintiff has done some act, or executed some deed, or been party to some record, which estops or precludes him from averring anything to the contrary of it.

The execution of a deed is said to be the most solemn and authentic act that a man can of himself possibly perform in the disposal of his property, and, therefore, he shall always be estopped by his own deed: or, in other words, he shall not be permitted to aver or prove anything in contradiction to that which is contained in it. 2 Bl. Com. 295. So, if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded or replied by way of estoppel, in another action of trespass between the same parties, in respect of the same fact or title.

It should appear whether the plea be intended as an answer to the whole declaration, or to part only; and if the latter, it should specify what part, expressly, and with

(A) *Title of Pleas.*[1]

(B) *Commencement of Plea.*[2]

certainty; thus: "And as to the said first count of the said declaration, he, the said J.S., says, that," &c., or, "as to the said assaulting, beating, and ill-treating the said G. H. by him, the said J. S., above supposed to have been done, the said J. S. says," &c. "As to the said breach of covenant first above assigned," and the like. 1 Sid. 338; Lutw. 241. So, where the general issue is pleaded to part, it must specify to what part.

If a plea begin only as an answer to part, and is in truth but an answer to part, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the unanswered part by *nil dicit;* for, if he demurs or pleads over, the whole action is discontinued. 4 Rep. 62, a. *Herlakenden's case*, and the authorities there cited. *See supra, per Holt, C. J.;* 1 Roll. Abr. 487, pl. 10; 1 Salk. 179, 180. *Market v. Johnson*, 2 Ld. Raym. 1121, 716. *Vincent v. Beston*, 2 Ld. Raym. 716. *Peers v. Henriques*, Gilb. Hist. C. B. 155, 158; 1 Stra. 302. *Woodward v. Robinson.* But this rule must be understood with this limitation, that the part of the declaration which is not answered by the plea is material, and the gist of the action; for where anything is inserted in the declaration as matter of aggravation or damages, the plea need not answer or justify that, for the answering of that which is the gist of the action will cover the whole declaration. 3 Wils. 20. *Dye v. Leatherdale*, 3 T. R. 297. *Taylor v. Cole*, and *Fisherwood v. Cannon*, there cited. But, substantially, the whole must be answered; as in a debt on bond to perform an award, if the defendant plead performance of part only, it is bad. R. 3 Lev. 24. And the same in account against one as bailiff of the plaintiff's house and goods, if he plead only as to the goods (R. 2 Leon. 195), in trespass for breaking the plaintiff's close and destroying his hop-poles, if the defendant plead *liberum tenementum*, and that he took the hops damage feasant, it is bad, for he does not answer as to the destruction of the poles. R. 2 Mod. Ex. 320. So, in trespass for a battery and wounding, if the defendant justify putting him into the stocks (*quæ est eadem transgressio*), and say nothing more, it is bad, for that matter does not go to the wounding. R. Cro. Eliz. 268. So, in trespass for an assault and imprisonment, if to all *præter*, the assault, and imprisonment, the defendant plead not guilty, and justify *quoad* the imprisonment, without saying anything to the assault, it will be bad, though there cannot be, it is said, an imprisonment without an assault. R. 1 Roll. 177.

In trespass for entering a close and taking timber, if the defendant make a title to the close, without answering to the timber, it is bad. R. 1 Roll. 406. So, in trespass for cutting down and taking away trees, if the defendant do not answer both to the cutting down and taking away (Dy. 35), in an action on the case against a common bargeman for goods delivered to him to carry to such a place, if he plead that he was discharged of keeping, without saying of carrying them. Hob. 18.

In trespass for driving away the plaintiff's cow, if the defendant justify the taking of his heifer, it is bad. R. Lutw. 1355. So, in trespass with a *continuando a die M. ad* 25 *Jul.*, if the defendant justify except *a dei M. ad* 20 *Jul.* R. 2 Cro. 27; 2 Cowp. 175; Com. Dig. Pleader, E. 1. *See* Pleading, *ante*, p. 135.

As it is a natural presumption that the party pleading will state his case as favourably for himself as possible, and that, if he do not state it with all its legal circumstances, it is not in fact favourable to him; it is a rule of construction, that a plea which has two intendments shall be taken most strongly against the defendant. Com. Dig. Pleader, E. 6; Co. Litt. 303, b; Plowd. 29, 46; 1 Saund. 276, a. But this intendment, in construction, does not obtain where it would be inconsistent with another part of the plea (10 Co. Litt. 59, n.); and there are some cases in which matters are implied in favour of the plea.

[1] Every plea is to be entitled in the proper court in which it is pleaded, and of the day of the month and year when it is pleaded, and to be so entered of record, unless otherwise ordered. C. L. P. Act, 1852, s. 54.

[2] No formal defence is required in a plea (or in an avowry or cognisance in the action of replevin), and it is to commence as follows, or to the like effect:—

In the Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas.]

The day of in the year of Our Lord, 186

C. D. *als.* A. B. } The defendant by *or* attorney [*or* in person, *or as the case may be*] says that [*here state the first defence*].

If the defendant be an infant at the time of pleading, say, "by E. F., admitted by the said court here as guardian of the defendant, to defend for him, he being an infant within the age of twenty-one years;" and it is not necessary to state in a second or other plea, or avowry, or cognisance, that it is pleaded by leave of the court or a judge, or according to the form of the statute, or to that effect, but every such plea, avowry, or cognisance, is to be written in a separate paragraph, and numbered, and to commence as follows, or to the like effect:—

2. And for a second, &c. plea, the defendant says that [*here state the second, &c., defence*]; or if pleaded to part only, then as follows, or to the like effect:—

2. And for a second, &c. plea to [*stating to what it is pleaded*], the defendant says that, &c.

(*a*) *Forms of Pleas prescribed by Common-Law Procedure Act*, 1852, *Schedule.*[1]

(C) *Effect of General Issue, &c. under Rules relating to Pleading.*[2]

And no formal conclusion is necessary to any plea, avowry, cognisance, or subsequent pleading. C. L. P. Act, 1852, s. 67.

By sect. 64, express colour shall no longer be necessary in any pleading.

By sect. 65, special traverses shall not be necessary in any pleading.

And by sect. 66, in a plea or subsequent pleading it shall not be necessary to use any allegation of *actionem non*, or *actionem ulterius non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment.

[1] *Pleas in Actions on Contracts.*

3. *Denial of Debt.* — That he never was indebted as alleged. *See* vol. v. p. 535.

This plea is applicable to declarations like those numbered 1 to 14 in the schedule to the act.

4. *Denial of Contract.* — That he did not promise as alleged. *See* vol. v. p. 540.

This plea is aplicable to all declarations on simple contract, but not on bills and notes, such as those numbered 19 to 22. It would be unobjectionable to use "did not warrant," "did not agree," or any other appropriate denial.

5. *Denial of Deed.*—That the alleged deed is not defendant's deed. *See* vol. v. p. 542.

6. *Statute of Limitations.* — That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit. *See* vol. v. p. 392.

7. *Payment.* — That before action he satisfied and discharged the plaintiff's claim by payment. *See ante*, p. 117.

8. *Set-off.*—That the plaintiff at the commencement of this suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the cause of set off, as in a declaration*], which amount the defendant is willing to set off against the plaintiff's claim. *See post*, Set-Off.

9. *Release.* — That after the alleged claim accrued, and before this suit, the plaintiff by deed released the defendant therefrom. *See post*, Release.

Pleas in Actions for Wrongs independent of Contract.

10. *Not Guilty.* — That he is not guilty. *See* vol. v. p. 561.

11. *Leave and License.*—That he did what is complained of by the plaintiff's leave. *See post*, Trespass.

12. *Self-defence.* — That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence. *See* vol. i. p. 565.

13. *Right of Way.* — That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof for twenty years before this suit enjoyed as of right, and without interruption, a way on foot, and with cattle, from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant, and over the said land of the plaintiff, to the said public highway, at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of the said way.

14. *Right of Common.* — That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed, as of right, and without interruption, common of pasture over the said land of the plaintiff, for all their cattle levant and couchant upon the said land of the defendant, at all times of the year as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common. *See* vol. iii. p. 143.

[2] The following rules, made in pursuance of the Common Law Procedure Act, 1852 (Reg. Gen. (Pl.) H. T. 1853), relate to the form of plea and the evidence that may be given under pleas in particular actions :—

Denying Character in which Parties Sue, &c. —Reg. 5. "In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as an issue, unless specially denied."

Operation of Non-Assumpsit. — Reg. 6. "In all actions on simple contract, except as hereinafter excepted, the plea of non-assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law." *See* vol. v. p. 540.

Exempli gratia : in an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Against Carriers and Agents. — In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express

or implied contract to the effect alleged in the declaration, but not of the breach.

To Indebitatus Counts. — To causes of action to which the plea of "never was indebted" is applicable, as provided in sched. B, 36, of the Common-Law Procedure Act, 1852, and to those of a like nature, the plea of "*non-assumpsit*" shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises. *Exempli gratia:* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery; in point of fact, in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. *See*, as to an action for rent, *Johnson v. Gibson*, 1 El. & Bl. 415.

Non-Assumpsit to Actions on Bills, &c. — Reg. 7. "In all actions upon bills of exchange and promissory notes, the plea of '*non-assumpsit*' and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact: *exempli gratia*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour, of the bill or note." *See* vol. v. p. 541.

By sect. 87 of the Common-Law Procedure Act, 1854, in actions on a bill of exchange or other negotiable instrument, the court or a judge may order that the loss of such instrument shall not be set up, provided that an indemnity is given to the satisfaction of the court or a judge, or a master, against the claims of any other person.

Matters in Confession and Avoidance to be pleaded specially. — Reg. 8. "In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratia*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

Interest in Policy of Insurance. — Reg. 9. "In actions on policies of assurance the interest of the assured may be averred thus: —'That A., B., C., and D. [*or some or one of them*] were or was interested,' &c.; and it may also be averred, 'that the insurance was made for the use and benefit, and on the account, of the person or persons so interested." *See* vol. v. p. 219.

Pleas to Actions on Specialties. — Reg. 10. "In actions on specialties and covenants, the plea of '*non est factum*' shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

Plea of "Nil Debet" abolished. — Reg. 11. "The plea of '*nil debet*' shall not be allowed in any action. Under the replication of *nil debet* to a plea of set-off, the plaintiff may object that the debt sought to be set off is not due from himself alone, but from himself and a third party." *Arnold v. Bainbridge*, 9 Ex. 153.

Confession and Avoidance to be Specially Pleaded. — Reg. 12. "All matters in confession and avoidance shall be pleaded specially, as above directed, in action on simple contracts."

Credit given in Particulars of Demand. — Reg. 13. "In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money." *See ante.*

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set off where the plaintiff does not state the particulars of such set-off.

Payment to be Pleaded. — Reg. 14. "Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." *See ante*, p. 119.

Operation of Plea of "Non Detinet." — Reg. 15. "In actions for detaining goods, the plea of '*non detinet*' shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea." *See* vol. iv. p. 69.

Actions of Tort. — Reg. 16. "In actions for torts, the plea of 'not guilty' shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration." *See* vol. v. p. 561.

Exempli gratia: in an action for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of "not guilty" will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. *Ante*, p. 12.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. *See post*, Way.

In an action for slander of the plaintiff in his office, profession, or trade, the plea of "not guilty," will operate in denial of speaking the

(D) *Plea of Matter subsequent to Action.*[1]

(E) *Plea* Puis darrein Continuance.[2]

words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged.

In actions for an escape it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of "not guilty" will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

Confession and Avoidance.—Reg. 17. "All matters in confession and avoidance shall be pleaded specially, as in actions on contract."

Operation of Plea of "Not Guilty" in Actions for Trespass to Land.—Reg. 19. "In actions for trespass to land, the plea of 'not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." *See* vol. v. p. 562.

In Actions for Converting Plaintiff's Goods.—Rule 20. "In actions for taking, damaging, or converting the plaintiff's goods, the plea of 'not guilty' shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein." *See* vol. v. p. 561.

Plea of General Issue by Statute: how to be Pleaded.—Reg. 21. "In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words 'by statute,' together with the year or years of the reign in which the act or acts of parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record." *See* vol. v. p. 566.

In *Edwards v. Hodges*, 24 L. J. (N. S.) C. P. 121, the court allowed the defendant to amend a plea of "not guilty by statute," by inserting in the margin the statutes necessary to justify the trespass complained of, after verdict for the defendant, and a rule *nisi* to set it aside.

Pleading a Defence arising after Suit and Costs therein.—Reg. 22. "A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea." *See* also rule 23.

Plea of "Judgment Recovered."—By the Reg. Gen. (Pr.) H. T. 1853, r. 10, where a defendant shall plead a plea of "judgment recovered," he shall, in the margin of such plea, state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered (if any); and in default of his so doing the plaintiff shall be at liberty to sign judgment as for want of a plea: and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of plea.

As to what is not a plea of "judgment recovered" within the meaning of the rule, see *Brokenshir v. Monger*, 9 Mee. & W. 111.

Equitable Defences.—*See* Equitable Pleas, vol. iv. p. 242.

[1] Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion, and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action. (Id. sect. 68.) And see Reg. Gen. (Pl.) H. T. 1853, r. 22.

[2] In cases in which a plea "*puis darrein continuance*" has heretofore been pleaded *in banc.* or at *nisi prius*, the same defence may be pleaded with an allegation that the matter arose after the last pleading, and such plea may, when necessary, be pleaded at *nisi prius*, between the 10th August and 24th October; but no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order. C. L. P. Act, 1853, s. 69; and *see* Reg. Gen. (Pl.), H. T. 1853, r. 23.

A set-off arising after action cannot be pleaded. *Richards v. James*, 12 Jur. 464. *See*, as to plea under a statute passed after commencement of action, *Cobbett v. Gray*, 4 Ex. 729.

As to when the affidavit will be dispensed with, see *Dunn v. Loftus*, 8 C. B. 76. The affidavit seems to be unnecessary when the subject-matter of the plea arose at the trial, in the presence of the judge. *Todd v. Emly*, 9 Mee. & W. 606; *see* also *Wagner v. Imbrie*, 6 Ex. 380.

(F) *Pleas not Objectionable on ground of treating Declaration as in Tort or on Contract.*[1]

(G) *Pleas to be construed Distributively.*[2]

(H) *Traverse of Allegations in Declaration.*[3]

(I) *Counsel's Signature not required.*[4]

(K) *Pleas founded on same Matter are Prohibited.*[5]

(L) *Plea to a New Assignment.*[6]

IV. Of the Pleading of several Matters, and of Pleading and Demurring.

(A) *What Pleas may be pleaded together, and in what cases Leave is necessary.*[7]

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[1] Any plea good in substance is not objectionable on the ground of its treating the declaration either as framed for a breach of contract, or for a wrong. C. L. P. Act, 1852, s. 74.

[2] Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of actions proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. C. L. P. Act, 1852, s. 75. Before this enactment, if a defendant did not prove his plea of payment or set-off to the full extent to which it was pleaded, he failed on the issue, but obtained the benefit of his proof in reduction of damages. *Cousins v. Paddon*, 2 C., M. & R. 547; 4 Dowl. 488. *Tuck v. Tuck*, 5 Mee. & W. 109.

It seems that the above section applies only to affirmative pleas, and not to pleas by way of denial. *Wilkinson v. Kirby*, 23 L. J. C. P. 224.

[3] The defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in the general traverse. C. L. P. Act, 1852, s. 76.

[4] The signature of counsel is not now required to any pleading. (Id. sec. 85.)

[5] By Reg. Gen. (Pl.) H. T. 1853, r. 2, several pleas, replications, or subsequent pleadings, or several avowries or cognisances founded on the same ground of answer or defence, shall not be allowed, provided that, on an objection taken before the judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognisances, on the ground of such pleadings being in violation of this rule, the court or a judge may allow such pleas, replications, or subsequent pleadings, or such avowries or recognisances, founded on the same ground of answer or defence, as may appear to such court or judge to be proper for determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit.

By r. 3, when no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one plea, replication, or subsequent pleading, avowry, or recognisance on the record, founded on the same ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify tothat effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such plea or other pleading, in respect of which he has failed to establish a distinct ground of answer or defence, including those of the evidence as well as those of the pleading.

[6] By C. L. P. Act, 1852, s. 87, one new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with, and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both. And by sect. 88, no plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits. *See* vol. v. p. 536.

[7] At common law a defendant was restricted to the use of one plea or answer, but in course of time this rule was relaxed, and by the statute 4 & 5 Anne, c. 16, a defendant might plead any number of pleas with leave of the court. A further relaxation has been effected by the Common-Law Procedure Act, 1852, allowing several replications to one plea, and several rejoinders to one replication, and also allowing either party both to plead and to demur to the same matter.

By the C. L. P. Act, 1852, s. 81, "the plaintiff in any action may, by leave of the court or a judge, plead in answer to the plea, or the subsequent pleading of the defendant,

as many several matters as he shall think necessary to sustain his action; and the defendant in any action may, by leave of the court or a judge, plead in answer to the declaration, or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact, provided that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."

By sect. 82, "no rule of court for leave to plead several matters shall be necessary where a judge's order has been made for the same purpose."

By sect. 83, "all objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries or cognisances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters."

By sect. 84, "the following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge; that is to say, a plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit prœter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property, an injury to which is complained of, is the plaintiff's, leave and license, *son assault demesne*, and any other pleas which the judges of the said superior courts, or any eight or more of them, of whom the chief judges of the said courts shall be three, shall, by any rule or order to be from time to time by them made, in term or vacation, order or direct."

By sect. 86, "except in the cases specifically provided for by sect. 84, if either party plead several pleas, replications, avowries, cognisances, or other pleadings, without leave of the court or a judge, the opposite party shall be at liberty to sign judgment, provided that such judgment may be set aside by the court or a judge upon an affidavit of merits, and such terms, as to costs and otherwise, as they or he shall think fit." See *Messiter v. Rose*, 13 C. B. 162.

The stat. 4 Anne, c. 16, previously referred to, and to which the Common-Law Procedure Act, 1852, in this respect is similar, was held applicable to proceedings by *scire facias* against a defendant, a member of a trading company, after judgment obtained against a public officer. *Phillipson v. Tempest*, 1 D. & L. 209. The Crown not being named was not bound by the act, and therefore an information in the nature of a *quo warranto* was not within its operation. *Attorney-General v. Allgood*, Parker, 1. *See* also *R. v. Richardson*, 9 East, 469. But by the next statute on the subject (32 Geo. 3, c. 58), a defendant to a *quo warranto*, for the exercise of any office or franchise in any city or town corporate, may plead several matters by leave of the court. And by the operation of the stat. 1 Wm. 4, c. 21, a similar privilege is conceded to defendants in prohibition. See *Hall v. Maule*, 4 Ad. & E. 283.

The decisions with reference to the allowance and disallowance of several pleas under the statute of Anne afford a criterion with respect to several pleas and replications under the present system. Such pleas as were then allowed will be allowed now, and such as were then disallowed will be now disallowed, unless the court or judge think that they are proper for determining the real question in controversy between the parties on its merits. Under the former rules the court or judge had little discretion in the matter, but was not bound to disallow pleas founded on the same grounds of defence.

In the exercise of this authority, any distinct matters of defence will be allowed to be pleaded together which are pleaded *bonâ fide*, and which appear necessary to the justice of the particular case. But pleas will not be permitted which would, on a given event, produce an incongruity on the record, a plea of payment as to part and the general issue as to the whole; for if the latter were found for the defendant there would appear to be no debt due, while the defendant admits on the record that something was due. *Skill v. Sturry*, 3 Dowl. 133; 1 Scott, 101.

Pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, were not allowed; *e. g.* pleas of right of common at all times of the year, and of such right at particular times. "The question is," observed *Tindal, C. J.*, in *Leukart v. Cooper*, 1 Hodge's Rep. 16 (and see *Triebner v. Duerr*, 1 Bing. N. C. 266), "whether the pleas are substantially the same?" One test is, whether the evidence necessary to support one plea is in all material points the same as the evidence required to support another. Thus the general issue "by statute," together with a plea of special matter, which may be given in evidence under the former, was not allowed (*Legge v. Boyd*, 9 Dowl. 39. *Ross v. Clifton*, id. 1033); nor the general issue, and a special plea amounting to it (*Hammond v. Teague*, 6 Bing. 197. *Heath v. Durant*, 13 L. J. Ex. 95. *Bently v. Keighley*, 1 D. & L. 946). Now, however, by the Common-Law Procedure Act, 1852, s. 76, a defendant may traverse separately any material allegation in the declaration, although it might have been included in a general traverse.

Where, however, under a possible state of facts, the pleas may set up a substantially different defence, they will be allowed. *Morse v. Appleby*, 8 Dowl. 206. *Pym v. Grazebrook*, 1 id. N. S. 489. *Johnstone v.*

Knowles, 1 id. 30. *Currie v. Almond*, 5 Bing. N. S. 225.

It is no objection to pleas that they are contradictory or inconsistent. *Wilkinson v. Small*, 3 Dowl. 564. *Cooper v. Langdon*, 10 Mee. & W. 785. Thus, the defendant may plead that he never was indebted, payment, and set-off to the same cause of action. Where, however, on a given event, the pleading of several pleas would produce incongruity on the record, they will not be allowed. Thus, a plea of the general issue, and of payment of money into court, will not be allowed together. In such a case, if the verdict should be for the defendant, there would be a difficulty with regard to the judgment. There would be a plea on the record showing that the plaintiff ought to recover the amount paid in. *O'Brian v. Clement*, 15 Mee. & W. 435, 436.

It is no objection to the allowance of several pleas that they are false, for the truth of pleas cannot be discussed upon affidavits. *Johnstone v. Knowles*, 1 Dowl. N. S. 32. The defendant will have to pay the costs occasioned by such of them as cannot be supported at the trial.

Several pleas may be pleaded, showing different legal conclusions from the same facts. Thus, to a declaration for having caused the defendant to be arrested on a groundless charge of felony, defendant was allowed to plead, first, that plaintiff had forged an acceptance; secondly, that the acceptance having been forged, plaintiff uttered it knowing of the forgery; thirdly, that the acceptance had been forged, and defendant had reasonable grounds for believing plaintiff had forged it; and, fourthly, that plaintiff obtained money on the bill, falsely pretending that it was accepted by A. B. *Currie v. Almond*, 5 Bing. N. S. 224.

Where the several pleas together amount only to one answer to the whole of the declaration, they may be pleaded without any leave. Thus, there may be a plea in abatement to part, and in bar to the residue; or a plea to part and a demurrer to the residue of the declaration, without any leave. *Archer v. Garrard*, 6 Dowl. 132. *Daniels v. Lewis*, 1 id. N. S. 844. *Phillips v. Claggett*, 10 Mee. & W. 102.

Where it was doubtful whether pleas should be allowed, the practice was to allow them. *Trickey v. Yeandall*, 1 Bing. 66. *Smith v. Dixon*, 4 Dowl. 571. *Hayward v. Bennett*, 1 D. & L. 918. *Bentley v. Keighley*, id. 946.

The following pleas were disallowed:—

1. Pleas founded on the same ground of defence.

2. Manifestly bad pleas. *Legge v. Boyd*, 9 Dowl. 42.

3. Pleas which clearly did not involve the real justice of the case. Thus, in an action for railway calls, a plea alleging that the calls were made for other purposes than those mentioned in the act of the railway company, was disallowed. *Brighton Railway Co. v. Wilson*, 8 Dowl. 44. So, a release which was a manifest fraud on a third party, seeking to enforce a demand against the defendant, who was party to the fraud. *Phillips v. Claggett, supra.* So, a plea of bankruptcy of the defendant sued as a public officer, the plaintiff undertaking not to sue out execution against the defendant or his individual estate. *Steward v. Dunn*, 12 L. J. Ex. 213. *Wright v. Burroughs*, 15 L. J. C. P. 277.

4. Vexatious or clearly immaterial pleas, or such as would throw needless difficulty or expense upon the plaintiff, will not be permitted. *Gulley v. the Bishop of Exeter*, 5 Bing. 42. *Duerr v. Triebner*, 3 Dowl. 184; 1 Bing. N. S. 266. *Curry v. Arnott*, 7 Dowl. 251. *Cooling v. Great Northern Railway Co.* 15 Q. B. 486. *Goodman v. Morrell*, 1 Dowl. N. S. 283. *Hancock v. Noyes*, 9 Ex. 388.

5. Pleas requiring separate and distinct trials will not be allowed; *e. g.* in dower, *ne unques accouple*, and *ne unques seisie que dower*. *Anderson v. Anderson*, 2 W. Black. 1157, 1207.

The court, in the exercise of its discretion, under stat. 4 Anne, c. 16, s. 4, would not give leave to plead not guilty "by statute," together with a special plea, although such plea raise a defence independent of the statute. *Ross v. Clifton*, 11 Ad. & E. 631; 9 Dowl. P. C. 1033. But the defendant may plead several pleas, showing different legal conclusions from the same facts. *Curry v. Arnott*, 7 Dowl. P. C. 249; 5 Bing. N. S. 224; 7 Scott, 172. As in *assumpsit* by indorsee against acceptor, the defendant has been allowed to plead, 1st, non-acceptance; 2d, non-indorsement; 3d, that plaintiff was jointly liable; 4th, drawer and defendants in partnership, and acceptance by one in fraud of the others; 5th, indorsement by drawer, with notice after the bill due; 6th, indorsement to plaintiff for accommodation; 7th, the bill drawn for accommodation; 8th, similar plea, and indorsement after becoming due; and, lastly, that the bill was drawn, accepted, and indorsed by fraud and covin and misrepresentation. *Bulley v. Foulkes*, 7 Dowl. P. C. 839. And in replevin justifying the taking of cattle damage feasant in the *locus in quo*, as the soil of A., and a like avowry as to the soil of B., are allowable. *Evans v. Davies*, 3 Nev. & P. 464. But two pleas to an action of trespass *quare clausum fregit*, the one justifying under a custom for all times to make trenches in lands for conveying water for the better working of a stannary, and the other alleging the custom to be upon making compensation for the injury done, were not allowed to be pleaded together. *Bastard v. Smith*, 1 Nev. & P. 242; 5 Ad. & E. 827. And in an action against the sheriff for a false return of *nulla bona*, the defence being the bankruptcy of the debtor, the court refused to permit the defendant to plead together two pleas, one traversing the allegation that the defendant seized the goods of the debtor, and the other setting forth dates, &c. of the act of bankruptcy and fiat; the former having been prior, the latter subsequent, to the seizure. *Wright v. Lainson*, 3 Mee. & W. 44. So, in

(B) *Of the Mode of obtaining Leave to Plead several Matters.*[1]

(C) *Appeal from Order to Plead several Matters.*[2]

(D) *Judgment for Pleading several Pleas without Leave.*[3]

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case for injury done to the plaintiff's reversionary interest, defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be tenant in the declaration was not tenant.

The defendants were a company incorporated by act of parliament, which enabled them to plead the general issue, and give in evidence that the act complained of was done in pursuance of the authority of that act. The court refused to allow the pleas together with the general issue. *Fisher v. Thames Junction Railway*, 5 Dowl. P. C. 773. So, in an action for not accepting railway shares, the court would not permit the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no such note. *Sykes v. Reeves*, 6 id. 384. So, where by a railroad-act it was enacted, that in an action for calls it should be sufficient for the company to prove that the defendant was a proprietor of shares at the time of the calls for which the action is brought. The court refused to allow the defendant in such an action to plead, in addition to never indebted and not a proprietor, that defendant had forfeited his shares before the calls in question were made; or that he had forfeited his shares and ceased to be a proprietor after the calls, and before action brought. *London & Brighton Railway Co. v. Fairclough*, 8 Dowl. P. C. 278; 6 Bing. N. S. 270; 8 Scott, 540. So where, by the terms of a railway act, the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the calls was given according to the act, unless the defendant should prove that he had paid the full amount of his subscription, defendant having pleaded to an action for calls, that he was not indebted and was not a proprietor, the court refused to allow him to add pleas, that due notice of the calls was not given: that no time or place was appointed for payment; that the calls were made for purposes other than those warranted by the act; that they were made after deviations in the line; and that fewer shares were allotted than the act required. *London & Brighton Railway Co. v. Wilson*, 8 Dowl. P. C. 40; 6 Bing. N. S. 137; 8 Scott, 347. *South-Eastern Counties Railway v. Hebblewhite*, 4 Per. & D. 246.

[1] Where leave is necessary a judge's order allowing the several pleas is sufficient, and it need not be made a rule of court. C. L. P. Act, 1852, s. 82. The order is obtained upon summons, to which is annexed an abstract of the pleas. When the order is granted, a copy of it should be annexed to the pleas delivered. The summons operates as a stay of proceeding, in the same manner as a summons for time to plead. *See ante*, p. 145.

Affidavit of Truth.—If an affidavit is required by the judge, the form of it may be as follows:—

In the Q. B. [C. P. *or* Exch. of Pleas.]
Between A. B., Plaintiff,
and
C. D., Defendant.

I, C. D., the above-named defendant, make oath and say, that I am advised and believe that I have just ground to traverse the several matters herein proposed to be traversed by me in this action, and which appear in the abstract of pleas annexed to the summons herein of the Hon. Mr. Justice dated the instant, for liberty to plead several matters, and that the several matters sought to be pleaded by me in this action, by way of confession and avoidance, in the said abstract mentioned, are respectively true in substance and in fact [*if to demur, also add*, and I further say, that I am advised and believe that the objections raised by the demurrer to the said declaration are good and valid objections in law].

Dated, &c. (Signed, &c.)

Sworn, &c.

[2] Although objections to the pleas upon the grounds that they raise the same defence are to be made at the time of hearing the summons, to plead several matters, yet an appeal lies to the court from the judge's decision, whether he allow or disallow the pleas. The application in either event should be to rescind the order, and either to be allowed to plead the several matters, or that they should be disallowed. The declaration and pleas, or an abstract of them and the order, should be brought before the court on such appeal, and be duly verified by affidavit. The application to the court should be made promptly (*Dewar v. Swabey*, 1 Gale & D. 397); and, if possible, before another step is taken in the cause by the party desirous of appealing. *Ashton v. Towers*, 2 Jur. 989. See *Gulley v. Bishop of Exeter*, 4 Bing. 525. The party will not be confined to the objections which were urged when the summons was heard at chambers. *Griffith v. Selby*, 9 Ex. 393.

[3] If a defendant plead several pleas without leave where leave is required, the plaintiff may treat them all as nullities, and sign judgment as for want of a plea. So, if the pleas delivered substantially vary from the pleas allowed by the order. *Bayley v. Baker*, 1 Dowl. N. S. 891. *Hills v. Hayman*, 2 Ex. 323. *Gabardi v. Harmer*, 18 L. J. Ex. 168. *Wills v. Robinson*, 5 Ex. 302. *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 618.

(E) *Of Pleading and Demurring together.*[1]

V. How Pleas are Pleaded and Delivered.[2]

(A) *Particulars of Set-Off must be delivered with Plea of Set-Off.*[3]

VI. Judgment for want of a Plea.[4]

It is safer, however, in the latter case, to apply to strike out such pleas. *Flight v. Smale*, 4 C. B. 766. When judgment is signed for this cause it may be set aside upon an affidavit of merits, and upon such terms as the court or a judge may think fit. C. L. P. Act, 1852, s. 87.

[1] By sect. 80 of the C. L. P. Act, 1852, "either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law, and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of." Although a party applying under this section make the requisite affidavit, it is discretionary with the judge whether he will allow a plea and demurrer together. *Thompson v. Knowles*, 18 Jur. 1018. An affidavit by the defendant's attorney, that he is advised and believes that the defendant has just grounds to traverse the several matters proposed to be traversed by the proposed pleas, is sufficient. *Platt v. Elce*, 8 Ex. 364. *See* also *Lumley v. Gye*, 22 L. J. (N. S.) Ex. 9. *Price v. Hewett*, 8 Ex. 146. *Sherry v. Professional Life Assurance Co.* 17 Jur. 653.

[2] If the declaration has been filed (vol. iii. p. 573), the defendant must take it out of the office before he pleads to it, otherwise his plea may be treated as a nullity. The plea should be engrossed on plain paper, dated of the day on which it is delivered, and be delivered to the plaintiff's attorney or agent before the hour of seven in the evening. Reg. Gen. (Pr.) H. T. 1853, r. 164. If delivered after that hour it will be taken as delivered on the following day. (Id.) If an order has been made to plead several matters, a copy should be annexed to the pleas delivered.

[3] If a plea of set-off be pleaded, containing claims similar to those in respect of which a plaintiff is required to deliver particulars of demand, particulars of the set-off should be delivered with the plea; or if they be not delivered, and a judge afterwards order their delivery, the defendant will not be allowed any costs in respect of the summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. Reg. Gen. (Pr.) H. T. 1853, r. 19. A copy of the particulars of set-off, when they have been delivered, must be annexed by the plaintiff's attorney to the record at the time it is entered with the proper officer. (Id.)

[4] After the time specified in the notice to plead has expired, the plaintiff may sign judgment if the defendant has not pleaded, nor obtained time to plead, or if he has delivered a plea which is a nullity. The judgment may be signed on the morning after the day on which the time limited for pleading has expired (*Blundell v. Hanson*, 2 Mee. & W. 243), unless indeed a plea has been delivered before judgment has been actually signed. Where, however, plea was tendered after the clerk had left the office to sign the judgment, and he signed it in ignorance of the tender, the judgment was held to be regular. *Stafford v. Nichols*, 4 Bing. N. S. 639. Although the defendant plead a null plea, yet the plaintiff cannot sign judgment before the full time of pleading is out, for the defendant may still deliver a proper plea. *Warne v. Beresford*, 4 Dowl. 361. After lapse of a year since the last proceedings, one calendar month's notice of the plaintiff's intention to proceed will be necessary before he can sign judgment. Reg. Gen. (Pr.) H. T. 1853, r. 176. The judgment cannot be signed on a *dies non* or holiday. *Harrison v. Smith*, 9 B. & C. 244. See *Bennett v. Potter*, 2 C. & J. 622. Reg. Gen. (Pr.) H. T. 1853, r. 173.

If the time for pleading has expired before the 10th of August, judgment may be signed between that day and the 24th of October. Reg. Gen. (Pr.) H. T. 1853, r. 9. So, if a plea be delivered which is a non-issuable plea, the defendant being under terms, or a plea in no way adapted to the declaration, or several pleas without leave where leave is required, or a plea of judgment recovered without the proper marginal note, or a demurrer without a sufficient cause of demurrer stated on the margin, judgment may be signed when the full time for pleading has altogether expired. *See ante.* So, if a tender or payment of money into court be pleaded, but no money be paid in, judgment may be signed for the amount which ought to have been paid in. *Chapman v. Hicks*, 2 Dowl. 641. And if a plea in abatement be pleaded without an affidavit of verification, judgment may be signed as for want of a plea. *Lovell v. Walker*, 9 Mee. & W. 299; 1 Dowl. N. S. 952; but see *Maybury v. Mudie*, 5 C. B. 283. *Fletcher v. Lechemere*, 2 Dowl. N. S. 848. *Newton v. Stewart*, 4 D. & L. 89. If

VII. Striking out or Setting aside Pleas.[1]

VIII. Amendment and Adding of Pleas.

(A) *Amendment of Pleas.*[2]

(B) *Adding of Pleas.*[3]

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a plea be pleaded to part of the declaration and answer only that part, judgment may be signed for the part unanswered (*Clarkson v. Lawson*, 6 Bing. 595. *Parratt v. Goddard*, 9 Mee. & W. 458. *Lowe v. Steele*, 15 L. J. Ex. 244); but if it be pleaded to the whole, and be in effect an answer only to part, the plaintiff cannot sign judgment, but should demur. *Bousfield v. Edge*, 17 L. J. Ex. 169. *Wood v. Farr*, 5 Bing. N. S. 247.

A mere informality or irregularity in the plea will not justify the plaintiff in signing judgment. In all cases of doubt the safer course is to apply to a judge to strike the plea out, or to cause it to be amended at the defendant's costs.

[1] If a plea has been pleaded which ought not to have been, the court or a judge will sometimes order it to be struck out, or set aside, and, in some cases, will allow judgment to be signed as for want of a plea. This has been done when a sham or tricky plea has been manifestly pleaded solely for the purpose of delay. *Balmanno v. Thompson*, 6 Bing. N. S. 153; S. C. 8 Dowl. 76. So, if a defendant plead a release which he has obtained from the plaintiff, who is only a nominal one, and who sues only as trustee, to the prejudice of the party really interested, the plea will be set aside. *Innell v. Newman*, 4 B. & A. 419. *Harrison v. Almond*, 4 Dowl. 321. See *Morgan v. Thomas*, 2 id. 332. *Legh v. Legh*, 1 B. & P. 447. *Britten v. Perrott*, 2 C. & M. 597. *Manning v. Cox*, 7 Moore, 617. *Barker v. Richardson*, 1 Y. & J. 362. *Payne v. Rogers*, Dougl. 407. *Phillips v. Claggett*, 11 Mee. & W. 84. So, as we have seen, a pleading framed so as to prejudice, embarrass, or delay the fair trial of the action, may be struck out or amended. C. L. P. Act, 1852, s. 52; and see *Levy v. Railton*, 14 Q. B. 418. *Tallis v. Tallis*, 1 E. & B. 397, n. *Trent v. Hunt*, 9 Ex. 14. *Forsyth v. Bristowe*, 8 id. 347. *Nutt v. Rush*, 7 D. & L. 192. In such cases there should in general be an affidavit of the falsehood of the plea. Where, to an action for infringing a patent, the defendant pleaded that the patent was granted on the petition of the plaintiff and the report of the solicitor-general, confiding in the representation that a paper writing deposited by him with the solicitor-general contained a true statement of the heads of the invention, that the plaintiff enrolled a specification, in which he claimed three distinct things, and falsely described as part of the invention the third claim, whereas such third claim was not part of the invention in the petition, paper writing, and letters patent mentioned, and was not any part of the invention for which the letters patent were granted; the court held, that it was a plea containing matter of evidence and calculated to embarrass the fair trial of the action, and ordered it to be struck out, the defendant being at liberty to plead *non concessit*, and that the plaintiff did not specify the invention for which the letters patent were obtained. *Hancock v. Noyes*, 9 Ex. 588.

A plea to a similar action, referring for explanation to drawings not traced on the record, but annexed to it, was held to be inadmissible, and the court ordered it to be struck out. *Betts v. Walker*, 14 Q. B. 363.

[2] As a general rule, pleas in bar may be amended by leave of the court or a judge, and this not only during the trial of the cause, but also after demurrer; and even sometimes during the argument of the demurrer leave is given to amend, on payment of costs. Pleas in abatement, however, and other pleas which are not favoured by the courts, are seldom allowed to be amended. *See* Amendment, vol. i. p. 330.

[3] In general a defendant will be allowed to add pleas which appear to be necessary to his defence, and this has been allowed after the lapse of a year from the time of issue joined. *Brown v. James*, Barnes, 362. And see *Field v. Sawyer*, 17 L. J. (N. S.) 211, C. P. *Smart v. Sanders*, 3 C. B. 380. *Huber v. Steiner*, 2 Dowl. 781. *Jones v. Roberts*, id. 698.

The commissioners of sewers having obstructed a watercourse, which the plaintiff claimed a right to navigate, made him an offer of compensation, which he refused, and sued for more. The defendants by their pleas denied the right, and also the obstruction. After abortive attempts during four years to proceed with a reference of the action, the court refused the commissioners leave to plead a third plea, which would defeat the action, unless the commissioners renewed and the plaintiff refused the offer of compensation made at first. *Medley v. Pritchard*, 8 Scott, 684; 6 Bing. N. S. 442.

A plea was allowed after the plaintiff had replied, and the cause was in the paper under special circumstances. *Jones v. Roberts, supra.* This is frequently on terms as to costs, &c.

It is not necessary, in applying to amend the pleadings by adding pleas, to set aside the judge's order to plead the original pleas (*Turquand v. Hawtrey*, 1 Dowl. N. S. 927); nor need a rule to add pleas be drawn up on reading such order. *Smith v. Goldsworthy*, 2 Gale & D. 189.

If the added pleas are nullities, yet the plaintiff cannot sign judgment, provided that the original pleas did not entitle him to do so. *Badman v. Pugh*, 2 Dowl. N. S. 907. *See* vol. i. p. 330.

IX. Withdrawal and Waiver of Pleas.[1]

X. Joinder or Severance in Pleading in the case of several Defendants.[2]

[1] A defendant may, it appears, simply withdraw his plea without the leave of a court or judge, if such plea has not been demurred to. *See* vol. i. p. 331. But he cannot withdraw it and substitute another; neither can he withdraw it after demurrer without leave; for by rule 8 of Reg. Gen. (Pr.) H. T. 1853, "the defendant shall not be at liberty to waive his plea, or enter a *relictâ verificatione* after a demurrer, without leave of the court or a judge, unless by consent of the plaintiff or his attorney." Such leave will in general be granted if the justice of the case requires it. See *Paplief v. Codrington*, 4 Dowl. 497. *Tarlton v. Wragg*, 2 Stra. 1271. *Free v. Hawkins*, 7 Taunt. 278.

Where the defendant had pleaded "never indebted" to an action for money lent, and issue had been joined thereon, the court refused to allow the substitution of a plea that the money was lent for the purpose of purchasing shares in a foreign lottery, and reselling them in England. *Ritchie v. Van Gelder*, 9 Ex. 762. *See* vol. i. p. 331.

The application to withdraw one plea and plead another, as well as to amend and add pleas, is one which, if made *bonâ fide*, and if it appears reasonable under the circumstances, will be granted at any stage of the cause, while the proceedings are on paper, upon such terms as may be necessary, so as not to delay or prejudice the plaintiff. Even a sham plea put in to save a judgment, but in the absence of instructions as to the nature of the case, has been allowed to be withdrawn upon an affidavit of merits, and upon the terms of pleading issuably, and going to trial at the sittings after term. *Free v. Hawkins*, 7 Taunt. 278. *See* Lush. Pr. 421.

[2] In general, when the defence is in its nature joint, several defendants may join in the same plea, or they may sever; and one defendant may plead in abatement, another in bar, and the other may demur (Vin. Abr. 75, Action, Joinder, H. D.; Com. Dig. Pl. E. 35); except in an action against the husband and wife, when the husband must join in the plea with his wife. Com. Dig. Pleader, 2 A.; 3 Cro. Jac. 239, 288.

And in trespass against two for a battery, they may jointly plead that the plaintiff assaulted them, and that they, in self-defence, beat the plaintiff; or they may sever (2 Vin. Abr. 76, pl. 14); or they may jointly plead that they were servants of N., and committed the assault in his defence. So, where two justify an arrest by joint warrant. (Id. 15, 16.)

Joint-tenants and coparceners must join in an avowry and a cognisance for the entire rent (Bac. Abr. Joint-Tenant K.; Replevin, K.; 5 T. R. 246); but tenants in common must sever, and the avowry of each must be *de una medietate* of the whole rent, and not of a certain sum which amounts to a moiety; and when the action is against one of several tenants in common, he avows for his own proportion, and makes cognisance as bailiff of his companion for the residue (Bac. Abr. Joint-Tenant, K.; Replevin, K.; 5 T. R. 240); or he may avow only for an undivided share of the rent (5 T. R. 246; 2 H. Black. 387); and if the action of replevin be against two tenants in common, they should join, one avowing, and the other, as his bailiff, making cognisance for an undivided moiety of the rent, and then the one who first avowed in his own right making cognisance, as his bailiff, for the other undivided moiety (Salk. 207; 5 T. R. 274); and if three tenants in common distrain beasts, it is said they should each avow separately (Salk. 207; Co. Litt. 314, 317); and one tenant in common cannot avow alone for taking damage feasant, but he ought also to make cognisance as bailiff of his companion. 2 H. Black. 386. And where two persons are defendants in replevin, they cannot make several avowries in their own right for distinct matters; thus, if one avow for rent-service, and the other for rent-charge, both the avowries shall abate, for the court would be in doubt to which of them return should be awarded. Co. 19 a, 38 b.

Several persons having several estates cannot join in prescribing, because the prescription of one does not concern the other (2 Vin. Abr. 56, pl. 47; 76, pl. 18. But *see* 1 Saund. 348; 2 Chitty's *Game Laws*, 1087); though an exception has been allowed where two persons commit a joint trespass. 2 Vin. Abr. 76, pl. 18. So personal defences, as coverture, infancy, &c., should be pleaded separately.

Thus it has been held, that if an officer plead separately under a writ of *fieri facias* or other process, he need not state the judgment on which the writ was founded; but if he join in the plea with the plaintiff in the former action, and the judgment be not stated, the plea will be bad as to both the defendants, unless the plaintiff in the former suit justify merely in aid of the officer. 2 East, 263, 270; 3 id. 132, 133, 143; 3 Wils. 376.

If two defendants join in a plea which is sufficient for one, but not for the other, the plea is bad as to both. *Philips v. Biron*, 1 Stra. 509. *Smith v. Bouchier*, 2 id. 994. *Middleton v. Price*, id. 1184. *Parsons v. Lloyd*, 3 Wils. 344. *Grant v. Bagge*, 3 East, 132. *Barker v. Braham*, 3 Wils. 376.

If the defendants plead severally, the plaintiff may demur to one plea and join issue on the other (Cro. Car. 239, 243; Hob. 70; Com. Dig. Pleader, E, 35; Tidd's Pr. 4th ed. 790; id. 6th ed. 617); and may, in

PLEDGE. *See* Bailment, vol. ii. p. 98.

PLENE Administravit. *See* Executors and Administrators, vol. iv. p. 403.

POINT Reserved.[1]

POINTS for Argument. *See* Demurrer, vol. iv. p. 44.

POISON. *See* Murder and Manslaughter, vol. v. p. 501.

POLICE. *See* Constable, vol. iii. p. 182.

POLICY. *See* Insurance, vol. v. p. 174.

POLL. *See* Elections, vol. iv. p. 201.

POLYGAMY. *See* Bigamy, vol. ii. p. 395.

POOR, Poor-Laws, and Poor-Rates.

See also Affiliation, vol. i. p. 256; Apprentice, id. p. 394; Certiorari, vol. iii. p. 58; Habeas Corpus, vol. iv. p. 619; Justices of the Peace, vol. v. p. 285; Mandamus, id. p. 423; Parish, *ante*, p. 47.

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an action *ex delicto*, afterwards enter a *nolle prosequi* on the demurrer, and proceed against the other; or, if several issues are joined, he may enter a *nolle prosequi* to one before or after judgment. 4 T. R. 360; 1 Saund. 385.

Single pleas by several defendants are not several pleas requiring leave of the court, or, with reference to costs or otherwise, deemed so. *Cazneau v. Morris*, 25 L. J. Q. B. 126.

[1] It sometimes happens that a point is reserved or saved by the judge at Nisi Prius, with liberty to apply to the court for a nonsuit or verdict; in which case the court has been in the habit of considering itself in the situation of the judge at the time of the objection raised, and a nonsuit or verdict is entered according to their determination, without subjecting the parties to the delay and expense of a new trial. 1 B. & P. 339; Barnes, 451, 455, 460; 1 Camp. 91, 241, 475, 545, 549; 2 Camp. 4, 79, 195, 427; 1 Stark. Ni. Pri. 14; Holt, Ni. Pri. 48, 49, 208, 209; 2 Marsh. 138, 139; Price, 288; 2 D. & R. 462.

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VI. Of Settlement. *See post*, Settlement.

VII. „ Removal. *See post*, Removal.

I. Of the Poor-Law Board, and of the Officers by whom the Poor-Law is Administered.

(A) *Of the Poor-Law Board.*[1]

(B) „ *District Auditors.*[2]

(C) *Of Paid Officers.*[3]

[1] By the 4 & 5 Wm. 4, c. 76, the administration of the parochial funds, and the management of the poor throughout the country, was placed for a period of five years under the superintendence and control of a central board, called "The Poor-Law Commissioners." This commission was subsequently extended to the year 1847, and was then superseded; but in lieu thereof a new board of commissioners was established for five years, by 10 & 11 Vic. c. 109, under the style of "Commissioners for Administering the Laws for the Relief of the Poor in England, to consist of the Lord President of the Council, the Lord Privy Seal, the principal Secretary of State for the Home Department, and the Chancellor of the Exchequer for the time being, in virtue of their offices, and of such other persons as her majesty by letters patent or commission shall appoint." This board, now called "The Poor-Law Board" (12 & 13 Vic. c. 103, s. 21), has all the powers and duties of the former Poor-Law Commissioners. 10 & 11 Vic. c. 109, s. 10; *see* 4 Steph. Com. 172. The commissioners have a common seal. 4 & 5 Wm. 4, c. 76, s. 5. They are empowered to frame general rules and regulations for the administration of relief, the apprenticing of parish children, the auditing of accounts, and such-like (4 & 5 Wm. 4, c. 76, s. 15; 10 & 11 Vic. c. 109, s. 14); as to the removal of rules or orders by *certiorari* into the Court of Queen's Bench, *see* 11 & 12 Vic. c 110, s. 4: 12 & 13 Vic. c. 103, s. 13. *Westbury-on-Severn Union case*, 4 E. & B. 314. Once in every year they are required to submit to both Houses of Parliament a general report of their proceedings. 10 & 11 Vic. c. 109, s. 13. They are empowered, where they think it desirable, to direct that the relief of the poor in any parish shall be administered by a board of guardians, to be elected by the owners of property and ratepayers in such parish. 4 & 5 Wm. 4, c. 76, ss. 39, 40; 10 & 11 Vic. c. 109. They are required to appoint a certain number of inspectors for the purpose of exercising a visitorial power over workhouses, and of being present at meetings of guardians or other local meetings, held for the relief of the poor. 10 & 11 Vic. c. 109, ss. 18, 20. They may, by order under hand and seal, unite several parishes into a union, under the government of a single board of guardians (4 & 5 Wm. 4, c. 76, s. 38; *see* 7 & 8 Vic. c. 101, ss. 14, 21; 14 & 15 Vic. c. 105, ss. 2, 3), having a workhouse in common (4 & 5 Wm. 4, c. 76, ss. 26, 28; *see* 5 & 6 Wm. 4, c. 69; 7 Wm. 4, & 1 Vic. c. 50; 7 & 8 Vic. c. 101, s. 73), though the expense of the poor of each parish falls on the parish to which they belong. 4 & 5 Wm. 4, c. 76, s. 26; 2 & 3 Vic. c. 84; *see* 25 & 26 Vic. c. 110.

The Commissioners may rescind and alter their former orders. *Reg. v. Hunt*, 3 Per. & D. 476. And the court will not interfere with their discretion. *Reg. v. Poor-Law Commissioners*, 6 Ad. & E. 54.

The following is a chronological list of the statutes relating to the Poor-Law Board, and to the administration of the poor-laws under its control:—4 & 5 Wm. 4, c. 76; 5 & 6 Wm. 4, c. 69; 6 & 7 Wm. 4, c. 107; 7 Wm. 4, & 1 Vic. c. 50; 1 & 2 Vic. cc. 25, 56; 2 & 3 Vic. cc. 83, 84; 3 & 4 Vic. c. 42; 5 & 6 Vic. c. 57; 7 & 8 Vic. c. 101; 8 & 9 Vic. c. 117; 10 & 11 Vic. c. 109; 11 & 12 Vic. cc. 31, 82, 110, 111; 12 & 13 Vic. cc. 13, 103; 13 & 14 Vic. cc. 11, 101; 14 & 15 Vic. c. 105; 15 & 16 Vic. cc. 14, 59; 20 Vic. c. 19; 22 & 23 Vic. c. 49; 23 & 24 Vic. c. 101; 24 & 25 Vic. c. 76.

[2] The Commissioners are empowered to appoint district auditors (7 & 8 Vic. c. 101, s. 32. See *Reg. v. Governors of Bristol Poor*, 13 Q. B. 405) to audit the accounts of the parishes and unions in the district. See *Reg. v. Great Western Railway Co.* 13 Q. B. 327. *Reg. v. Street*, 18 id. 682. *Reg. v. Tyrwhitt*, 2 E. & B. 77. *Reg. v. St. Andrew's, Holborn*, 6 Q. B. 78. And where sufficient cause is shown, they may authorise a deputy to act temporarily. 11 & 12 Vic. c. 91, s. 10; 12 & 13 Vic. c. 103. A *certiorari* lies to remove an allowance or disallowance improperly made into the Court of Queen's Bench (7 & 8 Vic. c. 101, s. 35. See *Reg. v. Great Western Railway Co. supra. Reg. v. Read*, 13 Q. B. 524. *Reg. v. Winsford*, id. 873. *Reg. v. Greene*, 17 id. 793. *Reg. v. Napton*, 25 L. J. Q. B. 296); or the party aggrieved may appeal to the Poor-Law Board. 7 & 8 Vic. c. 101, s. 36; 11 & 12 Vic. c. 91, s. 4.

The Poor-Law Board has power, under 4 & 5 Wm. 4, c. 76, s. 46, to direct the guardians or directors of a parish regulated by a local act, which contains more than 20,000 inhabitants, and which has adopted the provisions of 1 & 2 Wm. 4, c. 60, and has appointed auditors under it, to appoint an auditor of the poor-rate accounts, although sect. 65 of 7 & 8 Vic. c. 101, may prevent the Poor-Law Board combining such parish with other parishes to form an audit district. *Reg. v. Westminster Guardians*, 29 L. J. M. C. 4.

[3] The Commissioners are authorised to

(D) *Of the Guardians of the Poor.*

(*a*) *Qualification and Election of in Unions.*[1]

direct the overseers or guardians of any parish or union, or of so many parishes or unions as they declare to be united, for the purpose only of appointing and paying officers, to appoint such paid officers, with such qualifications as the Commissioners think necessary, for superintending or assisting in the relief or employment of the poor, and for examining and auditing, allowing or disallowing of accounts, in such parish or union, and otherwise carrying the act into execution. 4 & 5 Wm. 4, c. 76, s. 46. The word "officer" includes any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant-overseer, governor, master or mistress of a workhouse, or any other person who is employed in any parish or union in carrying this act, or the laws for the relief of the poor, into execution, and whether performing one or more of the above-mentioned functions. (Sect. 109.) A chaplain may be appointed (*Reg. v. Braintree Union*, 1 Q. B. 130); and a clerk and auditor (*Reg. v. Poor-Law Commissioners*, 11 Ad. & E. 558); or a collector of rates. *See* 2 & 3 Vic. c. 84, s. 2; 7 & 8 Vic. c. 101, s. 61. The appointment is made immediately by the guardians upon the requisition of the Commissioners. *Reg. v. Hunt*, 12 Ad. & E. 130. The officer may be appointed to a union under Gilbert's Act (*Reg. v. Poor-Law Commissioners*, 11 id. 558); or a parish regulated by a local act. *Reg. v. Poor-Law Commissioners*, 17 Q. B. 445. The paid officer may be removed by the Commissioners. 4 & 5 Wm. 4, c. 76, s. 48; 5 & 6 Vic. c. 57, s. 4. *Ex parte Teather*, 1 L., M. & P. 7. A *quo warranto* will lie for the office of clerk to the guardians. *Reg. v. St. Martin's-in-the-Fields*, 17 Q. B. 149. As to the orders of the Commissioners with reference to the appointment of paid officers, *see* Orders of 24th July, 1847, art. 153, to art. 197. Steer's *Parish Law*, 520, 3d ed.

[1] By 4 & 5 Wm. 4, c. 76, s. 38, when a union has been formed by the Commissioners a board of guardians is to be chosen for such union, by whom the workhouses are to be governed and relief administered. The number of the guardians are determined, their duties prescribed, and their qualification fixed by the Commissioners. The qualification is being rated to the poor-rate, but must not exceed an annual rental of 40*l.*; and one, at least, must be elected for each parish in the union. See *Robinson v. Todmorden Union*, 3 Q. B. 765. The Commissioners may alter the number of guardians to be elected for a parish in a union. 7 & 8 Vic. c. 101, s. 18. Populous parishes may be divided into wards for the purpose of the election. (Id. sect. 19.) A person cannot be elected for more than one ward. (Sect. 20.) And no assistant-overseer or paid officer, or person who, having been a paid officer, has been dismissed from office within five years, is capable of being a guardian; nor is any person receiving a fixed salary or emolument from the poor-rates in any parish or union capable of being a guardian in that parish or union.

The guardians are elected by the ratepayers and owners of property in the parish (4 & 5 Wm. 4, c. 76, s. 38; 7 & Vic. c. 101, ss. 14, 15, 16), the voting being by writing. 4 & 5 Wm. 4, c. 76, s. 49. *Reg. v. Oldham Union*, 10 Q. B. 700. *See* Orders of Poor-Law Commissioners of 24th July, 1847.

Justices residing in the parish (or extra-parochial place, the boundary line of which is coincident with the parish or union; 7 & 8 Vic. c. 101, s. 24), and acting for the county in which it is situate, or partly situate, are *ex-officio* guardians of the united or common workhouse. 4 & 5 Wm. 4, c. 76, s. 38. No justice of the peace shall be disabled from acting as a justice at any petty, or special, or general, or quarter-sessions, in any matter, merely on the ground that he is an *ex-officio* member of any board of guardians complaining, interested or concerned in such matter, or has acted as such at any meeting of such board. 5 & 6 Vic. c. 57, s. 15.

A *quo warranto* will not lie for exercising the office of guardian. *Re Acton Union*, 6 Ad. & E. 784.

By 7 & 8 Vic. c. 101, s. 8, if any question arises as to the right of any person to act as an elective guardian, the Poor-Law Board may inquire into the circumstances, and make orders for determining the question; which cannot be removed by *certiorari*, except during the term next after they are issued. No defect in the qualification or election of any person acting as a guardian at a board of guardians, the majority of persons assembled at which are entitled to act as guardians, is to be deemed to vitiate or make void any proceedings of such board in which he has taken part. 5 & 6 Vic. c. 57, s. 13. And the qualification or validity of the election of a guardian is not to be questioned in any proceeding more than twelve months after the election or disqualification. 10 & 11 Vic. c. 109, s. 25.

The Poor-Law Board may, with the consent of the owners and ratepayers of a parish or union, alter the mode of appointment, renewal, and period of service of the guardians. 4 & 5 Wm. 4, c. 76, s. 41.

If any person, pending or after the election of guardians, wilfully, or fraudulently, with intent to affect the result of the election, fabricates in whole or in part, alters, defaces, destroys, abstracts or purloins, any nomination or voting-paper used therein; or personates or falsely assumes to act in the name or on behalf of any person entitled to vote; or interrupts the distribution or

collection of voting papers, or distributes or collects the same under a false pretence of being lawfully authorised to do so, is liable to imprisonment with hard labour for three months. 14 & 15 Vic. c. 105, s. 3.

The guardians elected are to continue in office until the 15th day of April inclusive in the year next after their election, notwithstanding their successors have been elected before that day (14 & 15 Vic. c. 105, s. 2); and on the 25th of March, or if that day should fall on a Sunday or Good Friday, then on the next day following, or within forty days after the 25th of March in every year, others are to be chosen. 4 & 5 Wm. 4, c. 76, s. 38; 7 & 8 Vic. c. 101, s. 17. In the event of a vacancy by death, removal, or resignation, or refusal or disqualification to act, or in case the full number of guardians are not duly elected, the remaining members of the board, being not less than three, are to continue to act until the next election, or until the completion of the board. 4 & 5 Wm. 4, c. 76, s. 38; 5 & 6 Vic. c. 57, s. 12. See *Re Westbury-on-Severn Union*, 4 E. & B. 314. *Reg. v. Todmorden*, 1 Q. B. 185. And if no person is elected for the office of guardian in any parish at any annual election of guardians, the persons elected for the previous year may continue to act as guardians until the next annual election. 5 & 6 Vic. c. 57, s. 10.

A person put in nomination may tender his refusal to the officer conducting the election (5 & 6 Vic. c. 57, s. 9), or after his election to the Commissioners, who may accept it for any cause they deem reasonable. (Id. s. 11.) In every case of omission to elect, or of vacancy in the board by death, resignation or disqualification, the Commissioners are authorised to order a new election for completion of the board. (Id.)

To a *mandamus* to justices to order guardians to pay money pursuant to an order of the Poor-Law Board, the justices cannot return that the guardians were not duly appointed. *Reg. v. St. Andrew's, Holborn*, 10 Ad. & E. 736.

The guardians may maintain an action on a bond for non-performance of a contract to supply goods. *Elliott v. Martin*, 2 Mee. & W. 13.

[1] The guardians are a corporation, called "The Guardians of the Poor of the —— Union, or of the Parish of ——," and as such may accept, take, and hold, on behalf of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal, and by that name may bring actions, prefer indictments, and sue and be sued; and in all actions and indictments the property may be stated to be that of the Guardians of the —— Union, or of the Parish of ——. 5 & 6 Wm. 4, c. 69, s. 7; 5 & 6 Vic. c. 57, s. 16. No *ex-officio* or other guardian has power to act, except as a member and at a meeting of the board, except otherwise ordered by the Commissioners, or except for the purpose of consenting to the dissolution or alteration of the union, or any addition thereto, or to the formation of any union for settlement or rating; and no act of such meeting is valid unless three members are present, and concur therein. 4 & 5 Wm. 4, c. 76, s. 38. The presiding chairman has a casting-vote at meetings of the board in case of an equality of votes. 12 & 13 Vic. c. 103, s. 19.

As to the Contracts of the Board.—By 4 & 5 Wm. 4, c. 76, s. 49, any contract entered into by or on behalf of a parish or union relating to the maintenance, &c., or general management of the poor, which is not in conformity with the rules, &c., of the Poor-Law Commissioners, or otherwise sanctioned by them, is to be voidable, and if the Commissioners so direct, null and void; and all payments made under a contract so declared void are to be disallowed (*See* Orders of Poor-Law Board 24th July, 1847, art. 44, *et seq.*); and as to when contracts of the guardians must be under seal, *Sanders v. St. Neot's Union*, 8 Q. B. 810. *Lamprell v. Billericay Union*, 3 Ex. 283. *Paine v. Strand Union*, 8 Q. B. 326. *Smart v. West-Ham Union*, 10 Ex. 867. *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349.

Penalties are imposed upon guardians and others concerned in the administration of the poor-laws, who are concerned in contracts for, or who supply for their own profit, goods which are furnished for the relief of the poor. 4 & 5 Wm. 4, c. 76, ss. 51, 77. And by sect. 89 of the same statute, all payments, &c. made by guardians and charged upon the poor-rates contrary to the provisions of the act, or at variance with any rule, &c. of the Commissioners, are declared illegal, and are to be disallowed.

Vaccination.—The guardians are required to contract with a qualified medical practitioner for the vaccination of all persons in the union or parish, and the remuneration must be made contingent on the number of persons successfully vaccinated (3 & 4 Vic. c. 29; 16 & 17 Vic. c. 100, s. 6), and is payable out of the poor-rate. 4 & 5 Vic. c. 32, s. 2.

[2] By 5 & 6 Wm. 4, c. 76, s. 39, if the Poor-Law Commissioners direct that the laws for the relief of the poor of any single parish be administered by a board of guardians, such board is to be elected, constituted, and entitled to act for such single parish in all respects as is enacted in respect to a board of guardians for united parishes.

Subscription to Hospitals.—The guardians may, with the consent of the Poor-Law

(E) *Of Overseers.* *See ante*, p. 32.

(F) „ *Select Vestries.* *See post*, Vestry.

II. Of Unions of Parishes.[1]

Board, pay out of the funds of the union or parish any sum as an annual subscription towards the support of a public hospital or infirmary for the reception of sick, diseased, disabled, or wounded persons, or persons suffering from any permanent or natural infirmity. 14 & 15 Vic. c. 105, s. 4.

Payment of Costs.—By 7 & 8 Vic. c. 101, s. 59, the guardians may pay out of the funds in their hands the costs of the apprehension and prosecution of persons charged with deserting their families; with disobedience to the rules of the Poor-Law Board; with offences in or running away from workhouses, and carrying away goods belonging thereto; with neglecting or disobeying the orders of justices; with assaulting persons engaged in administering the poor-laws, or with fraudulently, &c. obtaining any property connected with the relief of the poor; or of prosecuting any officer employed in administering the poor-laws for a neglect or breach of duty. They may also, subject to the approval of the Poor-Law Board, pay the costs of all legal proceedings taken by an auditor for the protection of the poor-rates or property of any parish, union, &c., and charge them to the common fund of the union, or to the parish. By 14 & 15 Vic. c. 11, ss. 6, 7, they are bound to pay the costs of prosecutions under the Servants' and Apprentices' Act.

In all cases in which the guardians of any parish or union are empowered to make any application or complaint, or to take any proceedings before any justices at special, or petty, or general, or quarter sessions, any officer of such guardians empowered by the board, by an order in writing under the hand of the presiding chairman of such board, and sealed with the common seal of such guardians, may make such application or complaint, and take such proceedings on behalf of such guardians, as effectually to all intents and purposes as if the same were made or taken by such guardians, or any of them, in person. 5 & 6 Vic. c. 57, s. 17; 7 & 8 Vic. c. 101, s. 69. See *Reg. v. High Bickington*, 8 Q. B. 889.

As to the removal of nuisances by the guardians in places where there is no other authority with adequate powers for that purpose, *see* 18 & 19 Vic. c. 21. *See* Public Health, *post.* And for their other powers and duties, *see* under the proper heads.

[1] The commissioners may, by their order, declare so many parishes as they think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose, and the workhouse there shall be for their common use. 4 & 5 Wm. 4, c. 76, s. 26. *See* also 7 & 8 Vic. c. 101, ss. 64, 66; 22 Geo. 3, c. 83. *Reg. v. Shaw*, 29 L. J. M. C. 211.

By 24 & 25 Vic. c. 55, s. 9, "after the 25th March, 1862, parishes comprised in any union formed, or to be formed, under 4 & 5 Wm. 4, c. 76, are to contribute to the common fund, according to the annual value of the rateable property in the parish."

By sect. 10, "the annual rateable value is to be computed from the valuation upon which the parish was assessed to the county rate; or if there is no county rate, to the borough or ward rate, or other rate in the nature of a county rate, in the last assessment made, not less than one month next preceding the day when the order for contribution is made."

By sect. 11, "no order of guardians for contribution purporting to be made in accordance with the act, shall be deemed to be void by reason of any error in the estimate of the rateable value of the property in any parish in the union upon which the contribution shall have been calculated; but every parish affected by such error shall be entitled to have the same right in the making out and closing of the accounts of the union, or at the audit thereof."

By 22 & 23 Vic. c. 49, s. 1, "with respect to any debt, claim, or demand, which may, after the passing of this act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand, shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards; the commencement of such half year to be reckoned from the time when the last half-year's account shall, or ought to have been, closed, according to the order of the Poor-Law Commissioners or Poor-Law Board: Provided that the Poor-Law Board may, by their order, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months from the date of such debt, claim, or demand." See *Waddington v. London Union Guardians*, 6 C. B. (N. S.) 863. *Hall v. City of London Guardians*, id.; 6 Jur. N. S. 74.

By the 22 & 23 Vic. c. 49, s. 6, "no call or order for contribution made by guardians for any poor-rate made to meet such call or order shall be deemed to be illegal, on the ground that the same is made to provide for any debt, claim, or demand, the payment whereof is authorised by this act, or on the ground that the call or order for contribution includes a balance due from any parish or parishes at the time when the half-yearly accounts are made up or balanced as aforesaid: Provided always, that when the fund out of which any such debt, claim, or demand should have been discharged shall have been already paid by any parish to the

III. Of Workhouses.[1]

board of guardians of any union, and shall not have been applied for that purpose, any funds which may be required to be again contributed to discharge such debt, claim, or demand, shall be levied or contributed in the union in proportion to the rateable value of each such parish. See *Hall v. London Union Guardians*, 28 L. J. M. C. 5. This section is retrospective. *London Union Guardians v. Acocks*, 8 C. B. (N. S.) 760. *Woddington v. London Union*, 28 L. J. M. C. 113.

A part of a parish, made a district parish for ecclesiastical purposes, may be included in a union of the original parish. *Reg. v. Poor-Law Commissioners*, 6 Ad. & E. 56; 3 Nev. & P. 77. So districts under a local act may be included. *Reg. v. Poor-Law Commissioners*, 6 Ad. & E. 34; 2 Nev. & P. 8.

[1] By 48 Eliz. c. 2, s. 4, in order that necessary places of habitation may be more conveniently provided for poor impotent persons, the churchwardens and overseers, or major part of them, by agreement under the hand and seal of the lord of the manor, or according to any order of justices in sessions by like agreement, erect, in fit and convenient places in the waste or common, at the charge of the parish, or otherwise at the hundred or county, convenient houses of dwelling for the impotent poor.

The term "workhouse" includes any house in which the poor of any parish or union are lodged and maintained, or any house or building purchased, erected, hired, or used at the expense of the poor-rate, by any parish, vestry, guardians, or overseers, for the reception, employment, classification, or relief of the poor at the parish expense. 4 & 5 Wm. 4, c. 76, s. 109.

Cottages built with money applicable to the relief of the poor, and let to labourers at a rent, are not within this definition. *Cantrell v. Windsor Union*, 4 Bing. N. C. 348.

A workhouse is deemed within the local jurisdiction of the city, town, or borough to which it belongs, though situate in a part of a parish not within the chartered boundary. 4 & 5 Wm. 4, c. 76, s. 44. And for the purposes of relief, settlement, removal, and burial of the poor, it is considered as situate in the parish to which each poor person relieved, removed, or buried, or otherwise concerned in any such purpose, is or has been chargeable; but births and deaths within the workhouse must be registered in the parish or place in which it is locally situated. 7 & 8 Vic. c. 101, s. 56.

By 4 & 5 Wm. 4, c. 76, s. 22, "no additions or alterations are to be made to or in the rules of workhouses, nor are any rules, &c., made under the 22 Geo. 3, c. 82, or under any act altering, extending, or amending it, or under any local act relating to workhouses or the relief of the poor, until submitted to and confirmed by the Poor-Law Commissioners; and when so confirmed, no justices are to have power to repeal the same. The commissioners may also make rules, &c. for the government of such workhouses. (Sect. 42.)

Boards of guardians may, in certain cases, agree for the reception, upon terms, of the poor of another parish or union, with the consent of the Poor-Law Board. 12 & 13 Vic. c. 103, s. 14; 14 & 15 Vic. c. 105, s. 6.

The Poor-Law Commissioners may, by writing under their hands and seal, with the consent in writing of a majority of the guardians of any union, or a majority of the ratepayers and owners of property entitled to vote in manner therein prescribed in any parish, order the overseers or guardians of any parish or union not having a workhouse to build a workhouse, and to purchase and hire land for the purpose, or to acquire a building and convert it into a workhouse, or to enlarge the workhouse; and they are required to raise the necessary money by such means as the churchwardens and overseers or guardians of the poor may exercise for similar purposes, or to borrow money for such purposes. 4 & 5 Wm. 4, c. 76, s. 23.

In the case of a single parish under guardians, the consent of the majority must be given at a meeting of the board. *Reg. v. Poor-Law Commissioners*, 9 Q. B. 291. If under a select vestry or guardians, under a local act, the consent of a majority is sufficient to enable the commissioners to make the order. 12 & 13 Vic. c. 103, s. 18.

The Court of Queen's Bench will not interfere with the exercise of the discretionary power given to the commissioners. *R. v. Poor Law Commissioners*, 6 Ad. & E. 54.

An existing workhouse may be enlarged or altered by the order of the commissioners, without the necessity of any consent on the part of the guardians or others. 4 & 5 Wm. 4, c. 76, s. 25.

By 4 & 5 Wm. 4, c. 76, s. 21, all the powers given by any act, whether public or local, for building, &c., workhouses, must be exercised, subject to the rules, &c., of the Poor-Law Commissioners. See *Reg. v. Poor-Law Commissioners*, 3 Q. B. 325.

Cottages erected for charitable purposes are not workhouses within 4 & 5 Wm. 4, c. 76, and 5 & 6 id. c. 69. *Cantrell v. Windsor Union*, 4 Bing. N. S. 348.

By 9 Geo. 1, c. 7, s. 4, the churchwardens and overseers, with consent of the majority of parishioners in vestry, may purchase or hire any house or houses in the parish, &c., and contract for the lodging, keeping, maintaining, and employing their poor. The assent of the major part of the parish officers is sufficient. *Rex v. Beeston*, 3 T. R. 592; Bott, 408, P. L. 510.

The 59 Geo. 3, c. 12, s. 8, enacts, that it shall be lawful for the churchwardens and overseers of the poor, by the direction of the inhabitants in vestry assembled, to erect and build in such parish a suitable workhouse, or to alter and enlarge any messuage or

tenement belonging to such parish for that purpose.

By sect. 9, the churchwardens and overseers of the poor of any parish are authorised, by the direction of the inhabitants in vestry assembled, to sell and dispose of any workhouse, or any other houses or tenements belonging to such parish, which shall be found to be insufficient or unfit for the purpose, and to apply the produce of such sale, after deducting the reasonable expenses thereof, towards the purchase or building of a new workhouse, or in or towards the payment of any money to be borrowed under the authority of this act, as the inhabitants in vestry assembled shall direct.

By sect. 10. "And whereas there may be parishes in which no sufficient poor-house or workhouse can be procured for the accommodating of the poor thereof, be it further enacted, that it shall and may be lawful for the churchwardens and overseers of the poor of every such parish, by the direction of the inhabitants thereof in vestry assembled, to purchase or hire any suitable or convenient house or houses, building or buildings, for that purpose, in any adjoining parish, with the consent of two or more justices, such consent to be written upon or annexed to the agreement for purchasing or hiring such house or houses, building or buildings: Provided always, that no such house or building shall be situate more than three miles from the parish for which the same shall be purchased or hired."

Sect. 14, provides, that no sum exceeding the amount of a rate or assessment at one shilling in the pound upon the annual value of the property in any parish assessable to the rates for the relief of the poor shall be raised, expended, or applied in any one year, in purchasing, building, or repairing any buildings or land by this act authorised to be purchased, taken, built, or repaired, and in fitting up, preparing, and furnishing such buildings, and in stocking such land, or for any one or more of such purposes or objects, unless the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, shall consent thereto; nor until two-third parts in value of all the inhabitants and occupiers so assessed as aforesaid (whether present in vestry or not) shall have also signed their consent thereto in the vestry or parish-book.

Sect. 15, enacts, "that in every case where the inhabitants of any parish shall in manner aforesaid consent that no greater sum than the amount of a rate or assessment of one shilling in the pound will raise shall be expended in one year for all or any of such purposes and objects, it shall be lawful for the churchwardens and overseers of the poor of such parish, with the consent of such majority, as aforesaid, of the inhabitants and occupiers thereof, to be given and signed in the manner hereinbefore directed (after the rate or rates at or amounting to one shilling in the pound shall have been actually levied and applied for such purposes, or some of them), to raise any additional sum or sums, by loan, or by sale of any annuity, or of annuities of any life or lives, not being under the age of fifty-three years respectively, or for any certain term not exceeding fifteen years, so as the whole sum to be raised for all or any of such purposes by loan, and by the sale of annuities, or by either of such means, shall not be more than five shillings in the pound of or upon the true annual value of the property which shall in such parish be assessed to the poor-rates (every proposal for any such annuity being first stated to, and approved by, the inhabitants and occupiers of such parish, in vestry assembled): and the churchwardens and overseers of the poor shall, and they are hereby authorised, in the names and on the behalf of the inhabitants of the parish, to sign and execute securities for the money which shall be so borrowed, and for the annuities to be so granted; and by every such security to charge the produce of the future rates to be made for the relief of the poor of every such parish with the repayment of the principal sum which shall have been so borrowed, and the interest thereof, or with the payment of the annuity thereby granted (as the case may be), at and upon the days and times, and in such manner and proportions, as in and by the security for every such loan and annuity respectively shall be appointed, and express for the payment thereof; and the money to be raised by such future rates shall be subject and liable to the payment of every such loan and the interest thereof, and of every such annuity accordingly."

Sect. 16, provides, that no greater sum in the whole than the amount of a rate or assessment at one shilling in the pound shall in any parish be charged upon the future rates thereof, unless two-third parts in value of the proprietors of messuages, lands, and tenements within such parish (whether for estates of freehold or copyhold, or by virtue of leases for terms of not less than fifteen years, absolute or determinable upon a life or lives), shall have consented to raise the money for which the charge or security purport to be made, such consent to be given by writing.

Where money is to be received for purchasing, building, altering, or enlarging any workhouse, or for purchasing land whereon to build the same, the overseers or guardians of the parish or union may, with the consent of the Poor-Law Commissioners, under their hand and seal, apply to the Exchequer-Bill Loan Commissioners (under 57 Geo. 3, c. 34), for an advance of the necessary sum; and the commissioners may make the advance on the security of the poor-rates. 4 & 5 Wm. 4, c. 76, s. 63. The overseers or guardians may, to a limited extent, charge the future poor-rates of the parish or union with the amount of the money borrowed. 4 & 5 Wm. 4, c. 76, s. 24; 6 & 7 Wm. 4, c. 107; 1 Vic. c. 25, s. 1; 14 & 15 Vic. c. 105, s. 7; 7 & 8 Vic. c. 101, s. 30.

By 4 & 5 Wm. 4, c. 76, s. 15, the commissioners are to make such rules for the

management of the poor, the government of workhouses and the education of the children therein, as they think proper, and they may suspend, alter, or rescind such rules, &c., at their discretion. For the rules for the government of workhouses, *see* order of 24th July, 1847, art. 88, *et seq.* Steer's *Parish*, p. 611.

And by 4 & 5 Wm. 4, c. 76, s. 43, where the rules, &c. of the commissioners are not in force, the persons authorised by the preceding statute may proceed according to its directions; and where they are in force, any justice acting for the place, &c. in which the workhouse is situated, may inspect it when he thinks proper, to ascertain whether such rules, &c. are obeyed, as well as for the other purposes of the 30 Geo. 3, c. 49; and if he is of opinion that such rules, &c. are not obeyed, he may summon the party offending before two justices, upon conviction before whom such party will be liable to the penalties therein prescribed. As to the inspection of houses in which the poor are maintained under contract, *see* 12 & 13 Vic. c. 13, ss. 7, 8.

By an order of the commissioners of the 24th July, 1847, guardians are required to appoint one or more visiting committees from their own body; who are required carefully to examine the workhouse or workhouses of the union once in every week at the least, inspect the last report of the chaplain and medical officer, examine the stores, afford, so far as is practicable, to the inmates, an opportunity of making any complaints, and investigate any complaints that may be made to them. And by article 149, the visiting committee are required from time to time to write such answers as the facts may warrant to certain queries printed in a book entitled "The Visitors' Book," to be provided by the guardians, and kept in every workhouse for that purpose, and to be submitted regularly to the guardians at their ordinary meetings. In case of neglect of the guardians to appoint a visiting committee, the commissioners may appoint a paid visitor. 10 & 11 Vic. c. 109, s. 24. *See* further, 55 Geo. 3, c. 37; 59 Geo. 3, c. 12; 5 & 6 Vic. c. 57, s. 5; 7 & 8 Vic. c. 101, s. 58.

The 59 Geo. 3, c. 12, s. 17, enacts, "that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish."

Regulations touching the management of workhouses are also provided by the following statutes:—

By 30 Geo. 3, c. 4, s. 1, "any justice, or the officiating clergyman of the parish, or any physician, surgeon, or apothecary, authorised by a warrant under the hand and seal of any justice, may, in the daytime, visit any parish workhouse, or house provided for the maintenance of the poor of any parish, and examine into the condition of the poor therein, and the food, bedding, and clothing, and condition of such house; and if any cause of complaint be found, such justice, or person authorised as aforesaid, may certify the state and condition of such house, and of the poor therein, and of the food, clothing, and bedding, at the next quarter sessions of the county, under his hand and seal; and cause the overseers of the poor or master of the workhouse to be summoned to appear at the same sessions, to answer such complaint; and the justices there assembled shall make such orders and regulations therein as to them shall seem meet."

By sect. 2, "if any person is afflicted with any infectious disease, or is in want of any medical or other assistance, or of sufficient and proper food, or requires separation from the other poor in the said house, the justice shall certify the state of such poor person to another justice, and the other persons authorised as aforesaid shall apply to two justices of such county, &c., who shall make order therein as they shall think proper until the next quarter sessions; at which sessions they shall certify the same under their hands and seals, and the sessions shall make further order for the relief of such poor person, and the charges of such relief shall be paid out of the poor-rates as the sessions shall direct."

By sect. 3, "this act shall not extend to workhouses regulated by any special act of parliament.

By 49 Geo. 3, c. 124, s. 5, "two or more justices may at petty sessions direct such rules, orders, bye-laws, and regulations, as are appointed for every poorhouse established under 22 Geo. 3, c. 83, to be observed in every parish workhouse within their respective divisions or districts."

The lands may be sold or exchanged with the approbation of the Poor-Law Commissioners. 5 & 6 Wm. 4, c. 69, s. 1; 1 Vic. c. 50; 5 & 6 Vic. c. 18, s. 1; 7 & 8 Vic. c. 101, s. 73. Where the purchase-money exceeds 50*l.*, and there is no person capable of giving a discharge, it may be paid into the Bank of England. 5 & 6 Wm. 4, c. 69, s. 2. See *Ex-parte Earl of Albemarle*, 7 L. J. Ex. (Eq.) 63. *Re Lady Byron's Settlement*, 4 De Gex, M'N. & G. 694. So, workhouses, &c., may be sold, let, exchanged, or disposed of, with consent of a majority of the ratepayers, and subject to the approbation of the Poor-Law Commissioners. 5 & 6 Wm. 4, c. 69, s. 3. 5 & 6 Vic. c. 19, ss. 2, 3, 4. *Doe v. Webster*, 12 Ad. & E. 442.

Persons sent to the poorhouse who embezzle, spoil, waste, damage, or carry away, without the overseer's or keeper's permission, any of the clothing, goods, or materials, which are provided for the use of the poorhouse, or poor therein, shall, upon complaint on oath and conviction by one or more justices acting for the district, be committed to the house of correction, and kept to hard labour for any time not exceeding

two calendar months, nor not less than seven days. 50 Geo. 3, c. 50, s. 3.

By sect. 5, "any breach of the rules and orders put in force by this act shall be punished in the same manner as the breach of the rules and orders of 22 Geo. 3, c. 83, are directed.

By 54 Geo. 3, c. 170, s. 7, the master of any workhouse shall not inflict corporal punishment upon adult persons under his care for any offence whatever; nor confine them for a longer space than twenty-four hours, or such further space of time as may be necessary in order to have such persons before a justice of the peace."

By 58 Geo. 3, c. 129, s. 2, "the governor, director, &c., of any house of industry or workhouse, shall not, on any pretence, confine by chains any poor persons of sane mind."

By 24 Geo. 2, c. 40, "no spirituous liquors shall be sold or used in any workhouse or house of entertainment for the parish poor."

By 55 Geo. 3, c. 137, s. 1, "the property of and in the goods, chattels, furniture, provisions, clothes, linen, and wearing apparel, tools, utensils, materials, &c., provided for the use of the poor of any parish or township, shall be vested in the overseers of such parish, &c., for the time being, and their successors, who are hereby empowered to bring any actions or to prefer any bills of indictment against any persons who shall steal, take, or carry away, or buy, or receive any such goods, chattels, &c., as aforesaid; and in every such action and indictment, the said goods, chattels, &c., shall be laid to be the property of the overseers for the time being, without stating or specifying the names of any of such overseers: Provided always, that nothing herein contained shall extend to repeal any of the provisions contained in any act whereby the property of and in any such goods, chattels, &c., is vested in any other person jointly with, or independently of, the overseers of the poor."

By sect. 2, "the overseers, &c. shall cause all such goods, chattels, furniture, &c., capable of being marked, to be marked, stamped, or branded with the word 'workhouse,' or other mark; and if any pawnbroker or other persons knowingly take in pawn, buy, exchange, or receive any such goods, &c. so provided and given to the poor, or any of the goods or materials carried into any workhouse to be manufactured or used by the poor there, or any of the goods or furniture of any workhouse; or shall receive or buy any of the provisions provided for the poor of any workhouse, or shall be aiding or assisting therein; or if any person shall cause such marks, &c. to be obliterated or defaced; every such person being thereof lawfully convicted, by confession or oath of one or more credible witnesses before any justices, shall forfeit not exceeding 5*l.* nor less than 1*l.*; one moiety to the informer, the other to the poor; and in default of payment shall be committed forthwith to the common gaol or house of correction, there to remain, without bail or mainprize, for the space of two calendar months; and any person running away from any workhouse, and carrying away any clothes or goods, being convicted thereof as above, shall be committed to the common gaol or house of correction for three calendar months; and in all cases such mark, stamp, or brand, on any such articles or thing as aforesaid (being duly authenticated), shall be sufficient evidence of the right of property in such overseers, &c.: Provided always, that such mark or stamp as aforesaid shall not be placed on wearing-apparel so as to be visible on the exterior of the same."

By sect. 5, "any poor persons maintained in any workhouse refusing to work at any employment suited to their age, strength, and capacity, or guilty of drunkenness or other misbehaviour, and being thereof lawfully convicted before any justice, shall be committed to the common gaol or house of correction, there to remain, without bail or mainprize, for any period of time not exceeding twenty-one days, and during such time shall be kept to hard labour."

Sect. 8 gives a general form of conviction for any offence against this act, which shall not be set aside for want of any other form of words not removed by *certiorari* or otherwise.

By sect. 9, "persons aggrieved by any judgment of justices may appeal at the next general or quarter sessions of the peace to be held for the county, city, or place wherein the cause of complaint shall have arisen, such person, at the time of his conviction, entering into a recognisance, with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the court; and the justices in sessions shall hear and determine such appeal in a summary way, and their determination shall be final."

The 56 Geo. 3, c. 129, recites, "that divers local acts lately passed relative to the maintenance and regulation of the poor, varying the general law with respect to particular districts, parishes, townships, or hamlets, some of which it is expedient to repeal; all enactments since the commencement of the reign of George the 1st, whereby any poor persons other than such as shall actually apply for and receive parochial relief, are compellable to go to any house of industry or workhouse; or whereby any person may be detained in any house of industry or workhouse, at the discretion of the governors or directors thereof, or of the churchwardens or overseers, after such persons are capable of maintaining themselves; or whereby any poor persons may be compelled to remain in any house of industry or workhouse until the charges and expenses to which any district, parish, &c., may have been put for the maintenance of them or their family, shall be repaid by the earnings of such poor persons; or whereby any poor

IV. Of Relief.

(A) *Is subject to Regulations of Poor-Law Board.*[1]

(B) *Of the Order for Relief.*

(*a*) *By Justices for Out-Door Relief in Unions.*[2]

(*b*) *In Parishes under Guardians or a Select Vestry.*[3]

child is rendered liable to be apprenticed to any governor, director, or master of any such house of industry or workhouse; or whereby any parish, township, or hamlet, at a greater distance than ten miles from such house of industry or workhouse, shall be empowered to become contributors to, or take the benefit of it; or whereby any directors, guardians, or masters of any such house of industry or workhouse are authorised to hire out any poor person of full age, or to contract with any person for their labour, shall be wholly repealed."

If parish officers cut off the hair of a pauper in the poorhouse by force, and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde v. Skinner*, 4 C. & P. 239.

[1] Since the 4 & 5 Wm. 4, c. 76, s. 15, the administration of relief to the poor is made subject to the direction and control of the Poor-Law Commissioners, who, however, cannot interfere in any individual case for the purpose of ordering relief. Steer's *Parish*, 550.

[2] By 4 & 5 Wm. 4, c. 76, s. 15, "in any union formed under the act, two justices acting for the district in which such union is situated may direct, under their hands and seals, that relief be given to any adult person who, from old age or infirmity of body, is wholly unable to work, without requiring that he shall reside in the workhouse; but one of the justices must certify in the order of his own knowledge that such person is wholly unable to work; and such person must be lawfully entitled to relief in the union, and desire to receive the same out of the workhouse."

The parties to be affected by the order ought to be summoned before the justices. *Reg. v. Totnes Union*, 7 Q. B. 690.

[3] The ordering, giving, and directing of all relief to the poor of any parish under the government and control of guardians or a select vestry, and whether forming part of any union or incorporation, or not (but subject in all cases to the commissioners), is to belong exclusively to such guardians or select vestry, according to the provisions of the acts under which such guardians or select vestry are appointed. It is not lawful for any overseer to give any further relief or allowance from the poor-rate than such as is ordered by such guardians or select vestry, except in cases of sudden and urgent necessity, in which cases he is required to give such temporary relief as each case requires, in articles of absolute necessity, but not in money, and whether the applicant for relief be settled in the parish where he applies for relief or not; and in case such overseer refuses or neglects to give such necessary relief in any such case of necessity to poor persons not settled nor usually residing in the parish to which such overseer belongs, a justice of the peace may order him, by writing under his hand and seal, to give such temporary relief in articles of absolute necessity as the case requires, but not in money; and in case he disobeys such order he is, on conviction before two justices, to forfeit a sum not exceeding 5*l*. And a justice may give a similar order, for medical relief only, to any parishioner, as well as out-parishioner, where any case of sudden and dangerous illness may require it, and an overseer is liable for the same penalties as aforesaid for disobeying such order. But a justice cannot order relief from the poor-rates except as hereinbefore provided. 5 & 6 Wm. 4, c. 76, s. 54.

In parishes not under a board of guardians or select vestry, it would seem that a justice has still power to order relief to poor persons in their own dwellings, for the periods limited by 36 Geo. 3, c. 23; 55 Geo. 3, c. 137, s. 3; 59 Geo. 3, c. 12, ss. 2, 5. *See* 4 & 5 Wm. 4, c. 76, s. 53; Steer's *Parish*, 551.

No appeal lies against an order for relieving the poor. *Rex v. North Shields*, Cald. 68.

The order must state that the party adjudged to pay is of sufficient ability (*Rex v. Halifax*, 1 B. & A. 366), and lives within the jurisdiction of the justices making it. *See* 1 Bott, 371. It is decided that this species of order may be retrospective.

An order that the grandfather should keep the grandchild, the father being living, and unable to do it, and also to pay so much more money for the time past, while he was chargeable, as well as for the time to come, was confirmed. *Rex v. Joyce*, 10 Vin. Abr. 423.

It should also state that the person praying relief is chargeable (*Rex v. Tripping*, 16 id. 424), impotent (*St. Andrew's Undershaft v. Jacob*, 1 Ld. Raym. 699; 1 Bott, 565); or unable to work. *Rex v. Galley*, 1 Bott, 366. And this matter must be stated as an adjudication, and not by way of recital (id. 371); though a recommendation, without actually ordering relief, suffices. (Id.) And it must direct the time for which the allowance is to be made (*Stable v. Dixon*, 6 East, 162); that is, until an order to the contrary. *Jenkins's case*, 2 Salk. 534.

(C) *Relief to Able-bodied Poor.*[1]

(D) *By Relations.*[2]

This order may be procured as well on the application of the pauper as the parish officer. *Rex v. Fearnley*, 1 T. R. 316.

Disobedience to an order of maintenance is an indictable offence at common law (*Rex v. Robinson*, 2 Burr. 799; 1 Bott, 380); and a penalty of 20*s.* is incurred under the 43 Eliz.

Under an order for a weekly allowance, the money is due the beginning of the week. *Rex v. Fearnley*, 1 T. R. 316; 1 Leach, C. L. 452; 1 Bott, 418.

An order for relief may be good as to part and bad as to part. *Rex v. Inhabitants of Maulden*, 8 B. & C. 78; 2 M. & R. 146.

[1] By 4 & 5 Wm. 4, c. 76, s. 52, "the commissioners are empowered by such rules, orders, and regulations, as they may think fit, to declare to what extent, and for what period, the relief to be given to able-bodied persons, or to their families, in any particular parish or union, may be administered out of the workhouse of such parish or union by payments in money, or with food and clothing, in kind or partly in kind, and partly in money, and in what proportions, to what persons and class of persons, at what times and places, on what conditions and in what manner, such out-door relief may be afforded; and all relief given by any overseer, guardian, or other person having the control or distribution of the funds of such parish or union contrary to such orders, &c., is to be unlawful, and disallowed in the accounts of the persons giving the same."

The overseers or guardians may, however, in cases of emergency, depart from these rules, with the approval of the commissioners. For these regulations, *see* Rules of 21st December, 1844, and 14th December, 1852. Steer's *Parish L.* p. 553; Arch. *Poor L.* 336.

[2] By the 43 Eliz. c. 2, s. 7, it is enacted, "that the father and grandfather, and mother and grandmother, and the children of every poor old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein."

And by 59 Geo. 3, c. 12, s. 26, it is enacted, "that it shall be lawful for any two or more of his majesty's justices of the peace for the county or other jurisdiction in which any such sufficient person shall dwell, and they are hereby empowered, in any petty session, to make such assessment and order for the relief of every poor, old, blind, lame, impotent, or other poor person, not able to work, upon the father, grandfather, mother, grandmother, or child, being of sufficient ability to support them, as may, by virtue of the said act, be made by the justices in their general quarter sessions; and that every such assessment and order of two or more justices, in any petty session, shall have like force and effect as if the same were made by the justices in their general quarter sessions; and the disobedience thereof shall be punishable in like manner."

It is the party's residence within their county which gives the magistrates jurisdiction to proceed against him; and if he came there for a temporary purpose, they have no power to make an order.

The authority of the sessions is original (see *Rex v. Kempson*, 1 Bott, 369; Pl. 419), and cannot be delegated to other justices; but they must set the rate (*Rex v. Humphries*, Style, 154); and they cannot send poor persons from their own parish to their relation, who should maintain them, but ought to make a rate or order of so much a week upon the relation (*Thermanbury v. Bolney*, Comb. 379. *Rex v. Jones*, Nol. 53); and it seems that they may direct the money to be sent to him into another county.

By 4 & 5 Wm. 4, c. 76, s. 78, all sums of money assessed by any justices on the father, grandfather, mother, grandmother, child, or children of any poor person, for the relief or maintenance of such poor person, under the 43 Eliz. c. 2, s. 7, or any act to amend the same, and all penalties to which any person so assessed is liable in default of payment, are to be recoverable in the same manner as penalties under this act. *See* sect. 99; and 11 & 12 Vic. c. 43. And the guardians of a union are entitled to obtain orders of maintenance upon the relations liable under any statute now in force to maintain any poor person whose relief would be chargeable to the common fund of the union, in like manner as the churchwardens and overseers of any parish can obtain the same. 11 & 12 Vic. c. 110, s. 8.

All relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind, or deaf and dumb, is to be considered as given to the husband of such wife, or to the father of such child or children, as the case may be; and any relief given to or on account of the child or children of any widow, is to be considered as given to such widow. But this does not affect the right to proceed against the relations under the 43 Eliz. c. 2, and 4 & 5 Wm. 4, c. 76, s. 56. And although the children were born before wedlock, the responsibility is the same. Id. sect. 57. See *Lang v. Spicer*, 1 Mee. & W. 129. The mother of a bastard child, while unmarried, is bound to maintain it until sixteen, and relief granted to such child is to be considered as granted to the

(E) *By Loan.*[1]

(F) „ *Emigration.*[2]

mother. Id. sect. 71.

As to deserting family, *see post*, p. 173.

The statute of Elizabeth only extends to natural relations, and not such as are acquired by marriage. *Tubb v. Harrison*, 4 T. R. 118. Hence a father-in-law is not bound to support his wife's child after its mother's death (*Reg. v. Clentham*, 1 Holt, 371); nor in her lifetime (*Rex v. Munden*, 1 Stra. 190; 2 Ld. Raym. 1454), even though the husband had an estate with his wife. *Cooper v. Martin*, 4 East, 76. So, a father is not obliged to maintain his son's widow (*Rex v. Dempson*, 2 Stra. 955); nor a son-in-law his wife's mother. *Rex v. Munden*, *supra*. And, as the statute only applies to natural relations, it has been said an order cannot be made on a man to support his wife, unless he abscond (*Reg. v. Davison*, 11 Mod. 268); or his bastard child (*Tubb v. Harrison*, *supra*. *Cooper v. Masters*, 4 Cons. 76) before 4 & 5 Wm. 4, c. 76, s. 56.

The grandfather and grandmother may be called upon to maintain a pauper grandchild not able to work. *Bevan v. M'Mahon*, 28 L. J. M. C. 127; 5 Jur. N. S. 686.

An order to pay so much a week indefinitely, or while the pauper continues chargeable, is bad. *R. v. Morten*, 5 Q. B. 591. But an order to pay till the court shall order to the contrary has been held sufficient. *Jenkins's case*, 1 Bott, 365.

Under the 43 Eliz. c. 2, justices have a discretion whether they will make an order upon the grandfather rather than on the father of a poor impotent person; and an order which is made upon the grandfather need not, therefore, state upon the face of it that the father is dead, or unable to support the pauper. *Rex v. Cornish*, 2 B. & Adol. 498.

Where there is no legal obligation to take care of and maintain another, as in the case of brothers:—*Held*, that no indictment could be maintained for mere nonfeasance, as negligence in providing proper custody and maintenance of an idiot brother. *Rex v. Smith*, 2 C. & P. 449.

[1] By 59 Geo. 3, c. 12, s. 29, "the overseers of the poor, by the direction of the justices, or the general or select vestry, or the guardians, under 22 Geo. 3, c. 83, where application has been made to them respectively for relief for any poor person (and it appears to such justices, &c. that such poor person might have maintained himself and his family, as the case may be), may advance money to the applicant, weekly or otherwise, by way of loan, and take his receipt for and engagement to repay the same, for which no stamp is to be required; and upon the application of the overseers within a year, the justices may summon such person, and if they think him able to repay such sums by weekly instalments or otherwise, they may make an order for repayment, at such times and in such proportions as they think fit; and for every default of payment they may commit such person for not exceeding three calendar months."

By 4 & 5 Wm. 4, c. 76, s. 58, relief declared by rule of the Commissioners to be by way of loan is to be so considered and treated.

By orders of December 21, 1844, and December 14, 1852, no relief which is contrary to any regulation in those orders is to be given by way of loan, but any relief given in conformity with those orders, to or on account of any person to whom relief may be lawfully given above the age of twenty-one, or to his wife, or any part of his or her family under the age of sixteen, may, if the guardians think fit, be given by way of loan.

Loans are recoverable by summons before a justice, in the mode provided by 5 & 6 Wm. 4, c. 67, ss. 59, 90, and 11 & 12 Vic. c. 43. And by 11 & 12 Vic. c. 110, s. 8, "all relief granted by the guardians to any pauper upon loan, and which is chargeable to the common fund of the union, or to any parish therein, may be recoverable in the county court, or other court for the recovery of small debts, for the districts wherein the union or the major part thereof is comprised, on the plaint of the guardians, who may apply and be heard in such court by any officer appointed by them for such purpose, in manner prescribed by the statutes enabling them to appoint officers: Provided that the remedy already provided for the recovery of relief granted on loan shall be applicable to the relief so chargeable to the common fund."

[2] By 4 & 5 Wm. 4, c. 76, s. 62, "provision is made for the purpose of raising a fund to enable poor persons to emigrate. This may be done by resolution passed at a public meeting of ratepayers, by which a fund, not exceeding half the average yearly rate for the three preceding years, may be raised or borrowed, and devoted to this purpose, subject to the approval of the Commissioners."

By 11 & 12 Vic. c. 110, s. 5, "the guardians of a union or parish may, with the order of the Commissioners, and in conformity with their regulations, procure, or assist in procuring, the emigration of any poor person rendered irremovable by the provisions of 9 & 10 Vic. c. 66, and chargeable to the union, or irremovable from the parish, and charge the expense upon the common fund of the union, or in the case of a parish, upon the monies in their hands for the relief of the poor; but they must not expend more than 10*l.* for each person without consent of the ratepayers (12 & 13 Vic. c. 103, s. 20); and the whole amount expended in any one year must not exceed half the average yearly poor-rate for the three preceding years."

(G) *For Education.*[1]

(H) *Relief to Casual Poor.*[2]

As to emigration of orphan children, *see* 13 & 14 Vic. c. 101, s. 4.

[1] By 18 & 19 Vic. c. 34, the guardians of a union or parish may grant relief for the purpose of enabling any poor person, lawfully relieved out of the workhouse, to provide education for any child between the ages of four and sixteen, in any school to be approved of by the guardians, for such times and under such conditions as they see fit.

By sect. 2, the Poor-Law Board may regulate the mode, time, and place, in or at which such relief is to be given, or such education received. But the guardians cannot impose as a condition of relief that such education should be given. (Sect. 3.) The cost of such relief is to be charged to the same account, and recoverable in the same manner as other relief. (Sect. 4.)

By sect. 5, in the case of a child of such age as aforesaid relieved out of the workhouse, which has been deserted by its parents, or whose parents are dead, the guardians may, in their discretion, and subject to the regulations of the Poor-Law Board, grant relief for the purpose of providing education for such child.

[2] Casual poor are those who, in consequence of accident, calamity, or any other circumstance, require immediate parochial relief, and thus become a burden on the funds of the parish in which they may happen to be at the time when the necessity for such relief arises, although their legal settlement is elsewhere.

By 24 & 25 Vic. c. 55, s. 4, where any destitute wayfarer, wanderer, or foundling, shall be or become chargeable upon the common fund of any union, the cost of the relief of such wayfarer, wanderer, foundling, shall continue to be charged to such common fund until the relief shall be discontinued. And by sect. 5, when any person shall be or become chargeable upon the common fund of a union, by reason of some accident or sickness which will not produce permanent disability, the chargeability upon such fund shall cease when the person shall be cured; and thenceforth, if the relief continue, the cost thereof shall be charged to the parish where the poor person shall be then residing, unless he shall be in the workhouse of the union, and in such case it shall be charged to the parish wherein he was residing when he was removed to such workhouse, and the overseers of the parish so charged may apply for and obtain an order of removal.

It is by sect. 6 of the same statute (24 & 25 Vic. c. 55) enacted, "that the cost of the examination of any lunatic pauper, present or future, of his removal to or from, and his maintenance in any asylum, licensed house, or registered hospital, who would under any provision of 16 & 17 Vic. c. 97, be chargeable to a parish in a union, shall, from and after the 24th of March, 1862, be borne by the common fund of the union comprising such parish." And by sect. 7, the guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, or upon the treasurer of the county, and may appeal against or defend any orders in respect of any lunatic paupers thereby made chargeable upon the common fund of the union, in like manner and subject to the same incidents and provisions as are contained in the 16 & 17 Vic. c. 97, in respect of lunatic paupers chargeable to any parish in such union.

The parish in which an accident happens is liable, though the officer refuse an asylum to the pauper, who is taken to another parish. *Tomlinson v. Bentall*, 5 B. & C. 738; 8 D. & R. 493.

A pauper who comes *animo morandi*, and meets with an accident, is not casual poor. *Rex v. Oldland*, 4 Ad. & E. 929; 6 Nev. & M. 529.

It seems that no action will lie by one board of guardians against another for monies paid for the relief of their non-settled poor. *Wycombe Union v. Eton Union*, 1 H. & N. 687; 26 L. J. M. C. 97.

By 24 & 25 Vic. c. 55, s. 8, the temporary provisions of the several statutes, whereby the costs of the relief, burial, and maintenance of certain paupers have been made chargeable upon the common fund of unions, are made perpetual.

Casual poor have a claim for their support upon any parish in which they may be found. *Lamb v. Bunce*, 4 M. & S. 275.

Where a poor person, not settled in a parish, becomes chargeable from accident, sudden calamity, or any other circumstance, he falls within the description of casual poor, and the parish in which he is detained becomes bound to relieve and take care of him. See *Rex v. Chadderton*, 2 East, 27. This obligation is so strong that, if a parishioner, not being a parish officer, takes care of one rendered poor and impotent from sudden accident, as by the fracture of a limb, he may recover against the parish officers the sum expended for his cure and support, an implied promise arising from this their duty. See *Simmons v. Wilmot*, 3 Esp. N. P. 91. But the parish cannot recover as upon an implied promise the sum which they have expended for his relief from the place in which he is settled (see *Watson v. Turner*, Bull. N. P. 129, 147, 261), although they give notice to the officers of the parish where the pauper is settled, pending his illness (see *Atkins v. Banwell*, 2 East, 505); neither have they a remedy against the master of a servant who becomes suddenly disabled by misfortune, for parishes are under a moral as well as a legal obligation to take care of their casual

(I) *Relief to Bastards.*[1]

(K) „ *by Employment, &c.*[2]

(L) *Applying for Relief when possessed of Property.*[3]

V. Of the Poor-Rate.

(A) *By Whom made, and for what Purposes.*[4]

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poor. See *Newby v. Wiltshire*, Cald. 527; 2 Esp. N. P. 739. *Wennell v. Adney*, 3 B. & P. 247. *Rex v. Kynaston*, 1 East, 117.

As to relief to the families of militiamen, *see* 43 Geo. 3, c. 47; 51 id. c. 20, s. 20; 53 id. c. 81, s. 10; 49 id. cc. 86, 90; 51 id. c. 118, s. 5.

The parish of the principal is bound to reimburse that of the substitute, although he has more than one child when enrolled (*Rex v. Willis*, 6 T. R. 179), or has neither been approved nor enrolled, provided he is sworn in and actually serves. *Rex v. Ledbury*, 7 T. R. 558.

Under 19 Geo. 3, an order to maintain the family of a substitute in the militia, and that upon the parish for which he serves, to reimburse their maintenance, should be made by the same justice, and at the same time. *Rex v. White*, Cald. 185. *Rex v. Ledbury, supra.*

An appeal lies against an order to reimburse under the 34 Geo. 3. *Rex v. Ledbury, supra.*

[1] By 4 & 5 Wm. 4, c. 76, s. 71, the mother, as long as she is unmarried or a widow, is bound to maintain her bastard child until it attain the age of sixteen, and all relief granted to it while under sixteen is to be considered as granted to the mother. *See* also 7 & 8 Vic. c. 101, s. 6. It seems to have been doubtful prior to this act whether the father or mother was entitled to the custody of the child. *Ex-parte Knee*, 1 N. R. 148. *Strangeways v. Robinson*, 4 Taunt. 498. *R. v. Soper*, 5 T. R. 278.

A man marrying a woman having an illegitimate child, is bound to maintain it as part of his family, until it attain the age of sixteen, or the death of its mother. (Sect. 57.)

With respect to affiliation orders, *see* Affiliation, vol. i. p. 256.

[2] Parishes may maintain and employ poor at their homes. *Rex v. Wetherell*, Cald. 432.

By stat. 59 Geo. 3, c. 12, s. 12, reciting that by 43 Eliz. c. 2, the churchwardens and overseers are directed to set to work certain persons therein described, and that by the laws now in force sufficient powers are not given to the churchwardens and overseers to enable them to keep such persons fully and constantly employed, it is enacted, "that the churchwardens and overseers of the parish may, with the consent of the inhabitants in vestry assembled, take into their hands any land belonging to the parish or parish officers, or the poor thereof, or purchase, hire, or take on lease on account of the parish, any suitable portion of land within or near the parish, not exceeding fifty acres [1 & 2 Wm. 4, c. 42], and employ in the cultivation of it, on account of the parish, such persons as they are by law directed to set to work, and pay such persons reasonable wages; who shall be entitled to the same remedies for the recovery of their wages, and shall be liable to the same punishment for misbehaviour, as other labourers in husbandry are."

By sect. 13, "for the promotion of industry amongst the poor, the churchwardens and overseers of any parish, with the consent of the inhabitants in vestry assembled, or the guardians of unions or parishes [5 & 6 Wm. 4, c. 69, s. 4], may let any portion of parish land, or of the land purchased or taken on account of the parish, to any poor and industrious inhabitants, to be occupied on their own account, at such reasonable rent, and for such term, as shall be fixed by the inhabitants in vestry."

By 2 & 3 Wm. 4, c. 42, s. 1, the trustees of allotments made under acts of parliament for the benefit of the poor, with the churchwardens and overseers, may let portions of such allotments, not being more than one acre nor less than one quarter of an acre, to one individual, as a yearly occupation from Michaelmas, to labourers settled in the parish, and dwelling within or near it, at the usual rent. Provision is made for payment and recovery of the rent (sects. 4 and 5); and the tenant is liable to be evicted if the rent is four weeks in arrear, or the land has not been duly cultivated. (Sect. 7.) Possession of the land may be recovered by the order of two justices, upon the complaint of the churchwardens and overseers, if the tenant refuses to quit, or if any other person unlawfully holds possession. (Sect. 6.) All the powers of these acts are exercised (under the control and subject to the rules, &c. of the Poor-Law Commissioners) by the overseers in any parish not under guardians, and by the guardians of a union or parish established by any statute. 5 & 6 Wm. 4, c. 96, s. 4.

[3] A person applying for relief when in possession of property, of which he does not make disclosure, is punishable as an idle and disorderly person. 11 & 12 Vic. c. 110, s. 10.

[4] By 43 Eliz. c. 2, s. 1, the churchwardens and overseers of the poor of every parish, or the greater part of them, shall, by and with the consent of two or more justices in the same county, dwelling in or near the same parish, or division where the same parish doth lie, raise weekly or otherwise (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwood, in

the said parish, in such competent sums of money as they shall think fit), a convenient stock of flax, hemp, thread, iron, and other ware and stuff, to set the poor on work; and also competent sums of money, for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for the putting out children to be apprentices.

Before the statute of Elizabeth there were certain acts for the suppression of mendicancy, and providing relief for the poor. By a stat. made in the 12 Rich. 2, c. 7, the poor were restrained from wandering abroad, and were required to abide in the town where they were born, or in other places within the hundred, within which districts they were allowed to beg. By the 22 Hen. 8, c. 12, the justices were to distribute themselves into several divisions, within which divisions respectively they might license persons to collect alms. By the 27 Hen. 8, c. 25, the several hundreds, towns corporate, parishes or hamlets, were required to sustain the poor with such charitable voluntary benefactions, as that none of them might of necessity be compelled to go openly in begging, on pain that every person making default should forfeit twenty shillings a month; and the churchwardens or other substantial inhabitants were to make collections for them with boxes on Sundays, and otherwise at their discretion; and the minister was to take all opportunities to exhort and stir up the people to be liberal and bountiful. By the 1 Edw. 6, c. 3, houses were to be provided for them by the devotion of good people, and materials to set them on work; and the minister, after the Gospel every Sunday, was specially to exhort the parishioners to a liberal contribution. *See* also 5 & 6 Edw. 6, c. 2, and 14 Eliz. c. 5.

The poor-rate is made by the churchwardens and overseers (*Tawney's case*, 2 Salk. 531; 2 Ld. Raym. 1013); and as the statute requires it to be made by the major part, it cannot be done by one overseer. *Rex v. Atkins*, 4 T. R. 12.

By 4 & 5 Wm. 4, c. 76, ss. 34–36, the guardians of a union formed under that act may agree, with the approbation of the Poor-Law Commissioners, that the parishes comprised in the union shall be deemed one parish for the purpose of rating, in which case all expenditure for the poor is to be in common.

The general purposes for which this rate is to be raised, as stated in the act of Eliz., are, for setting to work those who are able, relieving such as are not, and for apprenticing the children of parents unable to maintain them; also, by 9 Geo. 1, for purchasing workhouses, c. 7, s. 4; and 18 Geo. 3, c. 19, enacts, that money shall be taken from this fund to repay constables, &c., what they expend for the relief and removal of paupers and vagrants, which the 13 & 14 Car. 2, c. 12, s. 18, had directed to be raised by a separate rate. *Rex v. Bird*, 2 B. & C. 522. Also, by 59 Geo. 2, c. 12, s. 7, the payment of such a salary to the assistant-overseer or overseers as shall be fixed upon by the vestry is to be defrayed out of the poor-rates. 43 Eliz. and 12 & 13 Car. 2. *Rex v. Glyde*, 2 M. & S. 323.

The salary of an assistant-overseer, appointed by a vestry meeting, cannot be paid out of. *Rex v. Welch and others*, Cald. 504; 1 Bott, 318; Pl. 338. See *ante*, Overseers, p. 32, as to his right to remunerate himself.

The rate may be applied to necessary law expenses (*Rex v. Muklefield*, Cald. 507), but it cannot be applied to pay a sum of money borrowed to rebuild a workhouse. *Rex v. Wavell*, Dougl. 116.

Where, owing to the mode in which a poor-rate has been made, the assessment is carried out so as to include in the sum demanded the fraction of a farthing, the ratepayer is not bound to pay the whole farthing. *Morton v. Bremmer*, 8 C. B. (N. S.) 791; 7 Jur. N. S. 211.

The charge for the expenses of a survey and valuation of the parish under the 6 & 7 Wm. 4, c. 96, s. 3, is a charge on the rates generally, and may be enforced against the rates in years subsequently to the five years next after the making of the charge. *Reg. v. Hurstbourne Tarrant Overseers*, 1 El. Bl. & El. 246; 27 L. J. M. C. 214.

[1] By virtue of the 6 & 7 Wm. 4, c. 96, s. 2, the rate "shall, in addition to any other particular which the form of making out such rate shall require to be set forth, contain an account of every particular set forth at the head of the respective columns in the form given in the schedule, so far as the same can be ascertained; and the churchwardens and overseers, and other officers whose duty it may be to make and levy the rate, or such a number of them as are competent thereto, shall, before the rate is allowed by the justices, sign the declaration given at the foot of the form, otherwise the rate shall be of no force or validity." See *Reg. v. Fordham*, 11 Ad. & E. 73. *Paynter v. Reg.* 10 Q. B. 908. *Reg. v. Lumsdaine*, 10 Ad. & E. 157. *Eastern Counties Railway Co. v. Moulton*, 5 E. & B. 974.

When a rate is imposed on real property, it is laid upon the specific thing taxed, which should be appropriately described in the rate, although technical accuracy is altogether unnecessary. It is immaterial also whether the occupier of this property reside within the parish or not; for he becomes an inhabitant for the purpose of assessment by occupying property which is subject to the tax. But personal property must be rated in a different manner. As it is only the excess of that property which the person has visibly within the parish beyond his debts that is rateable, it admits of no other than a very general description in the rate; and although it exists in the parish, it cannot be rated unless the proprietor reside there also. *Rex v. Liverpool; Rex v. Collinson*, 3 T. R.

(C) *Inspection of the Rate.*[1]

(D) *Publication of Rate.*[2]

(E) *Of the Allowance of the Rate.*[3]

(F) *Of Rates in Aid.*[4]

118; 3 Burn's *Just.* 22d ed. 939. No technical form of expression need be used in describing real property, in respect of which a rate is made; but it should be referred to with sufficient certainty to denote the subject assessed.

Holt, C. J., was of opinion that the rate should be made monthly, and not in advance, because, if a man left the parish, he might be charged twice. *Tracey v. Talbot*, Salk. 532. But now a rate may be made prospectively, not only for three months (*Rex v. Overseers of Middlesex*, 2 Black. 294) but for six. *Durant v. Boys*, 6 T. R. 580. The rate must not state a sum in gross for two things. *Rex v. Welbank*, 4 M. & S. 222.

There cannot be concurrent rates (*Reg. v. Inhabitants of Fordham*, 3 Per. & D. 96; 11 & Ad. & E. 73), or a standing rate. *R. v. Audley*, 2 Salk. 526. *R. v. Dursley*, 5 Ad. & E. 15.

[1] The 17 Geo. 2, c. 3, enacts, that the overseers shall permit the inhabitants to inspect the rates at all reasonable times (sect. 2); and if any overseer does not permit an inhabitant to inspect the rate, he is to forfeit for every such offence 20*l.* to the party aggrieved.

It is a sufficient compliance if the demand of inspection be conceded within a reasonable time, to be determined by the jury. *Tennant v. Bell*, 9 Q. B. 684. The persons entitled to demand inspection under the act are the inhabitants, as distinguished from the parish officers. *Wethered v. Calcutt*, 4 Man. & G. 566. A ratepayer is entitled at all reasonable times to take copies of or extracts from the books without paying anything for the same, and the person having the custody of the rate incurs a penalty in case of improper refusal. 6 & 7 Wm. 4, c. 96, s. 5. See *Tennant v. Cranston*, 8 Q. B. 707.

[2] The overseers, &c. must give public notice of the rate on the next Sunday after it has been allowed by the justices, otherwise it is null and void (17 Geo. 2, c. 3, s. 1), by affixing the notice, previously to divine service, on or near to the principal doors of all the churches and chapels within the place for which it is made. 7 Wm. 4, & 1 Vic. c. 45, s. 2. See *Ormerod v. Chadwick*, 16 Mee. & W. 367. *Reg. v. Marriott*, 12 Ad. & E. 779. Neglect to publish the rate as required renders the rate void. *Sibbald v. Rodderick*, 11 Ad. & E. 38. *Fox v. Davies*, 6 C. B. 11. The notice need not show how it was allowed. *Paynter v. Reg.* 10 Q. B. 908. After publication the rate cannot be abandoned; but the parish officers may decline to support it on appeal. *Reg. v. Fouch*, 2 Q. B. 308.

[3] The notice of allowance need not be signed, and therefore a notice signed only by an overseer and assistant-overseer is good. *Burnley v. Methley Overseers*, 28 L. J. M. C. 152; 5 Jur. N. S. 514.

Though the justices are required by the act to dwell in or near the division, it is not necessary that this should be stated in their allowance by the rate. *Cobbett v. St. Mary, Lincoln*, 16 Vin. Abr. 425. But the place for which they allow a rate must be within their jurisdiction. *Rex v. Folly*, 1 Bott, 76.

After a rate has been allowed, it should not be altered by inserting the names of others, although with the magistrates' approbation. *Rex v. Barrat*, Dougl. 465. But by 54 Geo. 3, c. 170, s. 11, two or more justices in petty sessions may, upon application, and with the consent of the overseers or other parochial officers, and proof of the party's inability, through poverty, to pay such rate, excuse him or her from the payment, and strike out the name from the rate.

The justices, if satisfied that the rate has, in fact, been made, must allow it. They cannot examine whether the rate has been made upon correct principles, and refuse allowance if they think otherwise. *Reg. v. Earl of Yarborough*, 3 Per. & D. 491. *Rex v. Abberford*, 2 Ld. Raym. 798.

Whatever might have been the legislature's intention in requiring the consent of the neighbouring justices to a rate, it has been often decided that they are to act ministerially, and must allow it as a matter of form, without exercising any discretion to refuse where they think it unjustly and improperly made. *Rex v. the Inhabitants of Peterborough*, 1 Sid. 377. *Rex v. Uttoxeter*, 1 Const. 76. *Rex v. Justices of Dorchester*, 1 Stra. 393. *Rex v. Edwards*, 1 Black. 637. *Rex v. Kynaston*, 2 East, 118.

If the justices refuse to allow the rate, a *mandamus* lies (*Aill's case*, Carth. 14), and afterwards an attachment. *Rex v. Edwards*, 1 Black. 637. *See* Tapping on Mandamus, p. 66.

If two rates be presented by different officers of the same parish, they may allow which they please. *Rex v. Anon.* Comb. 479. This allowance may be consented to separately. *Rex v. Hamshall Ridware*, 3 T.R. 380.

A rate not allowed is a nullity. *Fox v. Davies*, 6 C. B. 11.

[4] By 43 Eliz. 3, if the said justices do perceive that the inhabitants of any parish, in supporting their poor, are not able to levy among themselves sufficient sums for the purposes aforesaid, then the said two justices shall tax, rate, and assess any other of other parishes, or out of any parish within the hundred, to pay such sums to the churchwardens and overseers of the said poor

(G) *Of the Appeal against the Rate.*

(*a*) *To Petty Sessions.*[1]

parish, for the said purposes, as the said justices shall think fit. According to the words of the statute, this rate could be made only in aid of a parish, but it has been determined that since the 13 & 14 Car. 2, c. 12, one may be likewise made in favour of a vill which maintains its poor, as being within the equity of the act. But although it was doubted whether a vill which sustains its proper poor could call upon other districts to contribute, it is evident from the words of the act that a vill, or tithing, or extra-parochial place which is within the hundred, and of competent ability, may be rated in aid of a parish unable to support its poor.

Any division which is equivalent to a hundred is within the equity of the statute. *Rex v. Milland*, 1 Burr. 576. *St. Benedict v. St. Peters*, 11 Mod. 269. But justices cannot rate a parish within their jurisdiction in aid of one that is not, though both are rateable within the hundred. *Talbot v. Hulble*, 2 Stra. 1155. Nor can they a parish which has an exclusive jurisdiction. *Rex v. Holbeach*, 4 T. R. 778. For the statute of Eliz. says, that if the justices perceive that any of the inhabitants of any parish are not able to levy among themselves sufficient sums, &c., two justices shall and may tax, rate, and assess, any other parishes, &c.

When the assessment is judged necessary, it may be imposed in one of these two ways: the justice may tax particular persons in aid to that parish which cannot relieve its own poor (see *R. v. Knightly*, Comb. 309. *Rex v. Boraughfen*, 1 Bott, 351, pl. 433); or they may assess the whole parish in a certain sum, and leave it to the churchwardens to levy the same, on particular persons. See *case of St. Rumbald's parish*, Skin. 258. *Rex v. Eastchurch*, 2 Salk. 480. *Rex v. Boraughfen*, Fol. 487. *Rex v. Knightly*, Comb. 309.

The justices must make the rate in aid themselves (*Case of St. Peter and St. Paul*, 2 Stra. 1114), and name the particular sum (*case of St. Rumbald's parish, supra*), with certainty (*Rex v. Knightly, supra*); and limited as to time, and therefore not "till we, the said justices, shall see fit to order the contrary." *Case of Borough of Marlborough*, 16 Vin. Abr. 431; 1 Stra. 700. But if made for a specified sum per week (Skin. 258), or month (2 East, 417), or so much yearly (Comb. 241), or a sum in gross, to be levied for the whole year, it is sufficient. *Rex v. Boraughfen*, Fol. 37. It should appear on the face of the order that the parish which requires the aid of another is unable to maintain its poor; and there must be an assertion, and an adjudication that it so appeared to the justices who made it. See *Cobbett v. St. Mary, Lincoln*, 16 Vin. 431. *Rex v. Marlborough*, id.

If there be no hundred, the sessions may tax the county at large (*St. Benedict v. St. Peters*, 11 Mod. 269), the jurisdiction of the session being applicable to cases without the hundred (*Rex v. Percival*, 1 Stra. 56); and if they make an order within it, it will be quashed. *Rex v. Eastbridge*, 5 Mod. 397; 2 Salk. 480.

If the justices or sessions refuse to make a rate in aid, a *mandamus* lies to compel them. *Rex v. Holbeche*, 4 T. R. 778.

[1] By 6 & 7 Wm. 4, c. 96, s. 6, the justices acting for every petty sessional division shall, four times at least a-year, hold a special sessions for hearing appeals against rates, and give twenty-eight days' notice of the time and place of holding the same, on or near the door of the parish church of each parish in the division. At such special sessions (which may be adjourned) the justices are to hear and determine all objections to any rate on the ground of inequality, unfairness, or incorrectness in the valuation of the hereditaments included therein: they cannot, however, inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and the fairness of the amount at which they have been rated. Their decision is conclusive, unless the person impugning the same within fourteen days gives notice in writing of his intention to appeal, and of the matter or cause of the appeal, to the person in whose favour the decision is made, and within five days after the notice enters into a recognisance before a justice, with sufficient securities, to try such appeal at the next quarter sessions, and to abide the order and pay the costs there awarded. But no such objection can be inquired into by the special sessions, unless the complainant has given seven days' notice thereof in writing, under his hand, to the collector, overseers, or persons by whom the rate was made. The appeal must be to the next practicable sessions after the making of the rate (*Reg. v. Trafford*, 15 Q. B. 200), and not later than the second sessions after its publication. *Reg. v. Hammond*, 4 New Sess. Ca. 316. *R. v. Justices of London*, 15 East, 632. *R. v. Atkins*, 4 T. R. 12.

Where a rate was made on the 13th, and published on the 14th October, and the sessions were holden on the 23d, the following January sessions were held to be the next practicable sessions. *Reg. v. Suffolk*, 8 Dowl. 618.

The justice's clerk's fee for giving notice of the sessions is payable out of the poor-rate. 13 & 14 Vic. c. 101, s. 7. Notice of objection to one of the overseers by whom the rate was made is sufficient. *Reg. v. Devon*, 3 New Sess. Ca. 96. And provided the recognisance be entered into within the prescribed time, it is no objection that the record of it was not drawn up until after its expiration. *Reg. v. Justices of St. Albans*, 8 Ad. & E. 932.

By 6 & 7 Wm. 4, c. 96, s. 7, "the justices in such special sessions have all the powers

of amending and quashing any rate, and of awarding costs, which the quarter sessions has. Their order is not to be removed by *certiorari*. But it is provided that the act shall not deprive any person of his right to appeal to the quarter sessions in the first instance, and no order of the special sessions is of any force in opposition to an order of the quarter sessions, or while an appeal to that court is pending upon the same subject-matter.

And by 7 & 8 Vic. c. 101, s. 70, the justices may summon persons to appear and give evidence before them, and on neglect to appear, and proof of personal service of the summons, they may issue their warrant; and if a person refuses to give evidence, they may commit him to prison for fourteen days.

[1] As to boroughs within the 5 & 6 Wm. 4, c. 76, which have a separate court of quarter sessions, the appeal is to the quarter sessions of the borough (sect. 105); and in those to which no such court is granted, it is to the sessions of the county in which the borough is situate. (Sect. 111.) *See* 1 Vic. c. 78, s. 50. *Reg. v. Bridgewater*, 10 Ad. & E. 711.

By 12 & 13 Vic. c. 45, s. 1, "fourteen clear days' notice of appeal, at least, shall be given, and shall be sufficient notice of any act, or rule, or practice to the contrary notwithstanding; and such notice of appeal shall be in writing, signed by the party giving the same, or his attorney on his behalf, and the grounds of appeal shall be specified in every such notice."

[2] No objection on account of any defect in the form of a ground of appeal is to be allowed, nor is any objection to the reception of legal evidence offered in support of a ground of appeal to prevail, unless the court is of opinion that the ground of appeal is so imperfect or incorrect as to be insufficient to enable the party receiving it to prepare for trial, but the court may in all cases order the grounds of appeal to be amended in such terms as to payment of costs, or postponing the trial, as appear reasonable. (12 & 13 Vic. c. 45, s. 3); and the decision of the sessions is in such cases final. (Sect. 9.)

The appellant cannot go into or give evidence of any other ground of appeal besides those set forth in the grounds of appeal (12 & 13 Vic. c. 45, s. 1), even though the objection be apparent on the face of the rate. *R. v. Bromyard*, 8 B. & C. 240. But if the sessions allow him to abandon a particular ground of appeal, the Queen's Bench will not interfere with the decision. *Newmarket Railway Co. v. Dallington*, 4 New Sess. Ca. 87.

The 41 Geo. 3, c. 23, requires that persons appealing because any other person is rated, or omitted to be rated, or because any other person is rated for any greater or less sum than he ought to be, or for any other cause that may require any alteration in the rate with respect to any other person, shall give notice to the persons interested in the event of such appeal, who may appear and be heard, if they think fit. It further provides that the majority of justices may order the names of such persons to be inserted and rated at any sum, and that of others to be struck out, or the sum at which they are rated altered, in such manner as they shall think right.

A rate defective from omitting to name a party liable thereto, cannot be amended by adding his name, but must be quashed. The only method of amending it would be to add the party, and rate him in the same proportion with the others: but then all would be required to pay more than they were legally bound to pay at that time. *Rex v. the Parish Officers of Maddern*, 1 T. R. 625. Where the sessions quashed a rate; and it appearing to the King's Bench that a large tract of rateable land was not assessed therein, the order of sessions was confirmed. *Rex v. Aberavon*, 5 East, 453.

If any rate appear to be illegal by the title, the court will quash it, though no special case has been stated. *Rex v. Wavell*, Dougl. 116.

The Queen's Bench will not quash a poor-rate unless it is unequal upon the face of it. *Rex v. Hardy*, Cowp. 579.

If upon removal of an order of sessions, adjudging that certain persons ought to be added to a poor-rate, and ordering the rate to be amended accordingly, the sessions omit to state that such persons had notice, or appeared and were heard on the appeal, it is fatal. *Rex v. Churchwardens of Andover*, Cowp. 550.

The sessions on appeal may, under 17 Geo. 2, amend a poor-rate by which a party is overcharged. *Rex v. Inhabitants of Cheshunt*, 2 T. R. 623.

A rate legal on the face of it will not be quashed on a case reserved because made in fact for an illegal purpose. *Rex v. Corporation of Gloucester*, 5 T. R. 346.

A rate when made cannot be impugned for any defect in the appointment of those who made it. *Penney v. Slade*, 5 Bing. N. C. 319. See *Lorent v. Scadding*, 13 Q. B. 706.

If the rate is void as to part, it is void altogether. *Sibbald v. Roderick*, 11 Ad. & E. 38; 3 Per. & D. 106. *Hurrell v. Wink*, 8 Taunt. 359.

The court will not presume the rate to be unequal, although houses and lands are not rated alike (*Rex v. Brograve*, 4 Burr. 2491; 1 Bott, 207), unless it appear manifestly so. *Rex v. Butler*, 1 Bott, 114; Cald. 93. It will be quashed if made on an erroneous principle (*Rex v. Audley*, 2 Salk. 526); or if

(*d*) *A Special Case may be Stated.*[1]

(*e*) *Costs of Appeal.*[2]

(H) *Of the Persons upon whom the Rate is Assessed.*[3]

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it be not a proportionable rating (*Rex v. Mast*, 6 T. R. 154); though the court will lay down no general rule as to the proportion. *Rex v. Sandwich*, Cald. 105; 1 Bott, 115.

[1] A special case may be stated.

By the 12 & 13 Vic. c. 45, s. 11, "at any time after notice of appeal has been given, the parties may, by consent and by order of a judge of one of the superior courts, state the facts in a special case for the opinion of such court, and agree that a judgment in conformity with the decision of such court, and for costs, may be entered on motion by either party at the sessions next or next but one after such decision is given; and such judgment is to be of the same effect as if given by the sessions upon an appeal; and the sessions may also, if they please, state a case for the opinion of the Queen's Bench, and decide the appeal subject to that case."

[2] The sessions may order the party against whom the appeal is decided to pay to the other costs. (Id. s. 5.) And upon proof of notice of appeal having been given (though such appeal was not afterwards prosecuted or entered), the sessions for which it was given may order the party receiving it costs, to be paid by the party giving the notice. (Sect. 6.)

If the party has included in his notice any frivolous grounds of appeal, he is liable to pay the whole or any part of the costs incurred by the respondent in disputing such grounds. (Sect. 4.) See *R. v. Cawston*, 4 D. & R. 445.

By 11 & 12 Vic. c. 91, s. 11, "where appeals are brought at the same time against the poor-rates of several parishes, which appear to involve a common principle, the overseers or other authorities, with the consent of the respective vestries, may enter into an agreement, to be approved by the Poor Law Commissioners, mutually to bear the costs properly incurred in the trial of such appeals on the part of the respondents, as well as the costs of the appellants (if any) awarded against the respondents, in such proportions as are fixed with reference to the amount of interest of the several parishes in the question, or otherwise, as appears just; and such agreement is to continue binding on the several parishes, and their overseers in succession, until the appeals have been finally determined."

[3] The 43 Eliz. c. 2, enacts that competent sums, to be levied for the purposes therein specified, shall be raised by taxation of every inhabitant, parson, vicar, and others, and of every (*Rex v. Andover*, Cowp. 559) occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods, in the said parish, for, &c., to be gathered out of the said parish, according to the ability of the said parish.

The 13 & 14 Car. 2, c. 12, s. 22, extends the operation of the 43 Eliz. to villages and townships, but makes no alteration in the manner of imposing the tax.

By this clause the assessment is to be made upon the inhabitants and other occupiers of lands, &c., according to the ability of the parish, and the tax is levied upon the persons in respect of some particular property possessed or occupied by him. *Theed v. Starkey*, 8 Mod. 314. *Sir Anthony's case*, 2 Bulst. 354.

As an *inhabitant*, a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock-in-trade and other local and visible personal property he had within the parish, and of which he made profit. *R. v. Lumsdaine*, 1 W. W. & H. 587. But by a temporary act (3 & 4 Vic. c. 89), but which has been continued by subsequent statutes from time to time, and is now in force (19 & 20 Vic. c. 22; 22 & 23 Vic. c. 44), the liability to taxation in respect of inhabitancy is taken away; and no inhabitant as such is to be rated in respect of his ability derived from the profits of stock-in-trade, or any other property: but this is not to affect the liability of any parson or vicar, or of any occupier of lands, &c., to be rated under the act of Elizabeth.

The question of who is to be considered as the occupier is generally a matter of fact, and when actually found by the sessions, the Court of Queen's Bench will hold themselves concluded by the finding, unless it be expressly submitted to them, although the circumstances of the case would have warranted a contrary decision. *Rex v. Turner*, 1 Const. 126, pl. 158. And when property is profitable in its nature, as lands and houses, it will be considered by the court as rateable, unless it is expressly stated to them that no profit can be derived from it. *Per Lord Ellenborough, C. J.: Rex v. Agar*, 14 East, 256. *Rex v. Eyre*, 12 East, 416. But when the question before the sessions is upon the *quantum* of the rate, the officers making it must show to the justices some probable ground for the amount at which they charge the party in the rate. Where, therefore, the appellant, being rated for tithe-rents and compositions under an Inclosure Act, disputed the *quantum* of the rate as well as the rateability of the property, the court held that it was not enough for the parish officers to show that he was in the receipt of rents of this kind, but they must give some evidence of the probable amount. *Rex v. Topham*, 12 East, 546.

The statute applies to all who occupy real property within the parish, although dwelling elsewhere (*Jeffries' case*, 1 B. & A. 122;

(*a*) *Rating Landlord of small Tenements.*[1]

1 Nol. P. L. 68); and to a body corporate. *Rex v. Gardner*, Cowp. 79. *Rex v. Mayor of London*, 4 T. R. 21. *Rex v. Salter's Load Sluice*, 4 T. R. 730. *Rex v. Bath Corporation*, 14 East, 621. But the king is exempt by reason of his prerogative, as not being mentioned in the statute. *Rex v. Matthews*, Cald. 1.

The rate must be imposed on the occupier, and no other person. *Rex v. St. Luke*, 2 Burr. 1053. If on the landlord, it is bad (*Milward v. Caffin*, 2 Black. 1330), except in cases of small tenements (*see infra*); even though he has covenanted with the tenant to pay it. *Oswald v. Legh*, 1 T. R. 271. Therefore, if there be no occupier, no rate can be imposed. *Holdford v. Copeland*, 3 B. & P. 129.

But where the parson lets his tithes to the tenant of the land from whom they are due, it seems that the former is to be considered as the occupier, and rated to the poor as such (*Rex v. Bartlett*, 16 Vin. Abr. 427); for it has been observed that the letting is but an agreement with the tenant of the land to retain the tithes, and he is to be considered either as a person who buys them, or as one excused from paying them to the clergyman. *See infra.*

It is not, however, essential that the party should occupy every part of the house (*Rex v. St. Mary the Less*, 4 T. R. 477); or that he should reside there himself. *Rex v. Aberystwith*, 10 East, 354.

Where a tract of land vested in the mayor, aldermen, &c., was stocked by the resident burgesses, some fully and others partially, it was holden that the burgesses who turned out stock were occupiers and liable to be rated. *Rex v. Inhabitants of Aberavon*, 2 Smith, 144; 5 East, 453. And the same principle was held to apply where burgesses who did not turn on cattle had a sum of money in lieu thereof. *Rex v. Mayor of Sudbury*, 1 B. & C. 389.

A college porter, if he has the entire use of the house without the college intermeddling is a rateable occupier. *Rex v. Gardner*, Cowp. 81.

Where several enjoy an undivided moiety, all must be deemed rateable occupiers. *Rex v. Munday*, 1 East, 584.

An occupation may be considered as special when one person occupies so far as to receive immediately some particular profits, for which another person is rateable as occupier, although he has to a certain extent possession of the subject from which they issue for other purposes.

The Corporation of London was held rateable for the tolls of a barge-way, of which the herbage and pasture were demised to a lessee, who was rated for them. *R. v. Mayor, &c. of London.* *See* 4 M. & S. 222; 4 T. R. 21.

The lessee of the lot and cope of a lead-mine is liable, although the mine itself is in the possession of those who work it, and who are not subject to the tax. Cowp. 451. As is also the proprietor of the dues called toll and farm-tin (5 T.R. 480; 5 B. & A. 698), and the lessee of lot, toll, and free share of calamine. So the ranger of a park is assessable for his share of the profits of the land, yet the Crown, who permits a sort of community of possession as to the usufruct, is exempt from assessment (1 T. R. 338; 2 H. Black. 267. But if the tenant sells his own crop standing, he is rateable notwithstanding as the occupier of the land, 1 Stra. 525. So, if he sells underwood he is to be assessed, and not the vendee who grubs it up.

It is not every species of distinct occupation which is in the nature of a sub-tenancy, that should in policy and convenience be made the subject of a distinct assessment, although it might be so assessed if the parish officers should deem it expedient, or the parties rated should prefer it. Thus the occupier of a farm, who is possessed of considerable meadows, may sometimes underlet them in small portions to tenants to take the crop, or he may let the aftermath to different persons in joint tenancy; or a gentleman may demise part of the produce of his garden to certain persons. But great inconvenience and injury would arise not only to persons occupying land in this way, but to the parish, if these tenements must be assessed distinctly, instead of comprehending the whole in one entire rate upon the principal occupier of the premises. Upon this principle, the court seemed to be of opinion that a dairyman who rented a farmer's cows under an agreement that they should be depastured in particular parts of the farm, ought not to be rated separately, and that it was better to have the rate for the entire profits of the farm imposed upon the farmer himself.

Where the parson lets his tithes to the tenant of the land from whom they are due, it seems that the former is to be considered as the occupier, and rated to the poor as such. *Rex v. Bartlett*, 16 Vin. Abr. 427. *Rex v. Turner*, 1 Const. 126, pl. 158. *Loundes v. Horne*, 2 Bl. Rep. 1253.

A mere servant is not a rateable occupier (*Rex v. Field*, 5 T. R. 587), unless he inhabits as a principal. Hence, a servant put into a free school to look after pupils, and who occupies the house, is rateable (*Rex v. Catt*, 6 id. 332), provided he and his family live there. *Rex v. St. Luke's*, 2 Burr. 1053.

The objects of a charitable foundation in the actual occupation of almshouses for their own benefit, and liable to be removed at the pleasure of the patrons, are rateable in respect of such occupation. *Rex v. Green*, 9 B. & C. 203.

A navigation company who hire a towing-path are rateable in respect thereof. *Bruce v. Willis*, 3 Per. & D. 220.

[1] By 13 & 14 Vic. c. 99, the vestry of any

(I) *Of the Property subject to the Rate.*

(*a*) *Lands, &c. occupied in the Parish.*[1]

parish may order that the owners of tenements (*i.e.* houses, cottages, apartments, and land in the same parish held therewith, but not any other land or corporal hereditament (14 & 15 Vic. c. 39, s. 2), the rateable value of which does not exceed 6*l.*, shall be rated to the relief of the poor instead of the occupiers. (Sect. 1.) Such owners are to be rated accordingly, while the order is in force, at three-fourths of the amount at which the tenant would be liable to be rated if the act had not passed; or they may compound for the rates of all their tenements at not less than half the amount at which they would be otherwise rated. (Sects. 3, 4.) Such rates, and the costs of levying the same, may be recovered from such owners by distress or otherwise, and the goods of the occupiers are also liable to be distrained. (Sect. 5.) The owner may appeal. (Sect. 6.) And if he has paid all such rates, he is entitled to all municipal privileges under 5 & 6 Wm. 4, c. 76 (and also to any right of voting, retained or reserved, by the 2 & 3 Wm. 4, c. 45; 14 & 15 Vic. c. 39, s. 1), as if he had been himself rated and had paid; and if the owner has not paid, the occupier may tender the rates, in which case he will be equally entitled, and may deduct the payment from his next rent. (Sect. 7.) Owners of tenements held for longer periods than from year to year may add the rates paid by them to the rent. (Sect. 8.)

By 2 & 3 Wm. 4, c. 45, and 14 & 15 Vic. c. 14, occupiers may claim to be rated whether their landlord is or is not liable to be rated; and upon their doing so, and paying or tendering all rates due on the 5th of January preceding, they are entitled to be registered as voters for cities or boroughs, if otherwise duly qualified, without making any further claim. *See* 19 & 20 Vic. c. 112, s. 4, a similar provision in the Metropolitan Local Management Act, with respect to voting for vestrymen.

[1] By 43 Eliz. real property is assessable. 2 Bulst. 354; 4 T. R. 777; Cowp. 550. The meaning of real property in the poor-laws appears to have been in many of the older cases limited to signify immovable things, and capable of occupation to strict legal intendment, and to be synonymous to what is comprehended under the term land. More recent decisions seemed to incline towards considering it as extending likewise to all incorporeal rights which issue out of lands, and are included under the appellation of a tenement (*Lord Bute v. Grindall*, 2 H. Black. 265); but subsequent determinations have again confined it within its ancient and less extensive signification.

Profit derived from land, whether natural or artificially produced, is rateable. *Rex v. Calder Navigation*, 1 B. & A. 269.

A billiard-table annexed to a house which lets for a higher rent is rateable. *Rex v. St. Nicholas, Gloucester*, Cald. 262. A carding machine attached to a house is rateable. *Rex v. Hogg*, 1 T. R. 721. So is a potter's clay-pit. *Rex v. Brown*, 8 East, 528.

An estate may be rateable in a higher proportion on account of a right of common being appendant to it. *Kempe v. Spence*, 2 Black. 1245. So, members of a corporate body who hold in fee certain common lands, exercising their right of common in such lands, are rateable. *Rex v. Watson*, 5 East, 480; 1 Bott, 237; 1 Nol. P. L. 149.

Lands converted into a dock are rateable. *Rex v. Dock Co. Hull*, 1 T. R. 219. So a waterworks company, in possession of main-pipes buried in the soil, is *de facto* in beneficial occupation of the part of the soil occupied by the mains, and rateable in respect of them. *Reg. v. West Middlesex Waterworks Co.* El. & El. 716. *R. v. Chelsea Waterworks*, 5 B. & Adol. 156. *See* 17 Q. B. 512.

A reservoir for supplying a city with water is rateable. *Rex v. Corporation of Bath*, 14 East, 609. So, a railway company who occupies land with their railway are rateable. *R. v. South-Western Railway Co.* 1 Q. B. 558. So, of the occupation of docks by a dock company. *R. v. Bristol Dock Co.* id. 535. So, the occupation of land by posts carrying the wires of an electric telegraph, is a rateable occupation. *Electric Telegraph Co. v. Salford*, 11 Ex. 181.

A weighing-machine yielding profit attached to a building is rateable. *Rex v. St. Nicholas, Gloucester, supra.* So, the rateable value may be enhanced by the user of the land as a quay by means of a barge moored alongside. *Forrest v. Greenwich Overseers*, 8 E. & B. 890; 27 L. J. M. C. 96; 4 Jur. N. S. 480.

The occupier of land over which a way-leave, or way-leave waggon-way, is erected, for the purpose of carrying coals from his mine, is rateable for the value of the waggon-way. *Rex v. Bell*, 7 T. R. 598.

The rate is payable where the thing itself is situate and is productive of profit, whether the proprietor actually reside in the parish or not. *Rex v. Cardington*, Cowp. 581. See *Liverpool (Mayor of) v. West Derby, Overseers of*, 6 E. & B. 704; 25 L. J. M. C. 112. Hence, if a gardener carries all his crop to houses in different parishes, he is rateable in the parish where the garden lies. *Atkins v. Davis*, Cald. 327. So, a man occupying brick land is rateable where the land lies, and not where the bricks are sold. *Rex v. New River Co.* 1 M. & S. 509. But it is not enough to ascertain the local value of the property without inquiring whether it yields a return on the spot. (Id.)

Where a profit does exist, it is immaterial whether the return is annual, and in

(*b*) *Tolls, Rates, and Dues, when Rateable.*[1]

(*c*) *Rateability of Mines.*[2]

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a fixed unvarying proportion (*Jones v. Mansell*, Dougl. 302. *Rowls v. Gells*, Cowp. 451. *Atkins v. Davis: Buller, J.*, Cald. 325. *Rex v. Alberbury*, 1 East, 534. *Rex v. Woodland*, 2 id. 164); or whether it is uncertain in the amount, and subject to risk and expense. But in order to render the occupier rateable, it is not only necessary that the thing should yield a profit, but that some emolument should be derived from the occupation in a personal and private respect. *Rex v. Terrot*, 3 id. 506.

[1] An incorporeal hereditament, as an easement, is not rateable (*Rex v. Aire & Calder Navigation Co.* 9 B. & C. 820), the party not being the owner of the soil. *Rex v. Mersey & Irwell Navigation Co.* 9 id. 95. *Rex v. Thomas*, id. 114. *Colebrook v. Tickell*, 4 Ad. & E. 916. Persons, therefore, are not rateable in respect of a mere right of common. *Rex v. Churchill*, 4 B. & C. 750; 6 D. & R. 635.

Tolls *per se*, and unconnected with occupation of land, are not rateable (*R. v. Eyre*, 12 East, 416. *Rex v. St. Mary, Leicester*, 6 M. & S. 400), as the tolls at a mill. *Rex v. Aire & Calder Navigation Co.* 3 B. & Adol. 533. But the tolls of a subscription bridge are rateable. *Reg. v. Blackfriars' Bridge Co.* 9 Ad. & E. 828; 1 Per. & D. 603. See *Reg. v. Marquis of Salisbury*, 3 Nev. & P. 476.

Toll, tin, and farm dues are rateable. *Rex v. St. Agnes*, 3 T. R. 480; 1 Bott, 188; 1 Nol. P. L. 84.

A mere incorporeal fishery is not rateable; but the lessee of a fishery within the river Severn is rateable as a beneficial occupier of land. *Rex v. Ellis*, 1 M. & S. 665.

Herbage and pannage is not rateable when the party entitled to it does not put the cattle to take it. *Bute v. Grindall*, 1 T. R. 338; 1 Bott, 173; 1 Nol. 150. See *Jones v. Mansell*, Dougl. 302,

Lime-works are rateable in the hands of the occupier. *Rex v. Alberbury*, 1 East, 534.

The lock and tunnel of a canal is rateable for the dues and fees payable there. *Rex v. Macdonald*, 12 id. 324.

Non-resident lessees of lot, toll, &c. of calamine, are rateable. *Rex v. Baptist Mill Co.* 1 M. & S. 612.

A manor itself is not rateable. *Rex v. Vandewall*, 1 Bott, 131; 2 Burr. 991.

Land covered with mineral water is rateable upon the value created by the water. *Rex v. Miller*, Cowp. 619.

Canal tolls are rateable. *Rex v. Page*, 4 T. R. 543. *Rex v. Aire & Calder Navigation Co.* 2 id. 660. *Rex v. Staffordshire Navigation Co.* 8 id. 340.

The occupier of an ancient ferry, not resident, is not rateable. *Rex v. Nicholson*, 12 East, 330.

A soke-mill is rateable. *Rex v. Bradford* 4 M. & S. 317.

In *Rex v. Bell*, 5 M. & S. 221, the lessee of tolls of a market by prescription, holden in the public street, where the sacks of corn were set down for sale, the toll being a handful of corn taken thereout of each sack brought and exposed for sale, was adjudged not rateable, for the tolls would be equally payable to whomsoever the soil belonged.

The non-resident proprietor of a light-house is not rateable for tolls. *Rex v. Cake*, 5 B. & C. 797. *Rex v. Inhabitants of Tynemouth*, 12 East, 44. Tolls for passing a sluice are rateable. *Rex v. Cardington*, Cowp. 581. Turnpike tolls are not rateable. *Rex v. Staffordshire Navigation Co.* 8 T. R. 340. A towing-path is rateable. *Rex v. Mayor of London*, 4 id. 21.

A bridge for which toll is demandable is rateable on either side, if in different parishes. *Rex v. Barnes*, 1 B. & Adol. 113.

Town dues are not rateable (*Lewis v. Swansea*, 5 E. & B. 508); neither are tolls of a ferry (*Reg. v. North and South Shields Ferry*, 1 id. 140); or of a market (*R. v. Bell, supra*), unless they be for stallage and metage, which is connected with the occupation of land. *Roberts v. Aylesbury*, 1 E. & B. 432. So, a right to tolls imposed on every ship entering a port, if connected with the use and occupation of land, is rateable. *Reg. v. Earl Durham*, 28 L. J. M. C. 232.

[2] A direct interest or profit arising from a right to take part of the soil or its produce, is rateable when the land is not liable to assessment in other respects: such are the lot and cope of a lead-mine (*Rowls v. Gells*, Cowp. 451); and the toll and tin dues of a tin-mine (*Rex v. St. Agnes*, 3 T. R. 480); lot and free share of calamine to be raised within a manor (*Rex v. Baptist Mill Co. supra*); and if a man has taken a lease of land, with privilege to dig for mines, he may be rated for the land. See *Smelting Co. v. Richardson*, 3 Burr. 1341; 1 Bl. Rep. 349. And there is no distinction between cases where a party takes this interest under a specific contract, or where the adventurers work under a custom previously existing throughout a district. *Per Abbott, C. J.: Rex v. St. Austell*, 5 B. & A. 698.

But the rateability seems to depend upon the subject assessed being actually occupied by the person rated. Where a portion of the native mineral is reserved to the owner of the mine, he is rateable for it as the occupier of so much land, receiving the profits without risk; and freed from the hazards of working, they are assessable as the profits of so much land (*Rex v. Baptist Mill Co. supra*); and his lessee of the share would be equally rateable. *Rex v. St. Austell, supra.* But if the owner puts himself

out of possession of the mines altogether, standing towards the workers of the mine in the relation of landlord to a tenant, whether he reserves to himself a monied rent. (*Rex v. Bishop of Rochester*, 12 East, 353); or a portion of the mineral in its manufactured state, as, for instance, so much smelted lead, neither the owner nor his lessee are held rateable. *Rex v. Earl Pomfret*, 5 M. & S. 139.

If the reservation is not of rent, but of a certain proportion of the ore raised, the lessor may be rated as occupier. *Reg. v. Todd*, 4 Per. & D. 335. See *Rex v. Tremayne*, 1 Nev. & M. 194; 4 B. & Ad. 162.

The occupier of a mine is liable to be rated on improvements. *Rex v. Lord Granville*, 9 B. & C. 188.

A coal-mine is rateable in the several parishes into which it extends. *Rex v. Inhabitants of Foleshill*, 4 Nev. & M. 360.

Where a landlord leased mines, with liberty to the tenants to dig, reserving a certain rent and a proportion of the ore; none being raised, and he not resident within the parish, was holden not rateable. *Rex v. Bishop of Rochester*, 12 East, 353. So, an owner who reserved smelted ore in nature of rent was holden not rateable. *Rex v. Pomfret*, 5 M. & S. 139. But it is otherwise if the covenant reserves one eighth part of tin ore for smelting. *Rex v. St. Austell*, 5 B. & A. 693. This case is distinguishable from *Rex v. Pomfret;* first, because there was an absolute demise in that case of all the mines under which the possession, both of that part which was worked and that which was not, passed to the lessees. But here there is an express reservation of part; secondly, the share reserved to the lord in *Rex v. Pomfret*, was of smelted lead, and here it is of part of the native minerals. So, coal-mines are rateable by the express words of the statute; therefore the lessee is, though he derives no profit. *Rex v. Parrott*, 5 T. R. 593; 1 Bott, 209; Nol. Rep. 158. And though the coal be used for smelting the ore of his own mine. *Rex v. Cunningham*, 5 East, 478. But the statute does not extend to lead-mines; and, therefore, they are not rateable. *Smelting Co. v. Richardson*, 3 Burr. 1341.

Clay-pits are not rateable. *Rex v. Brettell*, 3 B. & Adol. 424.

The occupier of a slate-quarry is rateable. *Rex v. Woodland*, 2 East, 164.

The owner and occupier of coal-mines is rateable at the sum for which the mines would let, subject to outgoings. *Rex v. Atwood*, 6 B. & C. 277. But where the owner and occupier of an iron-stone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose:—*Held*, that the mine was not rateable to the poor in respect of the engine. *Rex v. Bilston* (*Overseers of*), 5 B. & C. 851.

An act for inclosing a common, which directs that the allotments to the commoners shall be deemed to be within the township wherein the lands of such commoners lie, does not alter the right or liabilities of the owners of coal-mines, either worked or unworked, under such allotment. *Rex v. Pitt*, 2 Nev. & M. 303; 5 B. & Adol. 565.

[1] Tithes in the lands of the efficient incumbent, whether parson or vicar, are not expressly mentioned in the statute. But, as it directs that the parson or vicar shall be taxed, it must intend that it shall be for that property which constitutes the chief subject of their occupancy. *Rex v. Lambeth*, 1 Stra. 525. Tithes being deemed a tenement by our law, not only parsonage-houses and glebe-lands are rateable in the lands of the occupier (*Rex v. Turner*, 1 Const. 126, pl. 158. *Rex v. Catt*, 6 T. R. 332); but both rectorial and vicarial tithes have been always deemed so, whether due by common law or by custom.

A modus or composition in lieu of tithes is rateable. *Lowndes v. Horne*, 2 Black. 1252. *Rex v. Lambeth*, 1 Stra. 525.

Tithes are rateable under the 6 & 7 Wm. 4, c. 96, s. 1. *Reg. v. Capel*, 4 Per. & D. 87. *Rex v. Joddrell*, 1 B. & Adol. 403. And in case of a lease, the lessee is liable. *Rex v. Wilson*, 5 Nev. & M. 119.

The corn-rent is to be added to the rack-rent; but the rate must be equal, and the rector is entitled to a deduction of land-tax. *Rex v. Joddrell*, *supra*.

An owner of a tithe commutation rent-charge, constituted under the 6 & 7 Wm. 4, c. 71, is rateable in respect thereof, in analogy to the principle established by id. c. 96. *Goodchild v. St. John, Hackney*, 1 E., B. & E. 1; 27 L. J. M. C. 156.

Where an inclosure act provided that a certain corn-rent, "free from all taxes and deductions whatsoever, except land-tax," issuing out of lands in the parish, should be paid to the rector in lieu of all great and small tithes, &c., it was held that this corn-rent was not rateable to the poor. *Mitchell v. Fordham*, 6 B. & C. 274. *Reg. v. Shaw*, 12 Q. B. 419.

Ecclesiastical dues are rateable, unless exempted by statute. *Rex v. Toms*, Dougl. 401. So are offerings which constitute the rectorial or vicarial dues (*Rex v. Catt*, 6 T. R. 332); and even a pension payable to the parson. *Lowndes v. Horne*, 2 Black. 1252.

[2] Whether underwood is or is not rateable depends upon the mode of growing and cutting. *Reg. v. Narberth*, 9 Ad. & E. 815; 1 Per. & D. 590.

Rateable underwood is that which yields a succession of profits (*Rex v. Ferrybridge*, 1 B. & C. 385), and intended for sale. *Rex v. Mirfield*, 10 East, 219.

By the 43 Eliz. saleable underwoods in

(*f*) *Rateability of Rents.*[1]
(*g*) *Exemption from Poor-Rates by Statute.*[2]
(*h*) „ *by reason of there being no beneficial Occupation.*[3]

the hands of the occupier are rateable; but not woods consisting of what is called great wood or timber trees, of twenty years and upwards (Com. Dig. Demesnes, H. 3; 1 Gwell. 15, 16. *Walton v. Tryon*, 2 id. 827), for they are not the profits of the occupier, considered as such, but parcel of the inheritance itself. *Herlakenden's case*, 4 Rep. 62, a. *Robert Liford's case*, 11 Rep. 466; 2 Com. Dig. Biens, H.

What is or is not annexed depends on the mode of creating it; hence, all the small wood which is cut down at certain periods, leaving the trees standing, is underwood. (*Aubery v. Fisher*, 10 East, 449), be the species of wood planted what it may. *Rex v. Ferrybridge*, 1 B. & C. 375.

[1] Rents are not generally rateable (*Bute v. Grindall*, 1 T. R. 338; 1 Bott, 173), but ground-rents are. *Rex v. Gibbs*, Comb. 62.

Quit-rents, and the casual profits of a manor, have been held not rateable (*Rex v. Vandewall*, 2 Burr. 991); but this decision is maintainable as to quit-rents, upon the principle of excluding a double rate; and the reason assigned by *Lord Kenyon, C. J.*, why a profit in the nature of rent could not have been rated was, because that would be to rate the subject-matter twice. *Rex v. Alberbury*, 1 East, 535; and *per Eyre, J.*, Comb. 264. *Lord Mansfield* appears to have been of the same opinion. *Mr. Justice Blackstone* seems to have doubted, likewise, whether some rents were not assessable to the poor. *Lowndes v. Horne, supra. Lord Holt* declared that quit-rents were determined to be rateable. *Per Holt, C. J.*, Comb. 264. *Rull's case*, Carth. 14.

[2] Where a statute directs that real property shall be accounted personal, and its object is, that thereby it may be descendible and transferable like personal property, it annexes it with the interests of personalty so far only as is sufficient for the end in view, for all other purposes the land retains its original properties. Therefore, lands converted into a dock, under a statute which declares that the shares of the proprietors shall be considered as personal property, are, as before, rateable to the poor, and in proportion to the annual profits. *Rex v. Dock Co. of Hull*, 1 T. R. 219.

That which is rateable can only be excepted by express words (*Rex v. Skingle*, 1 Stra. 100), which, though general, will suffice (*Rex v. Scott*, 3 T. R. 602), as the words "free from all taxes and assessment whatsoever" (*Eddington v. Borman*, 4 id. 4), or "clear from all taxes, deductions, charges, and extras whatsoever, parochial, parliamentary, or otherwise howsoever." *Rex v. Toms*, Dougl. 401. But the word "charges" only applies to private charges. *Case of Stonehouse Bridge*, 5 East, 356.

The words in a local statute, "free from all taxes and assessments," include poor-rates. *Rex v. London Gas Co.* 8 B. & C. 54; 2 M. & R. 12. *Mitchell v. Fordham*, 6 B. & C. 274.

[3] The rule is, if there is no beneficial occupier for private emolument, the property is not liable to assessment: but when such an occupier does exist, he is rateable, although the ultimate object of this occupation be to promote a charitable institution, or advance the public good.

Where a profit does exist, it is immaterial whether the return is annual, and in a fixed unvarying proportion (*Jones v. Maunsell*, Dougl. 302. *Rowls v. Gells*, Cowp. 451. *Atkins v. Davis*, Cald. 325. *Rex v. Alberbury*, 1 East, 534. *Rex v. Woodland*, 2 id. 164); or whether it is uncertain in the amount, and subject to risk and expense. But in order to render the occupier rateable, it is not only necessary that the thing should yield a profit, but that some emolument should be derived from the occupation in a personal and private respect (*Rex v. Terrot*, 3 East, 506); and where such an occupation exists, the law looks to the productive value of the thing as the fund to be taxed, without reference to his beneficial share of it, for the tax is laid upon the entire profit which the property yields, to whomsoever payable.

It is not only essential that there should be an occupier in fact, but that the occupation should make some return in the parish, the assessment being on the profit. *Bute v. Grindall*, 1 T. R. 338.

The governors or trustees of a hospital are not rateable (*Rex v. St. Bartholomew's Hospital*, 4 Burr. 2435. *Rex v. St. George, Southwark*, 10 Q. B. 852); nor is the founder of a charity-house, if he makes no profit (*Rex v. Waldo*, Cald. 358), unless he is an occupier who is otherwise within the act (*Rex v. Catt*, 6 T. R. 332), or derives a profit. *Rex v. Munday*, 1 East, 584. Hence the occupier of hospital lands is rateable. *Anon.* 2 Salk. 526. But if any such charitable institution derives a profit from the occupation of land or houses, it is rateable like any individual, and the fact of the profit, when received, being applied wholly to charitable purposes, will not affect the matter. *Reg. v. Baptist Missionary Society*, 10 Q. B. 884. *Reg. v. Temple*, 2 E. & B. 160. *Reg. v. St. Giles, York*, 3 B. & Adol. 573. *Reg. v. Sterry*, 12 Ad. & E. 84.

The principle is, that when the person who must be deemed the actual occupier is merely a trustee for others, and is prevented by law from deriving any benefit whatever from the occupation, he cannot be considered as the occupier for the purpose of being rated, the statute supposing that the party has both the control over the property and the power of enjoying it. *Reg. v. Wallingford Union*, 10 Ad. & E. 259. *Reg. v. Wilson*, 12 id. 94.

Where county courts and judges' lodgings were erected under an act of parliament, and vested in the justices as trustees for public purposes only; the lodgings were used by the judges during the assizes, and contained sleeping apartments, plate, and wine: —*Held*, not a rateable occupation by the justices. *Reg. v. Justices of Worcester*, 11 Ad. & E. 57. See *Reg. v. Manchester*, 3 E. & B. 336. So, if the residence of the governor of a house of correction, and of the turnkey within the prison, be no more than is necessary for the purposes of the prison, they are not rateable in respect of it. *Reg. v. Shepherd*, 1 Q. B. 650. See *Justices of Bedfordshire v. St. Paul, Bedford*, 7 Exch. 650. *Gambier v. Lydford*, 3 E. & B. 346.

Governors or guardians of the poor are rateable in respect of their occupation of a workhouse, whether it be in their own or in another parish; for although the occupation, as regards the guardians, is not beneficial to them individually, yet the most beneficial mode of relieving the poor is an advantage to the body. *Reg. v. Wallingford Union*, 10 Ad. & E. 259; 2 Per. & D. 226. *Governor of Bristol Poor v. Wait*, 5 Ad. & E. 1. *Toxteth Park Guardians v. Toxteth Park Local Board*, 30 L. J. M. C. 154.

By 4 & 5 Vic. c. 48, municipal corporations named in schedules A. and B. to the 5 & 6 Wm. 4, c. 76 (the profits of all whose corporate property must, by sect. 92, be carried to the borough fund, and applied to public purposes) are to be rated to the relief of the poor in respect of lands, tenements, and hereditaments, being the property of and in the occupation of such corporations, as if they were not corporate property, and they are to be taken to be the beneficial occupiers thereof for the purpose of rating, as if such occupation was for their own private advantage, and not for public purposes; but this does not extend to property in a parish wholly within the borough, where the poor of the borough were, before the passing of the act, relieved by one entire rate. (Sects. 1, 2.) This statute was passed in consequence of the decisions in *Reg. v. Exminster*, 12 Ad. & E. 2. *Reg. v. Liverpool*, 9 id. 435.

In the absence of any enactment compelling a company to devote their profits to a public object, they are rateable. *R. v. Tees Navigation Co.* 5 L. J. M. C. 31. *R. v. Beverley Commissioners*, 6 Ad. & E. 645.

In order to render persons occupying property in a manner which is *primâ facie* beneficial not rateable, on the ground of the occupation being for the benefit of the public, it is essential that the public, unlimited by bounds of county, parish, or borough, should have a direct and substantial interest in the funds. The principle does not apply where the inhabitants of certain parishes are alone concerned in the benefit. *R. v. Badcock*, 6 Q. B. 787. Thus, commissioners in the occupation of land or public docks are rateable, unless the profits derived from the land or docks are wholly and exclusively devoted to purposes strictly public. *Reg. v. Kentmere*, 7 Q. B. 551. *Mayor of Manchester v. Overseers of Manchester*, id. 859. *Reg. v. Longwood*, 13 id. 116. *Reg. v. Harrogate*, 15 id. 1012. *Birkenhead Dock Trustees v. Overseers of Birkenhead*, 2 E. & B. 148. And a local board of health have been held rateable for a yard occupied by them for the deposit of stone, as they were trustees, not for the public at large, but only for the inhabitants of the district. *Reg. v. Justices of Hull*, 4 E. & B. 29.

The occupation must be for private purposes, and not public; therefore, the office used by the Master in Chancery is not rateable. *Holford v. Copeland*, 3 B. & P. 129. *Rex v. Hurdis*, 3 T. R. 497. So the lessee of barracks, who derives no benefit, is not rateable. *Amherst v. Somers*, 2 T. R. 372. And the trustees of a drainage are not rateable for lands purchased and buildings erected by them there, from which no profit is derived, being for the purpose of draining other parishes. *Rex v. Sculcoates*, 12 East, 40. So, mere trustees to superintend tolls of a canal, and execute the purposes of the statute (*Rex v. Salter's Sluice Navigation*, 4 T. R. 730), or turnpike tolls, are not rateable (*Rex v. Staffordshire Navigation*, 8 id. 340), if no benefit is derived other than that in which the public at large participate. So, the tolls of a lighthouse are not rateable. *Rex v. Coke*, 5 B. & C. 797; 8 D. & R. 666. So, a police-station is not rateable, by reason of its being occupied by a police-sergeant and constables for the convenient performance of their duties. *Lancashire Justices v. Shetford Overseers*, 1 E. B. & E. 225; 27 L. J. M. C. 209. And the University of Oxford is not rateable in respect of any buildings occupied by it solely for public purposes. *In re Oxford City Poor-Rate Act*, 3 Jur. N. S. 1249. Commissioners of paving and lighting, holding premises for that purpose, are not rateable. *Rex v. Beverley Gasworks*, 1 Nev. & P. 646. A building for the use of justices of assize and quarter-sessions is not rateable. *Reg. v. Justices of Worcestershire*, 3 Per. & D. 8.

A corporation is not rateable to the relief of the poor in respect of lands of which the profits are payable to the borough fund under 5 & 6 Wm. 4, c. 76, s. 92, although the land is situate in a parish without the limits of the borough. *Reg. v. Inhabitants of Exminster*, 4 Per. & D. 69. So a house taken by the Postmaster-General, and occupied as a post-office for the purposes of the post-office revenue, is not rateable. *Smith v. Birmingham Guardians*, 7 E. & B. 483; 26 L. J. M. C. 105.

The king not being named in the stat. of Eliz., property in his occupation is exempt. *Holford v. Copeland*, 3 B. & P. 139. *Rex v. Mathews*, Cald. 1. But that does not apply to property of his occupied by others (*Rex v. Terrott*, 3 East, 514), from which profit is derived (*Bute v. Grindell*, 1 T. R. 338.) Therefore it has been decided, that when the site of a palace is demised to a subject for a certain permanent interest, the grantees who occupy are rateable. *Duke of Portland's*

(*i*) *Exemption of Scientific and Literary Societies.*[1]

case, 1 Const. 131, Pl. 166. Also those who beneficially occupy part of the royal parks, and(perhaps or the same reason) of the palaces, to their own use, are liable to assessment, although the premises are to be considered in all other respects as in the hands of the Crown. So the Crown lessee of certain duties, payable out of lead-mines, is rateable.

And the Master of the Rolls, and auditors and tellers of the Exchequer, were held rateable for houses which they occupied in respect of their offices as servants of the Crown. *Rex v. Hurdis*, 3 T. R. 497. In fact, wherever the occupation is for private benefit, the occupier may be rated, whether he is a civil or military officer of the Crown (*Rex v. Terrott*, 3 East. 506), though removable at pleasure (*Rex v. Hurdis, supra*), and though his title be defective. *Rex v. Bell*, 7 T. R. 598. So, where lands or other hereditaments are beneficially occupied, the quantity of the occupier's interest, or the validity of his title in the possession, are immaterial. 1 T. R. 338; Dougl. 362. He is rateable during his occupation, although he holds at will (3 T. R. 497; 3 East, 513; 5 East, 455); or may be turned out for misconduct.

A storekeeper or porter employed by the Crown in the public service, occupying premises belonging to the Crown, for the purpose of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emolument of his office. But if he have an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess, and of no more. *Reg. v. Stewart*, 8 E. & B. 360; 27 L. J. M. C. 81.

The president and members of the Royal Academy were held not rateable, on the ground that they occupied the Royal Academy in the exercise of a public duty. *Reg. v. Shee*, 4 Q. B. 2. But it is otherwise if the occupation be beneficial to the individual. Thus, the occupiers of apartments in Hampton Court Palace are rateable. *Rex v. Lady E. Ponsonby*, 3 Q. B. 14.

Soldiers in barracks are not occupiers to be rated. *Rex v. Hurdis*, 3 T. R. 499.

By 3 & 4 Wm. 4, c. 30, no persons are to be rated or pay to any church as poor-rate or cesses for or in respect of any churches, district churches, chapels, meeting-houses, or premises, or such part thereof as is exclusively appropriated to public worship, and which (other than churches, district churches, and episcopal chapels of the Established Church), are duly certified for the performance of such religious worship; but no persons are thereby exempted from any such rates, &c., in respect of any part of such churches, &c., which are not so exclusively appropriated, and from which such persons receive rent, or derive profit or advantage; but the user for Sunday and infant schools, or for the charitable education of the poor, does not render them rateable.

Before this statute a meeting-house was not rateable, unless the pews be let out at a profit. *Rex v. Southwark*, 2 Stra. 745. *Rex v. Woodward*, 5 T. R. 79.

Dock commissioners are rateable where surplus fund was to be devoted to reducing the dues, the benefit being only to a particular section of the public. *Tyne Improvement Commissioners v. Chirton Overseers*, El. & El. 516. *Reg. v. Chirton Churchwardens*, 28 L. J. M. C. 131; 5 Jur. N. S. 865. See *Mersey Docks and Harbour Board v. Jones*, 9 C. B. N. S. 812; 30 L. J. M. C. 239.

The Licensed Victuallers' School was held rateable, the hall being used for the purpose of holding the meetings of the society. *Licensed Victuallers' Society v. St. Mary, Lambeth*, 1 E. B. & E. 71; 7 Jur. N. S. 521.

An Exchange was, by a local act, vested in a company of proprietors, who were required to provide two public rooms for commercial purposes, to which, by regulation, certain fees were payable for admission, but were not payable by proprietors. The court held, that the company were rateable for the fair annual value of such rooms, with its advantages, but of which the proprietors' privileges were not to be taken as part. *Rex v. Liverpool Exchange*, 3 Nev. & M. 550.

A house partly let to the Inland Revenue for their officers, and partly occupied by the landlord himself, who was distributor of stamps for the district, was held rateable. *Smith v. St. Michael, Cambridge*, 30 L. J. M. C. 74; 7 Jur. N. S. 24.

A toll-porter to the trustees of a navigation who occupies for the purpose of superintending the canal is a rateable occupier. —— *v. Armstrong*, 2 Stark. 543.

The trustees for letting aftermath, who can only demise it out in pastures for cattle at a certain sum per head, are rateable occupiers. *Rex v. Trustees of Tewkesbury*, 13 East, 155.

The lessee of exhausted coal-mines is not rateable, though still bound to pay rent. *Rex v. Bedworth*, 8 East, 387.

A tenant who derives no benefit from his farm in consequence of having made a hard bargain with his landlord, is rateable. *Rex v. Parret*, 5 T. R. 593.

[1] By 6 & 7 Vic. c. 36, no person is to be assessed, or liable to pay to any county, borough, parochial, or other rates or cesses, in respect of any land, houses, or buildings belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant, or owner and occupier of it, for the transaction of its business and for carrying into effect its purposes; provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not and by its laws may not make any dividend, gift, division, or bonus in money unto or between any of its

(K) *Rateable Value, how Ascertained.*

(*a*) *In General.*[1]

members, and provided it obtains the certificate of the barrister appointed to certify friendly societies. A society, in order that it may be entitled to the exemption, must have for its primary object the promotion of science, literature, or the fine arts; and not merely the gratification of the members by means of these pursuits. *Reg. v. Brandt*, 16 Q. B. 462. And the premises must be occupied solely for these purposes. *Purviss v. Traill*, 3 Ex. 344. Thus the Linnean Society is exempt (*Linnean Society v. St. Anne, Westminster*, 3 E. & B. 793); but neither the Zoological Society (*Reg. v. the Zoological Society*, id. 807), nor the United Service Institution (*Reg. v. Cockburn*, 16 Q. B. 480), are exempt. So, although libraries, properly so called, are exempt (*Reg. v. Manchester*, 16 Q. B. 449. *Birmingham v. Shaw*, 10 id. 868. *Earl of Clarendon v. St. James's, Westminster*, 10 C. B. 806), news-rooms are not. *Reg. v. Gaskell*, 16 Q. B. 472. *Reg. v. Phillips*, 8 id. 745. *Purchas v. St. Sepulchre, Cambridge*, 4 E. & B. 156. *Russell Institution v. St. Giles's*, 3 id. 406. Religious and educational societies are not exempt. *Reg. v. Baptist Missionary Society*, 10 Q. B. 884. *Scott v. St. Martin-in the-Fields*, 25 L. J. M. C. 42. *Reg. v. Jones*, 8 Q. B. 719. *R. v. Pocock*, id. 729. *Reg. v. Phillips*, id. 745. The exemption will not be destroyed by a small part of the premises being let (3 E. & B. 793); nor by the receipt of a small fee for admission (16 Q. B. 449); but there must be a rule expressly prohibiting a dividend. *Reg. v. Jones, supra. Reg. v. Phillips, supra.* So, the circumstance that the use of the library is confined to subscribers, does not prevent it having the benefit of the exemption. *Bradford Library v. Bradford Overseers*, 28 L. J. M. C. 73; 5 Jur. N. S. 513.

Neither will a library be deprived of the exemption by the circumstance that, by the rules, the members must subscribe a certain sum annually, under penalty of forfeiture of their rights as members, such payments being voluntary; nor by a possible increase in the value of the shares from the sale of superseded editions of books. *Liverpool Library v. Liverpool (Mayor of)*, 5 H. & N. 526; 29 L. J. M. C. 221. *Bradford Library v. Bradford (Churchwardens of)*, 1 El. & El. 88.

A rate is not void where the exemption exists. *Birmingham v. Shaw, supra.* The barrister's certificate is not conclusive. *Reg. v. Phillips, supra.*

[1] The poor-rate is imposed in respect of the value of occupation. It is made upon an estimate of the net annual value of the hereditaments; that is to say, of the rent at which the same might be reasonably expected to let from year to year, free of all the usual tenant's rates and taxes, and tithe-commutation rent-charge (if any), and deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses (if any), necessary to maintain them in a state to command such rent. 6 & 7 Wm. 4, c. 96, s. 1. See *Reg. v. Capel*, 12 Ad. & E. 382. The Poor-Law Commissioners may direct a new valuation (6 & 7 Wm. 4, c. 96, s. 3. See *R. v. Yarborough*, 12 Ad. & E. 416. *Reg. v. Bangor*, 10 Q. B. 91), so may the guardians of a union. 11 & 12 Vic. c. 110, s. 7.

The proportions fluctuate with the property, therefore a parish cannot have a standing rate. *Rex v. Audley*, 2 Salk. 526. And if two districts agree that each shall contribute towards the entire poor, the rate will not be binding if the contributions are unequal. *Rex v. Newell*, 4 T. R. 266. The proportion of the rate hinges on the profits (*Rex v. Dursley*, 6 id. 53), and productive value of the subject (*Kemp v. Spence*, 2 Black. 1245); in other words, the improved value. *Rex v. Mast*, 6 T. R. 154. As if a house be let to-day for 30*l.* per annum, and to morrow for 50*l.*, the rate shall be on the 50*l. Rex v. St. Nicholas, Gloucester*, Cald. 262.

From what cause the improvement proceeds is immaterial. *Rex v. Mast, supra.* Nor is the rent a certain criterion. *Rex v. Skingle*, 7 id. 549. Nor should an extraordinary expenditure diminish the rate. *Rex v. Agar*, 14 East, 256.

Wherever the value of the occupation is enhanced by collateral circumstances, arising out of the occupation itself, and not merely personal to the individual occupier, such improved value is that upon which the rate should be based. As where the value is increased by the annexation of machinery fixed to the freehold. *Reg. v. Haslam*, 17 Q. B. 220. But steam-power let with a room, and supplied by a revolving shaft, ought not to be included in the estimate. *Robinson v. Learoyd*, 7 Mee. & W. 48. So the value of the occupation of land was held to be enhanced for rateable purposes by being occupied as a landing-place for steamboats, by means of floating barges anchored to the bottom of the river, and communicating with the shore (*Reg. v. Leith*, 1 E. & B. 121); but a floating dock, occasionally moored to the side of a ship-building yard, and used to support vessels while under repair, was held not to be properly taken into consideration. *Reg. v. Morrison*, 1 E. & B. 150. So, if the land be used as a brick field. *Reg. v. Westbrook*, 10 Q. B. 178.

The profits must arise from occupation within the rating parish in order to increase the rateable value there. *R. v. Bath*, 14 East, 609. Thus, dues payable to a dock company for entering a port or harbour, of which they are not occupiers, cannot increase the rateable value of the docks, which they do not occupy. *R. v. Bristol Dock Co.* 1 Q. B. 535. *Reg. v. Hull Dock Co.* 7 id. 2. See *Reg. v. London and South-Western Railway Co.* 1 id. 558. See *Reg. v. Kentmere*, 17 id.

(b) In the case of Railway, Canal, Water, and Gas Companies.[1]

551. Further, any pecuniary advantage received by the occupier, which does not spring out of the occupation, but is merely personal, or, at all events, so disconnected with the rateable subject that it cannot add to its rent, ought not to be taken into consideration in ascertaining the rateable value. *Newmarket Railway Co. v. St. Andrew's the Less*, 3 E. & B. 94. But it has been held that the privilege of supplying beer to certain public-houses demised with a brewery, at one rent, ought to be regarded in ascertaining the rateable value of the brewery. *Allison v. Monkwearmouth Shore*, 4 id. 13.

Where the right of killing game is reserved in the lease, the tenant is rateable only to the value of the land without such right. *Reg. v. Thurlestone*, 28 L. J. M. C. 106; 5 Jur. N. S. 820.

By a canal act, the company was to be rated according to the value of adjoining land. It was held that, where the value of the adjoining land was enhanced by being built upon, that value furnished the standard of rateability, and not its value for agricultural purposes. *Reg. v. Glamorganshire Canal Navigation Co.* 29 L. J. M. C. 239; 6 Jur. N.S. 1146.

Any expense properly applicable to the occupation, and necessary to keep the land or other subject in a state to command the assumed rent, ought to be deducted from its rateable value; and it is immaterial whether such expenses arise in the rating parish or elsewhere, provided they diminish the value of the occupation there. *Reg. v. Brighton, &c. Railway Co.* 15 Q. B. 313. *Reg. v. Great Western Railway Co.* id. 1085. *Reg. v. Directors of Holme Reservoirs*, 10 W. R. 734, Q. B.

The expense of a steam-tug, kept by a dock company for towing ships in and out of their docks, was allowed as a proper deduction. *Reg. v. Southampton Dock Co.* 14 Q. B. 587. But it was held that a cemetery company was not entitled to deduct the salaries of directors and the expense of a central office. *Reg. v. St. Giles, Camberwell*, id. 571.

Where an incumbent, owner of a tithe rent-charge, endowed a district parish formed for spiritual purposes, by granting to the minister of such district parish a rent-charge, charged on the tithe rent-charge, it was held that the amount of such charge could not be deducted in assessing the incumbent's rent-charge. *Lawrence v. Churchwardens of Tolleshunt Knights*, 31 L. J. M. C. 148. But where two parishes are united in one benefice, but with separate churches and tithes, the incumbent of the two parishes, if he be compelled to appoint a curate, is entitled to have a proportionate deduction made from the assessment of his rent-charge in each parish for the curate's salary. *Williams v. Churchwardens of Llanqernwen*, 1 Best & Smith, 699; 31 L. J. M. C. 54.

But where the appellant, having held a benefice in the gift of a spiritual corporation for the space of four years, became lessee of the tithe commutation of another benefice under the same corporation, and discharged the duties at the latter by a curate, he was not entitled to deduct the curate's stipend. *Wheeler v. Burmington*, 1 Best & Smith, 709; 31 L. J. M. C. 57.

A liability to sewers'-rate for the protection of lands liable to be flooded, ought to be allowed for in ascertaining the rateable value. *Rex v. Ademes*, 4 B. & Adol. 61.

As to the right to deduct on account of previous payments, see *Reg. v. Kingston-upon-Thames*, 27 L. J. M. C. 199, 201; 4 Jur. N. S. 758.

The rate is usually imposed in one of these three ways: — 1st. Upon the actual rack-rent, when the lands are in the occupation of a lessee. 2nd. On a supposed rent formed on valuation, which is done when they are occupied by the proprietor, or by a tenant who pays less rent than the premises are worth. 3rd. On an annual per-centage calculated upon the purchase-money, with a just allowance for necessary outgoings.

In taking other hereditaments, such as tolls, water-works, and coal-mines, of which the produce is tolerably certain, the profits of the last form a fair ground to estimate those of the rising year, unless reasons are given to increase or reduce it. *Rex v. Hull Dock Company*, 5 M. & S. 394. But there is difficulty in cases where the profits are dubious and the amount uncertain, as they may be rateable notwithstanding. *Jones v. Maunsell*, Dougl. 302. Such are the ranger's profits from the king's park, for the rate is prospective (*Durrant v. Boys*, 6 T. R. 580; 17 Geo. 2, c. 38, s. 12); and the thing is rateable only when it produces profit. *Lord Bute v. Grindall*, 1 T.R. 338; 2 H. Black. 267. The assessment must, therefore, be either made on past profits, contrary to the manner of rating land and tenements, or else those which are accruing must be estimated by the average production of former years.

[1] Where the total rateable value arises from works, some of which are directly, and others indirectly, productive of profit (such as the service-pipes on the one hand, and the reservoir buildings, &c. of a water-company on the other, the rateable value of the latter should be deducted from the gross rateable value, and divided among the parishes in which they are situated, according to their extent in each parish, and the residue of the rateable value should be apportioned among the parishes containing the directly productive works, in the ratio of the net profits earned in each of those parishes. *Reg. v. Mile-End Old Town*, 10 Q. B. 208. *Reg. v. Hammersmith Bridge Co.* 15 id. 369. But if one uniform sum is paid for passing over any part, great or small, of a canal, or,

in the case of water or gas companies, where the same payment is made by the consumer irrespective of the distance along which the water or gas has been carried, the rateable value in each parish may be ascertained by dividing the whole rateable value in proportion to the length or area of land occupied in each parish. *R. v. Woking*, 4 Ad. & E. 40. *Reg. v. Hull Dock Co.* 18 Q. B. 325. But this principle is not applicable to a ferry. *Reg. v. North and South Shields Ferry Co.* 1 E. & B. 140.

As to Railways.—The portion of the line in the parish should be rated according to its actual value there, at the rent for which it would let from year to year to a lessee having the right to take the tolls received by the company, and having the same facilities for occupying the land profitably as the company actually have. *Reg. v. London and South-Western Railway Co.* 1 Q. B. 558. *South-Eastern Railway Co. v. Dorking*, 3 E. & B. 491. *Reg. v. Grand Junction Railway Co.* 4 Q. B. 18. *Reg. v. Great Western Railway Co.* 6 id. 179. See *Reg. v. Great Western Railway Co.* 15 id. 1085.

A deduction may be made for the expense of repairs, and to maintain the railway. *Reg. v. Brighton, &c. Railway Co.* 15 Q. B. 313.

The profit derived from the occupation of a branch line as a feeder of the main line should be included in estimating the rateable value of the latter. *South-Eastern Railway Co. v. Dorking, supra.*

A collateral guarantee of profits is no part of the rateable value. *Newmarket Railway Co. v. St. Andrew the Less, Cambridge*, 3 El. & Bl. 94.

The profit earned depending on the portion actually traversed, the rateable value of the portion comprised in each parish must be separately ascertained with reference to the net profits earned by that part. *Reg. v. Brighton, &c. Railway Co. supra.*

The per-centage amount to be allowed for interest on capital and tenant's profits, ought to be calculated on the actual value of the rolling stock at the time when the rate is made, and not upon its cost price. *North Staffordshire Railway Co. v. Rushton Spencer Overseers*, 30 L. J. M. C. 68; 7 Jur. N. S. 363.

A sum payable by another company under an agreement for the use of a station, forms part of the rateable value of the station. *Reg. v. Fletton Overseers*, 30 L. J. M. C. 89.

As to Canals.—Where a navigation runs from A. and B. through several intervening parishes, and the tolls for the whole navigation are collected in those two parishes, they may be assessed to the poor-rates in those two parishes for the whole amount, according to the proportion collected in each. *Rex v. Aire and Calder Navigation Co.* 2 T. R. 660.

Where goods are carried along to different lines of canal, one of which is by statute exempted from being rated in respect of the tolls, and the others not, though the voyage happen to finish on the unexempted line, where the tolls become due and are received, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempted from any taxes, rates, &c., other than such as the land which should be used for the purpose of the navigation would have been subject to if the act had not been made, that goes to exempt tolls, *quà* tolls, altogether from being rated in respect of the line so exempted, leaving the land rateable as before. *Rex v. Leeds and Liverpool Canal Co.* 5 East, 325.

The proprietors of a navigation are rateable only as the occupiers of the canal, or land covered with water, for their tolls, as profits arising out of the land so used, the true principle of their rateability being, that the land is to be rated to the relief of the poor in the parish where it is productive of profit to the proprietor, and in the proportion of that profit. (Id.)

The proprietors of an inland navigation were rated to the relief of the poor for a certain number of acres of land within the township occupied by the canal, and were assessed in respect of that land at a sum not exceeding that which they actually received for the passage of goods over that part of the canal situate within the township : — *Held*, that this rate was good. *Rex v. Trent and Mersey Navigation Co.* 1 B. & C. 545. So, the proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation; and, therefore, where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, the court held that this rate could not be supported. *Rex v. Palmer*, 1 B. & C. 546.

In assessing to the poor-rate of a township, a canal passing through several townships, and having locks and other works in the particular township, the expenses of repairing and maintaining those locks and works are not to be deducted from the gross earnings of the canal in that township; but only such proportion of the whole expense of repairing and maintaining the locks and works upon the entire canal as, upon an apportionment on the mileage principle, would attach to that township. *Reg. v. Coventry Canal Navigation Co.* El. & El. 572.

A Gas Company were authorised, under an act, with consent of certain commissioners, to break up the road and pavement and lay down pipes, &c., and laid them accordingly, for the conveying of gas from their works, situate in an adjoining parish. The court held that they were liable to be rated as occupiers of land in the parish where laid, and

(L) *Distress for Poor-Rate.*[1]

to the extent of the entire profits arising from the increased value of the land by the pipes so placed, which, while so fixed, were, with the land, to be considered as an entire thing, and the right to remove them did not make a difference. *Rex v. Brighton Gas Co.* 5 B. & C. 466; 8 D. & R. 308.

As to water companies, see *Chelsea Waterworks Co. v. Putney Overseers*, 29 L. J. M. C. 236; 6 Jur. N. S. 940.

[1] By 43 Eliz. c. 2, s. 4, it shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two such justices, one whereof is of the quorum, to levy the said sums, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale." And by the 17 Geo. 2, c. 38, s. 7, the goods of any person assessed, and refusing to pay, may be levied by warrant of distress, in any place within the county or precinct; and if sufficient distress cannot be found within the county or precinct, on oath made thereof before a justice of any other county, &c. (which oath shall be certified under the hand of such justice in the warrant), the goods may be levied in such other county or precinct, by virtue of such warrant and certificate; and if any person shall find himself aggrieved by such distress, he may appeal to the next sessions for the county or precinct where the assessment was made, and the justices there are required to hear and finally determine the same.

By stat. 54 Geo. 3, c. 170, s. 12, it is enacted, "that the goods and chattels of any person or persons neglecting or refusing to pay any sum legally assessed on and due from him, in respect of any rate for the relief of the poor, &c. of any district, parish, township or hamlet, for the space of seven days after the same shall have been legally demanded, shall and may be distrained, not only within such district, parish, &c., but also within any other district, parish, &c.; and if sufficient distress cannot be found within the same county, &c., then, upon oath thereof made before any one or more justice or justices of the peace of any other county, &c., in which any of the goods or chattels of such persons shall be found, which oath such justice or justices are hereby required to administer and certify, by indorsing in his handwriting his name on the warrant granted to make such distress, the goods and chattels of the said person so neglecting or refusing to pay as aforesaid shall be subject and liable to such distress and sale, in such county, &c., where the same shall be found, and may, by virtue of such warrant and certificate, be distrained and sold in the same manner as if the same had been found within the district, &c., in or for which such rate had been made or was due."

By 59 Geo. 3, c. 12, ss. 19, 20, owners of apartments or dwellings assessed under that act, their goods and chattels, are made liable for such rates. Also those of every occupier thereof which shall be found in and about the same, are liable to be distrained on for so much of any rate in arrear as shall have become due during his occupancy, but not to exceed the amount of his rent then actually due. *See* 17 Geo. 2, s. 7; 59 Geo. 3, c. 12, s. 22.

By 41 Geo. 3, c. 23, s. 1, if the sessions quash the rate, all the sums of money by such rate charged on any person shall nevertheless be levied in the same manner as if no appeal had been made against such rate; and such sums when levied or recovered shall be taken as payment on account of the next effective rate made for the relief of the poor of the same parish, township, vill, or place.

By 12 Vic. c. 14, s. 5, the summons must be directed to the party rated, and may be in the form given in the schedule to that act, or to the like effect. It may be served by a churchwarden or overseer, or the constable or other person to whom it is delivered, either personally or at the last place of abode. If the party does not appear, the justices, on proof of the service of the summons may proceed *ex-parte*.

By sect. 11, the justices may, in their warrant, order that the costs of obtaining it, together with the costs of the distress, be levied. And they may order the party to be imprisoned for a period not exceeding three calendar months, in default of distress. (Sect. 2.) See *Re Ramsden*, 3 D. & L. 748. One warrant of distress may be issued against any number of persons neglecting or refusing to pay the rate; but a single warrant of commitment cannot issue against several in default of distress. (Sect. 3.) The warrants may be directed to the churchwardens and overseers, and to the constable and any other persons, or to any one or more of them. (Sect. 4.) If before the party is imprisoned he tenders the rate and costs to the churchwardens or overseers, or person authorised to collect it, all further proceedings for the recovery thereof are to cease. 12 Vic. c. 14, s. 6; *see* sect. 7. *Walsh v. Southworth*, 6 Ex. 150.

The justices who issue a distress warrant to levy a rate are not liable to be sued for any irregularity or defect in the rate, or by reason of the party not being liable to be rated. 11 & 12 Vic. c. 44, s. 4.

If the overseers have not the power to make the rate, they cannot distrain. *Cortis v. Kent Waterworks Co.* 7 B. & C. 314.

The constable executing the distress warrant is bound to receive the amount if tendered. *Cotton v. Kadwell*, 2 Nev. & M. 399.

If the officer take privileged goods he is not within 24 Geo. 2, c. 44.

Before distress the rate must be lawfully demanded. *East India Co. v. Skinner*, 1 B.

& A. 249. *Hawell v. Wink*, 2 Moore, 417. And if the person liable should die after such demand, and before further proceedings, it seems the better opinion and safer practice to demand it likewise from his personal representatives. *Stevens v. Evans*, 2 Burr. 1152; 1 Bl. Rep. 284. And though tendered not by the person rated, it must be received. *Rex v. Cozens*, Dougl. 426. If not paid the justices must issue a summons, and then their warrant; if they refuse, a *mandamus* lies to compel them (*Rex v. Harris*, 6 T. R. 198); or a criminal information. *Rex v. Cozens*, *supra*. And if justices illegally issue a distress warrant they are liable. *Harper v. Carr*, 7 T. R. 270.

In answer to the summons, the party assessed may show anything which amounts to a payment (*Rex v. Cozens, supra*); as that he has paid one of the parish officers (*Rex v. Benn*, 6 T. R. 198); or he may show the rate to be a nullity, as that no notice was given of its allowance (*Rex v. Newcomb*, 4 id. 368); or that the property assessed was not subject to be rated (*Jones v. Mansell*, Dougl. 302); or that he was not the occupier (2 . lack. 1331); or, at least, not the rateable occupier. *Amherst v. Sommers*, 2 T. R. 372. But an overcharge is no answer; that must be controverted by appeal to the sessions. *Rex v. Ufculm*, 2 Const. 233. But by 54 Geo. 3, c. 170, s. 11, two or more justices in petty sessions, upon application of the person rated, may, on proof of his inability to pay through poverty, exempt him therefrom, with consent of the churchwardens or overseers.

Formerly, if notice of appeal was given, it took away the magistrate's jurisdiction to distrain until the appeal was either abandoned or decided; but now, by 41 Geo. 3, c. 23, s. 1, the justices may proceed to recover by distress so much only as the person then rated, or any other occupier of the premises, was rated in the last effective rate.

A general warrant of distress is not sufficient. *Tracy v. Talbot*, 2 Salk. 532. But one warrant may be granted to enforce payment of two rates. *Milward v. Caffin*, 2 Black. 1330.

In executing the warrant effects in another parish may be taken, if the offender has none in the one for which the rate was made. *Hampton v. Lammas*, Ld. Raym. 735.

Under 27 Geo. 2, the person executing the warrant must, on request, show the warrant. *Fletcher v. Wilkins*, 6 East, 283. And must not seize, 1st, the property of persons not rated (*Edwards v. Harben*, 2 T. R. 587); nor, 2dly, things affixed to the freehold. The things seized may be sold: the remedy for poor-rates being more like an execution than a distress. *Gorton v. Falkner*, 4 id. 569.

If the officer does not take sufficient goods by his first distress to satisfy the exigence of his warrant, he may make a second levy. *Hutchins v. Chambers*, 1 Burr. 579.

It has been held, that beasts of the plough may be taken as a distress for the poor-rates, although there is at the time more than a sufficiency of other goods. *Hutchins v. Chambers*, 1 Burr. 579; Salk. 136. Hence all goods, being the property of the person rated, which can be taken as a distress for rent, may be taken in satisfaction of the poor-rates. See Distress, vol. iii. p. 78.

So money may be distrained (See *East India Co. v. Skinner*, 1 Bott, 249); or the working tools of a carpenter lying in his shop for the purpose of carrying on his trade (*Edgecomb v. Sparks*, 2 Show, 126. *Simpson v. Hartopp*, Willes, 513; 3 Com. Dig. Distress. *Gorton v. Falkner*, *supra*); nay, the very wearing apparel of his wife and children, if taken while not in actual use, as when those who had worn them were in bed. *Bissett v. Caldwell*, 1 Bott, 249, n. a. But the officers cannot justify breaking by violence into the house, in order to seize the goods. *Bell v. Oakley and others*, 2 M. & S. 259.

When sold, the officer who makes the distress is empowered by 27 Geo. 2, c. 20, to deduct the reasonable charges of taking, keeping, and selling the distress out of the money arising by the sale; and the overplus, after satisfying these charges, and the sum directed to be levied, is to be returned on demand to the owner of the goods. *Moyse v. Cocksedge*, Willes's Rep. 636.

The goods of the servant of an ambassador, residing in a house of his own, of which he *let part in lodgings*, was rated to the poor-rates in respect thereof. It was held that the rate may be levied by distress. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort, and not given for the servant's benefit. *Novello v. Toogood*, 1 B. & C. 554. *See* vol. i. p. 317, n.

If there should be no distress, the party may be committed by warrant of two justices to the common gaol, there to remain until he discharges the sum at which he is assessed. When it is intended to proceed to this extremity, the summons to appear before the magistrates should be served upon the defendant in person.

Formerly, if payment was enforced even from those who do not appeal, and the rate was afterwards quashed, the justices who granted the warrant of distress, and the officers who acted under it, were liable to an action of trespass. These mischiefs were remedied by the act for the better collection of the poor-rates, 41 Geo. 3, c. 23.

No action will lie for distraining for a poor-rate, unless notice of appeal was given. *Priestly v. Watson*, 4 Tyr. 916.

Where the plaintiff in replevin on a distress for poor-rates failed to proceed under the 43 Eliz. c. 2, s. 19, the broker's charges were held to be the only damages incurred, in respect of which the defendant was entitled to treble damages. *Newman v. Barnard*, 10 Bing. 274; 3 M. & Scott, 748.

A *mandamus* may issue to compel the jus-

POSSESSION.

See post, Trespass; Trover.

POSTEA.

I. What it is, and how Drawn up.[1]

II. Who entitled to Postea.[2]

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tices to issue a distress warrant. *Rex v. Justices of Sussex*, 3 Nev. & M. 263. *Rex v. Justices of Bucks*, 1 Nev. & P. 503. If it be clear, the rate is good, otherwise not. *Rex v. Justices of Bucks*, 3 Nev. & M. 68.

The justices have no right to refuse the warrant on the ground that in their opinion the rate is bad. *Reg. v. Kingston-upon-Thames*, 1 E. B. & E. 256; 27 L. J. M. C. 199.

The power of collecting arrears of poor-rate and reimbursing preceding overseers, is not confined to their immediate successors in office. *East Dean Overseers v. Everett*, 30 L. J. M. C. 117; 7 Jur. N. S. 124.

No action will lie for a poor-rate. *Stevens v. Evans*, 1 Black. 284; 2 Burr. 1152. But it seems that a *mandamus* will lie to a corporation to compel them to pay a poor-rate. *Rex v. Margate Pier*, 3 B. & A. 220.

[1] The *postea* is the entry on the back of the nisi prius record of the proceedings which took place in the cause at the trial; and purports to be the return of the judge himself, who is the sole party to apply to for any amendment (*Oxenham v. Smythe*, 3 F. & F. 85), and his discretion will not be reviewed by the court *in banc*. *Daintry v. Brocklehurst*, 3 Ex. 691. It states the day on which the cause was tried, the name of the judge, the attendance of the jury and parties, and the finding of the jury upon oath, and the amount of damages.

The *postea* is not drawn up until judgment is about to be signed, and all that is done at the trial is, that the associate makes a minute of the verdict or nonsuit at the time, and the judge makes his certificate where he considers it necessary. If immediate execution be granted, the nisi prius record is delivered at once to the party entitled to it; but if the usual period of fourteen days elapse, or further delay is granted, it is not delivered till that time is expired. In causes tried in London and Middlesex, the associate himself does not draw out or indorse the *postea*, but the attorney of the party does so. In causes tried at the assizes, it is the practice for the associate to draw up and indorse the *postea*. The *postea* must be entered according to the legal effect of the finding; therefore, where a verdict was taken at the trial for plaintiff at a certain sum, and the costs 40*s*., subject to the award of an arbitrator who had the powers of a judge, and he reduced the 40*s*. to one farthing, and did not certify, it was held the *postea* must be amended by striking out "and for those costs to 40*s*." *Cooper v. Pegg*, 16 C. B. 264.

As to the amendment of the *postea*, see Amendment, vol. i. p. 336.

If the *postea* be lost, the court will order a new one to be made out from the associate's notes. *Dayrell v. Bridge*, 2 Stra. 1264.

[2] The party ultimately succeeding in the action — that is, a plaintiff who has a verdict and damages on any part of his claim, whether on one of several counts, or on part of a count only (*Trotman v. Holder*, 1 B. & B. 222. *Doe d. Errington v. Errington*, 4 Dowl. 602), or a defendant who has judgment on any issue going to the whole of the plaintiff's cause of action (*Frankum v. Lord Falmouth*, 4 Dowl 65), is entitled to the *postea*, and to have the general costs in the cause.

It is the duty of the successful party to complete the *postea* down to the verdict. *Newton v. Boodle*, 5 C. B. 207. Where the plaintiff has succeeded on any part of his declaration, and the pleas on which issues are found for the defendant do not go to the whole cause of action, the plaintiff is in general entitled to the *postea*. *Smith v. Edwards*, 4 Dowl. 621. But where the pleas answer the entire cause of action, and there is a verdict for the defendant, he has the general verdict, and is entitled to the *postea*. *Smith v. Brown*, 5 Dowl. 736. *Staley v. Long*, 3 Bing. N. C. 781; 4 Scott, 481. In such cases no damages can be found for the plaintiff. In all cases where the defendant has the general verdict, he is entitled to the *postea*. *Grout v. Glasier*, 1 Dowl. N. S. 58. It may happen that where the plaintiff has the general verdict, if the judge has certified to deprive him of his costs, and some of the issues have been found for the defendant, it may not be expedient for the plaintiff to obtain the *postea*, which is only got for the purpose of entering up judgment, as the costs of the defendant will far exceed what he is entitled to. In such a case, though the plaintiff is strictly entitled to the *postea*, yet if he refuses to sign judgment, the defendant may apply to a judge to order the plaintiff to deliver it up to him; or to attend with it to allow judgment to be signed, and the defendant may sign judgment, not only on the count found for him, but also for the plaintiff on the other count. Thus, where the plaintiff recovered one farthing damages on one of two counts, and defendant had a verdict on the second, in order that the judgment might be pleaded *puis darrein continuance* in another action, brought by the same plaintiff against a third party (suggested to be for an assault, which was the subject of the first action), defendant obtained a summons to show cause why the plaintiff should not sign judgment, or the defendant have the *postea* for the purpose of signing it; the defendant thereupon obtained the *postea*, and signed judgment for the plaintiff on the first count, with a farthing

III. Forms of Postea prescribed by Reg. Gen. H. T. 1853.[1]

damages, and for himself on the second, with a remittance of his own costs. *Taylor v. Nessfield*, 4 E. & B. 462. A party cannot introduce a new averment in the postea, but the judge may modify the language. *Hoxby v. Prectin*, 5 D. & L. 7; 16 L. J. Q. B. 337. *Oxenham v. Smythe*, 3 F. & F. 85. See 10 Mee. & W. 689; 18 L. J. Ex. 347; 27 L. J. Q. B. 424; 3 Man. & G. 912. The postea alone is not sufficient to prove a verdict, but the judgment must be shown, as it may have been arrested (1 Stra. 162; Bull. N. P. 234); but it suffices to prove the fact that a cause came on to be tried. (Id.) *See* 1 Nev. & M. 315; 2 Stark. 365.

[1] *Form of a Postea on a Verdict for Plaintiff on all the Issues where the Cause is tried in London or Middlesex, and where the Defendant appears at the Trial.*

Afterwards on the day of A.D. [*the first day of the sittings*], at the Guildhall of the city of London [*or* at Westminster Hall, in the county of Middlesex], before the Right Hon. John Lord Campbell, her Majesty's Chief Justice assigned to hold pleas in the court of our Lady the Queen, before the queen herself. [*If a puisne judge sit for the chief, name him, and add:* in the absence and in the place of the Right Hon. &c. the chief justice of the said court] [*or if in the Common Pleas,* before the Right Hon. Sir John Jervis, her Majesty's Chief Justice assigned to hold pleas in her Majesty's chief court of the Bench [*or in the Exchequer,* before the Right Hon. Sir Frederick Pollock, Knight, Chief Baron of her Majesty's Court of Exchequer] come the parties within mentioned by their respective attorneys within mentioned, and a jury of the within county [*or* city] being summoned, also come, who, being sworn to try the matters in question between the said parties upon their oath, say, that [*&c., state the affirmative or negative of the issue, as it is found for the plaintiff, and in the terms adopted in the pleading*]. [*If there be several issues joined and tried, then say:* as to the first issue within joined, upon their oath say, that [*&c., state the affirmative or negative of the issue, as found for the plaintiff*], and as to the second issue within joined, the jury aforesaid, upon their oath, say, that [*&c., so proceed to state the finding of the jury on all the issues*]. [*Conclude with an assessment of the damages, thus:*] And they assess the damages of the plaintiff, on occasion of the premises within complained of by him, over and above his costs of suit, to £ and for those costs at forty shillings. Therefore, &c. (Rules, Pr. H. T. 1853, sched.)

(2.) *The like where the Cause is tried at the Assizes.*

Afterwards, on the day of A.D. [*the commission-day of the assizes*] at in the county [*or* city] of before Sir knight, and Sir knight, justices of our said Lady the Queen, assigned to take the assizes in and for the within county [*or* city and county, *or* town and county, *as the case may be*] come the parties within mentioned, by their respective attorneys within mentioned, and a jury of the said county [*or* city and county, *or* town and county, *as the case may be*] being summoned, also come, who, being sworn to try the matters in question between the said party, upon their oath say, that [*&c., state the negative or affirmative of the issue, as it is found for the plaintiff, and in the terms adopted by the pleading*]. [*If there be several issues joined and tried, then say:* "as to the first issue within joined, upon their oath say, that [*&c., state the affirmative or negative of the issue, as it is found for the plaintiff*]; and as to the second issue within joined, the jury aforesaid say, that [*&c., so proceed to state the finding of the jury on all the issues*]. [*Conclude with stating an assessment of the damages, thus:*] And they assess the damages of the plaintiff, on occasion of the premises within complained of by him, over and above his costs of suit, to £ and for those costs to forty shillings. Therefore, &c. (Id.)

(3.) *The like where Defendant did not appear at the Trial.*

—— comes the within-named plaintiff, by his attorney within-mentioned, and the within-named defendant, although solemnly required, comes not, but makes default. Therefore, let the jurors of the jury be taken against him by his default. And a jury of the said county [*or* city] being summoned, also come, who, being sworn to try the matters in question between the said parties, upon their oath say [*as in other cases*].

(4.) *Postea on Verdict for Plaintiff in Debt.*

—— upon their oath say, that the defendant was indebted to the plaintiff in £ as within alleged [*or* that the defendant was indebted to the plaintiff in £ parcel of the debt within alleged, and that he never was indebted in more than that sum as within alleged], and they assess the damages of the plaintiff on occasion of the detention of the within debt, over and above his costs of suit, to one shilling [*if nominal damages, or if real damages, to* £], and for those costs to forty shillings.

(5.) *The like in Detinue.*

—— says that the defendant did detain the goods [*or* deeds, &c. *as in the issue*] as within alleged, and they find the goods so detained to be of the value of £ and they assess the damages of the plaintiff, on occasion of the detention of the said goods [*or* deeds, &c.], over and above his costs of suit, to one shilling [*or* £] and for those costs to forty shillings. Therefore, &c.

(6.) *The like on issue on a Plea of Payment.*

—— say that the sum paid into court is

POST-OBIT Bonds.[1]

POST-DATED. *See* Bills and Notes, vol. ii. pp. 406, 429.

not enough by £ to satisfy the claim of the plaintiff in respect of the matter to which the within plea of the defendant is pleaded, and they assess the damages of the plaintiff, on occasion of the premises within complained of by him, and to which the said plea is pleaded, and above his costs of suit, to £ and for those costs to forty shillings. Therefore, &c.

(7.) *Where the Judge certifies for immediate Execution.*

[*After the assessment of damages*] and thereupon the said judge [*or* chief justice, &c.] ordered execution to issue in this cause within days then next [*or* on]. Therefore, &c.

(8.) *Postea for Plaintiff, where one of several Defendants allows Judgment by Default.*

—— upon their oath say, that the within-named C. D. did promise [*or as the case may be*] as within alleged, and they assess the damages of the plaintiff, on occasion of the premises within complained of by him, as well against the said C. D. as against the said E. F., over and above the plaintiff's costs of suit, to £ and for those costs to forty shillings. Therefore, &c.

(9.) *Ditto where Issues in Law and Fact, and Issue in Law first determined.*

—— as to the issue within joined, to be tried by the country, the jury, &c. say, that [*as in ordinary cases, ante*, p. 193] and they assess the damages of the plaintiff, on occasion of the premises in the first count complained of [*&c. as in No.* 1]. And they assess the damages of the plaintiff, on occasion of the premises, whereof the parties have put themselves upon the judgment of the court, over and above the costs of suit, to £ and for those costs to forty shillings.

(10.) *Ditto where the Issue in Fact is first determined.*

[*As in No.* 9.] And as to the issue within joined, whereof the parties have put themselves upon the judgment of the court, the jury, &c. say, that if it shall happen that judgment shall be thereupon given for the plaintiff, that they assess the damages of the plaintiff, on occasion of those premises complained of by him, over and above his costs of suit, to £ and for those costs to forty shillings. Therefore, &c.

(11.) *Postea on Verdict for Defendant.*

—— upon their oath say, that the defendant did not promise [*or* was never indebted, *or* is not guilty of the premises within laid to his charge] as within alleged [*or if there be several issues say*, as to the first issue within joined, upon their oath say, &c., and as to the second issue within joined aforesaid, upon their oath say, &c.].

(12.) *Ditto where one Defendant suffers Judgment by Default, or is Acquitted, &c.*

—— say, upon their oath, that the within-named C. D. did not promise [*&c. as the case may be*] and hereupon the jury aforesaid are discharged from inquiring against the within-named E. F. what damages the plaintiff has sustained by reason of the premises within complained of [*or*, with the consent of the parties respectively, are discharged from giving any verdict on the last issue within joined]. Therefore, &c.

[1] A post obit given by an expectant heir has been held bad (see *Varnee's case*, 2 Freem. 63); and it is clear that the party who takes a post obit has the *onus* thrown upon him of proving the fairness of the bargain (*Evans v. Cheshire*, 1 Madd. Ch. 170. *Bowes v. Jacobs*, id.); whether such a doctrine was wisely laid down has been doubted. (Id.) If, on the death of the person upon whose decease the post obit is payable, the transaction is, without imposition, confirmed, it cannot be set aside, nor can relief be had, except as to the penalty (see *Chesterfield v. Janseen*, 2 Ves.; 1 Atk. 301); for a new agreement may confirm what was at first a doubtful bargain, though it could not avoid one (see 1 Atk. 954. *Cole v. Gibbons*, 3 P. Wms. 294); but if the confirmation is not freely given, if the party be distressed, or under the influence of the former transaction, or not freely apprised of his rights (see *Dunbar v. Tredennick*, 2 Ball & Bea. 317. *Cann v. Cann*, 1 P. Wms. 723); and that his act will operate as a ratification (*Murrey v. Palmer*, 2 Sch. & Lefr. 486), it is not an effectual confirmation. *Crowe v. Ballard*, 1 Ves. jun. 215; 3 Bro. C. C. 117; 2 Cox, 253. *Roche v. O'Brien*, 1 Ball & Bea. 339. *Shirley v. Martin*, 355, 356. Confirmations of this description are looked upon with jealousy. Where a post obit was from the fear of an execution paid, it was not considered as a valid ratification, but a repayment compelled. *Curiam v. Milner*, 3 P. Wms. 293, n. *Roche v. O'Brien*, 1 Ball & Bea. 357.

If a post obit be given, and the obligor and obligee of a bond die, as well as the person on whose life it was given, and the bond has been assigned, it will not be set aside, no proof of imposition appearing. *Hill v. Caillard*, 1 Ves. 120. *See* Story's Eq. 342, 344, 347.

The provisions of the stat. 8 & 9 Wm. 3, c. 11, s. 8, do not extend to post-obit bonds. *Wordell v. Fermor*, 2 Camp. 285, n.; S. P. *Murray v. Earl Stair*, 2 B. & C. 82; 3 D. & R. 278. But it seems the enactments in 4 & 5 Anne, c. 15, are applicable to such securities. *Murray v. Earl of Stair, supra.* A declaration on a post-obit bond is good, though it does not aver that the party upon whose death the money was to become payable is dead. (Id.)

POST-OFFICE.

I. Duty to Deliver Letters, &c. and Responsibility for Letters Lost or Stolen.[1]

II. Stealing or Embezzling Post-Letter Bags, Letters, &c. *See* Larceny, vol. v. p. 329.

POTIOR est Conditio possidentis. *See* vol. iii. p. 530; vol. v. p. 98.

POUNDAGE, Sheriff's. *See* Execution, vol. iv. p. 355.

POUND-Breach. *See* Distress, vol. iv. p. 117.

POWER of Attorney.[2] *See* Principal and Agent, *ante*, p. 220.

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[1] The 10 & 11 Vic. c. 85, regulates the sending of letters by post. The 11 & 12 Vic. c. 88, and 15 & 16 Vic. money orders. 24 & 25 Vic. c. 14, savings' banks. As to bonds given by railways to convey, *see* 1 Johnson, 28. A postmaster is bound to deliver all letters to the several inhabitants within a post-town or place, at their several respective places of abode, at the rate of postage only as established by act of parliament. *Smith v. Powdich*, Cowp. 182. *Smith v. Dennis*, Lofft. 753. *Stock v. Harris*, 5 Burr. 2709. *Barnes v. Foley*, 4 id. 2149; 1 W. Black. 643.

If a postmaster has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could have given notice of dishonour in time if he sent a special messenger, though too late to do so by post. *Hordern v. Dalton*, 1 C. & P. 181.

S. was employed by a postmistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the postmistress, but which was repaid to her by the Post-office: —*Held*, that S. was a person employed by the Post-office within the stat. 52 Geo. 3, c. 143, s. 2. *Rex v. Salisbury*, 2 C. & P. 155.

The post-mark upon a letter is *primâ facie* evidence, (subject to contradiction, 7 Mee. & W. 515), as to the existence of the letter at the time of the date, where such mark is proved to have been the one used by the office at that time (*Fletcher v. Braddyll*, 3 Stark. 64); but it has been rejected as proof of a letter being put in at a particular place. *R. v. Watson*, 1 Camp. 215.

Where, in trespass for taking goods, the question was as to the bankruptcy of the plaintiff: — *Held*, that letters found in his possession after the bankruptcy, with post-marks of a date previous thereto, must be taken to show that he received them before. *Cotton v. James*, 3 C. & P. 505; 1 M. & M. 276. See *Abbey v. Lill*, 5 Bing. 299.

It is not necessary to call a person from the Post-office to prove the post-mark. *Abbey v. Lill*, *supra*. *Kent v. Lowen*, 1 Camp. 178. *Arcangelo v. Thompson*, 2 id. 620. *See* R. & R. 66, 264.

Case lies against a postmaster for not delivering a letter on request, if the postage be tendered, although no particular damage may have accrued to the plaintiff (*Edward v. Dickinson*, 12 Mod. 6); or for the non-delivery of letters gratis in a country post-town. *Rowning v. Goodchild*, 2 W. Black. 906. But an action will not lie against the Postmaster-General for the loss of Exchequer bills and letters delivered to the Post-office (*Lane v. Cotton*, 11 Mod. 12; 5 id. 456; 1 Salk. 17; 1 Ld. Raym. 646; 12 Mod. 472); nor for a bank-note stolen by one of the sorters out of a letter delivered into the Post-office. *Whitfield v. Lord Le Despencer*, Cowp. 754.

Postage may be recovered on a count for money paid. *Dickenson v. Hatfield*, 1 M. & Rob. 141. Remittance by post, by direction of creditor, will support a plea of payment or satisfaction. *Kington v. Kington*, 11 Mee. & W. 233; 12 L. J. Ex. 248. Sending a post-office order is not payment unless the money be received. *Gordon v. Strange*, 1 Ex. 477. Service of notice to produce by post is not enough without proof of the receipt in time. *Lawrence v. Clarke*, 14 Mee. & W. 250. So as to a notice to quit. *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J. Ex. 265.

[2] An instrument under seal appointing a party attorney or agent, sometimes called a "letter of attorney." Such a power cannot be delegated. Where, however, authority is given by A. to B., to execute a power himself, or give it to another, by giving it to the other he does not delegate it. *Doe d. D. of Devonshire v. Lord G. Cavendish*, 4 T. R. 744, n. See *Mason v. Joseph*, 1 Smith, 406; 9 Co. 75, b.

A power of attorney given to fifteen persons by name, "jointly or separately, to sign and underwrite all such policies as they or any of them should jointly or separately think proper," is to be construed as a joint and separate authority. *Guthrie v. Armstrong*, 1 D. & R. 248; 5 B. & A. 628. An authority to an agent to execute an indenture under seal must be by deed. *Berkley v. Hardy*, 8 D. & R. 102. *See* 6 Mee. & W. 200.

One partner possesses no general authority under a power of attorney granted to his copartner. *Edmiston v. Wright*, 1 Camp. 88. Filling up a blank for the Christian name will not vitiate. 11 Mee. & W. 465; 12 L. J. Ex. 359.

Where a power of attorney is given as part of a security for money, it is not revocable. *Walsh v. Whitcomb*, 2 Esp. 565. See *Smart v. Saunders*, 5 C. B. 916. *Willis v. Palmer*, 7 id. 340; 29 L. J. C. P. 194. *Perry v. Holl*, id. Chan. 677. And where a debtor handed to his creditor a power of attorney, authorising him to sell certain lands of the debtor, and pay the debt out

POWERS.[1]

I. Of the different Kinds of Powers, how Created, and by Whom and how they may be Exercised, p. 196.
II. Construction of Instruments creating Power, p. 201.
III. Effect of Execution of Power, p. 202.
IV. Relief in Equity and by Statute in case of Defective Execution of Power, p. 203.
V. Extinguishment of Powers, p. 205.
VI. Of Particular Powers, p. 205.
(A) *To Devise*, p. 205. (B) *To Lease*, p. 206.
(C) *Power of Tenant for Life to Lease*, p. 209.
(D) *Powers of Sale of Settled Estates under* 19 *&* 20 *Vic. c.* 120; 21 *&* 22 *Vic. c.* 77; *and* 23 *&* 24 *Vic. c.* 145. *See post*, Settlement.
(E) *To Sell, Mortgage, or Charge for Payment of Debts, Legacies, &c. See* 22 *&* 23 *Vic. c.* 35, *ss.* 14–18.

I. Of the different Kinds of Powers, &c.[2]

of the proceeds of the sale, it was held that the power of attorney could not be revoked; for it was an authority coupled with an interest. *Gaussen v. Morton*, 10 B. & C. 731. *Clerk v. Laurie*, 2 H. & N. 200. But death is a revocation of such a power, though coupled with an interest (*Watson v. King*, 4 Camp. 272; 1 Stark. 121. *Shipman v. Thompson*, Willes, 105. *Hibbard v. Knight*, 17 L. J. Ex. 119), although the act were appointed to be done after the death of the principal. Roll. Abr. Feoff. s. 1; 2 Ves. 118; Willes, 565; 1 Bac. Abr. Autho. E. And a payment to the attorney, made after death of the principal, is bad (*Wallace v. Cook*, 5 Esp. 117), but bankruptcy is not a revocation. Buck, 94; 3 Mer. 327.

By the civil law, payment before the death of the principal can be known, is valid. Dig. 17, l. 26, l. e. *Dictum per Bayley, J., in Snaith v. Mingay*, 1 M. & S. 87; 2 Ves. 118; 18 id. 142, 146; 5 T. R. 215. And by the 22 & 23 Vic. c. 35, s. 26, "no trustee, executor, or administrator, making any payment or doing any act *bonâ fide* under a power of attorney, shall be liable for what is so done by reason that the person who gave the power was dead at the time of such payment or act, or had done some act to avoid the power." Where a deed is delivered by virtue of a power of attorney, the power should be produced and proved. 1 Esp. 89; M. & M. 149. A joint power by the members of a club requires only one stamp. 8 B. & C. 569. A party who pays money to another, who is authorised to receive it by a power, is not entitled to keep possession of the power. 1 C. & Kir. 613. *See* 2 Ex. 11; 17 L. J. Ex. 119. The power of attorney of an infant is void. 3 Burr. 1804.

[1] A purchaser may refuse a conveyance executed under a power. 1 Esp. 116; id. 268. A letter authorising a party to indorse bills must be stamped as a power of attorney. 2 C. B. 850. *See* Sugden on Powers; Chance, id.; 1 Platt on Leases, 394; Cruise's Digest.

[2] A power is an authority given by one individual to another, or a reservation to do an act. Powers were well known to the common law, and were divided into two sorts — naked powers or bare authorities, and powers combined with an interest. Thus, Littleton says, a man may devise that his executors shall sell his land, in which case the power is a naked one. And Lord Coke, in his comment, observes, that if a man devises land to his executors to be sold, this is a power coupled with an interest. There is a material difference in common-law powers between a naked power or bare authority, and a power coupled with an interest. In the case of a naked power, if it is exceeded in the act done, it is entirely void; but in that of a power coupled with an interest, it is good for so much as is within the power, and void for the rest only.

Powers derived from the Statute of Uses are authorities of revocation and appointment, and may be inserted in conveyances which owe their effect to that statute; and when executed, the uses originally declared cease, and new ones immediately arise to the persons named in the appointment, to which uses the statute transfers the legal estate and possession.

Powers of revocation and appointment may be reserved either to the original owners of the land, or to strangers; from whence arises the general division of powers into those which relate to the land and those which are collateral to it. Powers relating to the land are those which are given to some person having an estate or interest in the land, over which they are to be exercised. These are again subdivided into powers appendant and in gross. A power appendant is where a person has an estate in land with a power of revocation and appointment, the execution of which falls within the compass of his estate; as where a tenant for life has the power of making leases in possession. A power in gross is where a person has an estate in land with a power of appointment, the execution of

which falls out of the compass of his estate, but, notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest vested in the appointor. Sugd. 40, 41.

Powers collateral are those which are given to mere strangers, who have no interest in the land. Thus, where powers of sale and exchange are given to trustees in a settlement, they are said to be collateral to the land.

No particular words need be used. It is sufficient if the intention of the person who creates the power be clearly manifested.

A married woman may execute a power, whether appendant in gross, or simply collateral (*Harris v. Graham*, 1 Roll. Abr. 329, pl. 12; 2 id. 247, pl. 6. *Gibbons v. Moulton*, Finch. 346. *Daniel v. Upley*, Latch. 39; Godb. 327, pl. 419. *Bayley v. Warburton*, Com. Rep. 494. *Tomlinson v. Dighton*, 1 P. Wms. 149. *Travel v. Travel*, 3 Atk. 711; 2 Ves. 191), and as well over a copyhold as a freehold estate. *Driver v. Thompson*, 4 Taunt. 294.

It is not material whether the power is given to an unmarried woman who afterwards marries (*Gibbons v. Moulton, supra*), or to a woman while she is married, who afterwards takes another husband (*Bayley v. Warburton, supra. Barnett v. Mann*, 1 Ves. 157); in both cases she may execute the power, and the concurrence of her husband is in no case essential. Sudg. Pow. 150, vol. i. p. 132, n. N. But a power given to a woman, being *sole*, cannot be executed by her during her coverture. *Lord Antrim v. Duke of Buckingham*, 1 Ab. Eq. 343; 1 Ch. Ca. 17; 2 Freem. 168.

It is now usually inserted in the deed by which the power is created, that a woman shall be enabled to execute it, whether she be *sole* or married. The proper mode of creating such a power is to convey the lands to trustees, to the separate use of the wife; remainder to such persons and for such estates as she shall, by any deed or writing under her hand, notwithstanding her coverture, direct or appoint; but although no such conveyance be made, and articles only are entered into, previous to a marriage, by which it is agreed that the wife shall have a power to dispose of any estate which may descend to her, it will be sufficient, and a court of equity will support such a power. 4 Cro. Dig. 238. *Wright v. Lord Cadogan*, 6 Bro. P. C. 156; Ambl. 468. *Rippon v. Dowding*, Ambl. 565. And see *Doe v. Staple*, 2 T. R. 684. *Dillon v. Grace*, 2 Sch. & Lef. 456. But where the agreement is that the wife may dispose of the estate by will, a will made before the marriage, although subsequently to the agreement, will be revoked by the marriage, unless expressly authorised by the articles to be made before the marriage. *Hodsden v. Lloyd*, 2 Bro. P. C. 534. *Doe v. Staple, supra. See post*, Will. It will not, however, be inferred, that the power was only to be executed in the event of the wife surviving the husband, from the circumstance that it was to be executed by will only, although a *feme covert* cannot make a proper will. *Driver v. Thompson*, 4 Taunt. 294; Sugd. Pow. 153.

An infant is capable of executing a bare authority. 1 Sugd. 211, 537. Where an authority is given to an infant relating to his own estate, it must be inserted in the deed, that he may execute it during his infancy, otherwise his execution of it will have no operation.

All those who are capable of taking lands by any common-law conveyance may be appointees. A woman may also take by appointment from her husband, because the estate does not pass immediately from him but from the trustees.

It is a general rule, that all the forms and circumstances prescribed by the deed creating the power must be strictly observed. See *Digge's case*, 1 Co. 173. *Thruxton v. the Attorney-General*, 1 Vern. 340. *Hawkins v. Kemp*, 3 East, 410. *Bath and Montague's case*, 3 Ch. Ca. 55; 2 Freem. 193. *Kibbet v. Lee*, Hob. 312. *Ward v. Lenthall*, 1 Sid. 343. *Darmer v. Thurland*, 2 P. Wms. 606. *Thayer v. Thayer*, Palm. 112. *Wright v. Wakeford*, 17 Ves. 454; 4 Taunt. 213. *Morrison v. Turnover*, 18 Ves. 175. *Doe d. Mansfield v. Peach*, 2 M. & S. 576. *Doe v. Pearse*, 2 Marsh. 102. *Wright v. Barlow*, 3 M. & S. 512. *Moodie v. Reid*, Rep. 516; 7 Taunt. 355.

An instrument may in some cases take effect, either as an appointment of a use, or as a common-law conveyance, where the person who conveys has a power of appointment, with an estate in fee-simple in default of appointment. Thus, in *Clere's case* (6 Rep. 176) it was resolved, that where a feoffment was made to the use of such person and persons as the feoffer should appoint, and until appointment to the use of his heirs; if, in such a case, the feoffer devised the land by will (having a power to devise it) as owner, without any reference to his power, it would pass as a devise by the will, and not appointed under the power, for the testator had an estate devisable to him, and also a power to limit a use, and his election to pursue whichever of them he chose. So that, when he devised the land itself, without any reference to his power, he showed his intention to pass the estate by his will, as owner of the land, and not to limit a use under his power.

Although at law a different interest cannot be given from that mentioned in the power; for example, a chattel interest instead of a freehold (*Whitlock's case*, 8 Co. 69, n. *Rattle v. Popham*, Stra. 992. *Roe v. Prideux*, 10 East, 158); yet, where the nature of the interest is the same, an appointment of a lesser estate than that which the appointor was enabled to limit may be good at law as well as in equity. Sugd. Pow. 447. *Phelp v. Hay*, id. But where a person has a power of appointment unto and among his children, in such shares and proportions as he shall think proper, the appointor must give the whole among his children: and although at law any share, however nominal, will be a good execution of the power (1 Vern. 67; 1 T. R. 438, n.; and *see* 4 Ves.

785; 16 id. 26. *Morgan v. Surman*, 1 Taunt. 2895), yet in equity (1 Wm. 4. c. 46), the gift of a sum merely illusory with reference to the amount of the fund, and the number of the objects among whom it is distributed (as if a man give one of his children 10,000*l.* and another only 2*s.* 6*d.*), would have been void. *Gibson v. Kinver*, 1 Vern. 66. *Vanderzel v. Acclom*, 4 Ves. 771. *Ker v. Duke of Roxburgh*, 2 Dougl. 199, 200. So, where a man, with such a power of appointment, gave a proper share to a daughter, just before her expected death, in this way making a gift to himself (as he would be her administrator), it was held bad; for the power, though discretionary, must not be abused, but substantially executed. (Id.) But all the interest given to a party, contingent as well as vested, must be taken into consideration. *Bare v. Whitebread*, 10 Ves. 15.

The question, whether an appointment is or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however large the terms, being in some degree coupled with a trust: but an equal distribution is not required, nor any reason for the inequality, unless a share, is clearly unsubstantial. *Butcher v. Butcher*, 1 Ves. & B. 79; 9 Ves. 382. And see *Mocatta v. Lousada*, 12 Ves. 123. *Dyke v. Sylvester*, id. 126. *Bare v. Whitbread*, 10 id. 31; 16 id. 15.

Where a power of appointment extends over different kinds amongst the same objects, a part of each fund need not be appointed to each: for example, if there are two objects, all the realty may be given to one, and all the personalty to the other. *Morgan v. Surman*, 1 Taunt. 239. *See* 11 East, 290; 13 id. 394.

The very large body of cases referable to illusory appointments, except as regards those made prior to 16 July, 1830, are now of no avail; as the 1 Wm. 4, c. 46, recites that "by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property; and whereas appointments in exercise of such powers, whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed, to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding in law; and whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law: Be it therefore enacted, that no appointment which, from and after the passing of this act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed, to devolve upon any one or more of the objects of such power, but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power." (Sect. 1.) "Provided always, and be it further enacted, that nothing in this act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded." (Sect. 2.) "Provided also, and be it further enacted and declared, that nothing in this act contained shall be construed, deemed, or taken at law or in equity to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed, to devolve upon any object of such power." (Sect. 3.)

An appointment to one child, under a power of appointment to one or more, is good if fairly made (*Dauberny v. Cockburn*, 1 Meriv. 644); though, if fraudulent, it has no consideration to support it (id.); 2 Sugd. 194. *Wellesley v. Earl of Mornington*, 2 K. & J. 143. *See* 23 Beav. 101; 26 id. 407; 28 L. J. Ch. 906; 8 Jur. 1083. The exercise of a power in favour of a stranger is de med a fraud upon creditors, who will be entitled in preference to the appointee. 2 Sugd. 102.

A condition cannot be annexed to an estate created under a power without an express authority. So that if a parent, having a power, appoint a sum of money among his children, and qualify his appointment to one of them with a condition that he shall release a debt or pay a sum of money, the appointment will be absolute and the condition void. *Pawlet v. Pawlet*, 1 Wils. 224. *Burleigh v. Pearson*, 1 Ves. 281. *Alexander v. Alexander, supra. Dauberny v. Cockburn, supra;* 4 Drew, 624. But where an agreement is made by one of the objects of a power to return part in consideration of an appointment in its favour, it is a fraud in the appointee as well as in the appointor, both on the other objects of the power and on the party who is to take in default of appointment. An appointment also cannot be made to persons not objects of the power; therefore, a power to appoint to children will not authorise an appointment to grandchildren (*Alexander v. Alexander, supra. Bristow v. Warde*, 2 Ves. jun. 336. *Whistler v. Webster*, id. 367. *Smith v. Camelford*, id. 698. *Crompe v. Burrow*, 4 id. 681. *Adams v. Adams*, Cowp. 651. *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382. *Butcher v. Butcher*, 9 Ves. 382); but they may be appointed with the child's consent. *Routledge v. Dorril*, 2 Ves. jun. 357. *Langstone v. Blackmore*, Ambl. 289. *White v. St. Barbe*, 1 Ves. & B. 399.

A power to appoint to children living at the parent's death includes a child *en ventre sa mère* at that time. *Beale v. Beale*, 1 P.

Wms. 244. *Clarke v. Blake*, 2 Bro. C.C. 320. *Thelluson v. Woodford*, 4 Ves. 226. But where the estate is settled on the eldest son, and subject to that, a power is given of appointing portions to the younger children, the younger child becoming eldest before receiving his portion, is not within the power. *Chadwick v. Doleman*, 2 Vern. 528. *Lord Teynham v. Welb*, 2 Ves. 198. *Lady Lincoln v. Pelham*, 11 Ves. 166. *Bowles v. Bowles*, id. 179. *Leake v. Leake*, 10 id. 479. *Savage v. Carroll*, 1 Ball & Bea. 265. *See* 29 L. J. Ch. 116.

A power relating to land is expounded favourably; but a power collateral to the land is construed strictly. *Earl of Darlington v. Pulteney*, Cowp. 263.

In executing a power, the grantee can only do that which the grantor himself might have done. *Robinson v. Hardcastle*, 2 T. R. 241. But the execution may be good in part and void as to the remainder. *Doe d. Devonshire v. Cavendish* (1792), 4 id. 743, n.

In the execution of a power, in order that the deficiency of one instrument may be supplied by the sufficiency of another, it must appear that the party intended they should operate conjointly. *Hawkins v. Kemp*, 3 East, 410. But an appointment invalid in its origin cannot be made good by subsequent circumstances. *Brudenell v. Elwes*, 1 East, 442. The rule that an authority once executed is at an end, only applies where the execution is valid, at least, if it be a statutory power. *Strachey v. Turley*, 11 East, 194.

Where the particular instrument by which the power is to be executed is specified, it must be adopted. Therefore, if a deed be expressly required, the power cannot be executed by will (*Darlington v. Pulteney*, Cowp. 260. *Doe v. Pulteney v. Cavan*, 5 T. R. 567; 6 Bro. P. C. 175), because the form prescribed is a condition precedent to the right of executing the power (*Doe d. Ellis v. Sandham* 1 T. R. 705). Nor can a power, which is expressly required to be executed by will, be executed by any act to take effect in the lifetime of the donee *Whaley v. Drummond*, Sugd. Pow. 209. *Reid v. Shergold*, 10 Ves. 370. *Anderson v. Dawson*, 15 id. 532. *Heatley v. Thomas*, id. 596. But the mere circumstance of the estate being limited to A. for life, and "after his death," or "then" to be at his disposal, will not, by implication, restrain the execution of the power to a will (*Anon.* 3 Leon. 71. *Tomlins v. Dighton*, 1 Com. 174; 1 P. Wms. 149), although it has been decided that a devise to the testator's wife for her life, and also at her disposal afterwards to leave it to whom she pleased, gave her a power of disposition by will only, by reason of the word "leave," which was properly applicable to a disposition by will. *Doe v. Thorley*, 10 East, 438. So, if the bequest has been to her for life, and then to devise as she might think proper, for the word "devise" will admit but of one sense; though it would be otherwise if the bequest had been to her for life, to dispose thereof as she should devise and think proper, which words would give her a general power. *Grace v. Wilson*, Rolls' MSS. Oct. 1811; Sugd. Pow. 210. Although, where a power is required to be executed by will, it cannot be executed by deed, yet if the instrument is in its nature testamentary, the mere circumstance of its being in the form of a deed will not prevent it from operating as a will. *Anon. v. Dyer*, 314, a, pl. 97. *Hixon v. Wytham*, 1 Ch. Ca. 248. *Green v. Proude*, 1 Mod. 117. *Habergham v. Vincent*, 2 Ves. jun. 204. And although all the circumstances required by the person who creates the power must be strictly pursued, yet there are few cases in which the court requires anything beyond the strict letter of the power; therefore, where a writing under hand and seal is required, it need not be delivered (*Carter v. Carter*, Moore, 369), although writings under hand and seal are usually delivered. So, if the deed is required to be duly attested, an attestation by one witness will be sufficient. *Poulson v. Wellington*, 2 P. Wms. 533. And where a power is given generally, without any restrictions as to the mode in which it is to be executed; or, if words of a general nature only, such as writing or instrument, be inserted, it may be exercised either by deed or will. *Kilbert v. Lee*, Hob. 312. *Roscommon v. Fowke*, 6 Bro. P. C. 1501. And where a power is not restrained to be executed by deed, a simple note in writing, even unattested, would be a good execution of the power. *Saunders v. Owen*, 2 Salk. 467; 3 East, 440. So, whether it be a common-law authority given by will, or a power operating under the Statute of Uses, it may be executed by feoffment (*Daniel v. Upley*, Latch. 9, 39, 134; 1 Noy. 137); covenant to stand seised (*Stapleton's case*, 1 Vent. 228. *Dame Hastings' case*, Raym. 239; S. C. 3 Keb. 511. *Right v. Thomas*, 3 Burr. 1441. *Wykham v. Wykham*, 11 East, 468); lease and release (*Dyer v. Ansiter*, 1 P. Wms. 165; 10 Mod. 34, nom. *Gier v. Osseter*. *Dighton v. Tomlinson*, 1 P. Wms. 149); or lease, and release, and fine (Sugd. Pow. 68); which modes, however, operate only as an appointment of the estate, or declaration of use under the power. (Id. 201.)

A power to appoint a sum of money by deed or will is ambulatory during the life of the party appointing. *Perrott v. Perrott*, 14 East, 423.

A mere devise of a residue will not amount to an execution of a power of appointment by will. *Buckland v. Barton*, 2 H. Black. 136.

The attestation under a power which requires that it shall be attested, must express that all the forms requisite to give the instrument validity were observed. *Doe d. Mansfield v. Peach*, 2 M. & S. 576. *Wright v. Barlow*, 3 M. & S. 512. *Wright v. Wakeford*, 4 Taunt, 213. *Doe d. Hotchkiss v. Pearce*, 2 Marsh. 102; 6 Taunt. 402.

It is a rule applicable to all instruments, except wills made or republished since the 1 Vic. c. 26, came into operation, that a power of appointment over realty shall not be considered as executed, unless the instrument which is relied upon as an

execution of the power contain a reference thereto, or to the property which was the subject of the power, or unless the provision made by the person entrusted with the power would have been ineffectual, and would have had nothing to operate upon, unless it were considered as an execution of such power. *Denn d. Nowell v. Roake*, 6 Bing. 475; 4 Bligh, N.S. 1. *Doe d. Caldecott v. Johnson*, 8 Scott, N. R. 761. *Logan v. Bell*, id. 872. *Hughes v. Turner*, 3 Mylne & K. 666.

With respect to wills, it is by the 1 Vic. c. 26, s. 27, provided, that real and personal property, over which the testator has a power of appointment, shall pass by a general devise or bequest, unless a contrary intention shall appear.

The instrument by which the power is executed need not recite the power (*Guy v. Dormer*, T. Raym. 295); but an express reference to the power, on executing it, may aid what would otherwise be an imperfect execution of it. *Rowe v. Power*, 2 N. R. 1.

If the attestation to a document executed under a power expresses, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it is sufficient; but when the terms of the power require two or more such acts to be done, then, if the attestation expresses only the doing of one of them, even although from it all persons would clearly infer that the other act had also taken place, then the power is not well executed. *Vincent v. Bishop of Sodor and Man*, 5 Ex. 683; 19 L. J. Ex. 366; 8 C. B. 905; 20 L. J. Ch. 433. Thus, in *Doe d. Spilsbury v. Burdett* (7 Scott, N. R. 66, 101; 4 Ad. & E. 1; 9 id. 936), lands were limited to such uses as S. should appoint by her last will and testament, in writing, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses. S., prior to the 1 Vic. c. 26, signed and sealed an instrument containing an appointment commencing thus:—"I, S., do publish and declare this to be my last will and testament," and concluding, "I declare this only to be my last will and testament. In witness whereof I have, to this my last will and testament, set my hand, this 12th of December, 1789." And then followed the attestation, thus: "Witness, C. B., E. B. A. B." It was decided by the House of Lords that the power was well executed; and the case was distinguished from several in which the attestation clause in terms stated the performance of one or more of the required formalities, but was silent as to the others, and in which, consequently, the power was held to have been badly exercised, on the ground that legal reasoning would necessarily infer the non-performance of such others in the presence of the witnesses, but that a general attestation clause imported an attesting of all the requisites.

A power executed under a mistake may be binding. *Walker v. Laxton*, 1 Y. & J. 557. If the power omits the appointment of any one estate, it is not a sufficient execution. *Davies v. Williams*, 3 Nev. & M. 821. An improper execution of a power may enure as a conveyance. *Doe d. Daniel v. Keir*, 4 M. & R. 101. A defective execution of a power is not aided by time. *Cholmeley v. Paxton*, 5 Bing. 41; 1 M. & P. 127.

Where lands are appointed under a power to A. to the use of B., the legal estate is in A. *Doe d. Worger v. Haddon*, 4 M. & R. 118. By deed between coparceners and their husbands, to lead the uses of a fine, in order to effect a partition, the share of one coparcener was limited (after life estates to the parents) "to the use of the child or children" (without words of inheritance) "for ever, subject, nevertheless, to such divisions, directions, orders, and appointments, as the husband by will or deed should think fit to direct or appoint:"—*Held*, that these words gave the husband not merely a power of distribution, but a general power to appoint the fee-simple, and that such power was well executed by indentures of lease and release, expressed to be made in consideration of money paid as well as of natural affection. *Doe d. Chadwick v. Jackson*, 1 M. & Rob. 553.

On a devise to such of the testatrix's children as J. S. should by deed or will appoint, and an appointment executed in consequence of a previous contract with one of the objects of the power to pay annuities to the other objects, and also to provide for certain costs, and to settle the estates upon the appointee for life, with remainders to his children:—*Held*, to be well executed. *Tucker v. Sanger*, 1 M'Clel. & Y. 425.

An estate comprising a manor and tenements, with the appurtenants, was demised to trustees to the use of the eldest son of Sir H. E. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of his eldest son in tail-male, &c., with a power to the trustees, at the request of the person who for the time being should be in possession or entitled to the rents and profits of the said manor and tenements, with the appurtenants, by virtue of the limitations therein contained, by any deed or writing to make sale or dispose of the same, or of any part or parts of the manor and tenements aforesaid, with the appurtenants, to any person, either together or in parcels; and to that end the trustees were also empowered by any deed or deeds, writing or writings, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, created, provided, and declared of and concerning the manor and tenements aforesaid, with the appurtenants, sold, to be sold, disposed of, or exchanged, and by the same or any other deed or deeds, writing or writings, to limit and appoint the manor and tenements aforesaid, with the appurtenants, whereof the uses should be so revoked, unto the purchaser. The trustees sold the estate, exclusive of the timber growing upon it, for 13,400*l.*, and the tenant for

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life by the same deed sold the timber, wood, and underwood for 2448*l.*: — *Held*, that the power was not well executed. *Cockerell v. Cholmeley*, 10 B. & C. 564.

A testator devised his estate to his wife for life, and directed that after her death his brother (in case the brother survived his wife) should part and share his estate among his children, as they should severally arrive at twenty-one years of age, as his brother should think fair; and that in case his wife should survive his brother, she should by will devise his estate amongst her children, in the fairest way she could. The widow survived the children, one of whom died under age. The court held, that on the death of the testator the remainder, subject to the widow's life estate, vested in the heir-at-law, liable to be divested if the children had survived their mother. *Halfhead v. Sheppard*, 28 L. J. Q. B. 248.

Time and Manner of Executing. — By 22 & 23 Vic. c. 38, s. 12, a deed, after the 13th August, 1839, executed in the presence of, and attested by, two or more witnesses, in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that some additional or other forms or attestations shall be observed. A power may be executed at different times, if not wholly executed at first, provided the execution in the whole does not transgress the limits of the power. *Doe d. Milburne v. Milburne*, 2 T. R. 721. *See* 9 H. L. C. 150. And the several acts may be considered as making together but one assurance. *Herring v. Browne*, 2 Snow, 185. *Hawkins v. Kemp*, 3 East, 410. *Leicester case*, 1 Vent. 278. Hence, a power to make a life estate to the wife may be executed at different times. *Woolston v. Woolston*, 1 Black. 281; 2 Burr. 1136. No memorandum in the attestation is required to show the forms have been duly observed. 9 H. L. C. 262; 31 L. J. Ch. 247.

A power may be effectually exercised, although it is uncertain whether an event on which alone it can take effect will ever happen. *Logan v. Bell*, 1 C. B. 872.

By whom. — Where powers not merely private are to be exercised by many, provided a sufficient number be assembled, the act of the majority binds the minority. *Grindley v. Barker*, 1 B. & P. 229. As where a power was given to fifteen persons jointly and severally to act as they or any of them should jointly and severally think proper: — *Held*, that the execution of the power by four was sufficient. *Guthrie v. Armstrong*, 5 B. & A. 628. But see *Townsend v. Wilson*, 1 id. 608. We have seen a power cannot be delegated; though, where authority is given by A. to B. to execute it or give to another, by giving it to the other this is not a delegation. *Doe d. Devonshire v. Cavendish*, 4 T. R. 744. Where the power is originally authorised to be executed by the donee and his assigns, and is annexed to an interest in the donee, it will pass with it to any person who comes to the estate under him; and this whether the claimant is assignee in fact, or an assignee in law, as an heir or executor. *How v. Whitfield*, 1 Vent. 338, 339; Freem. 476. So, the donee of a power not annexed to an interest may delegate the power by virtue of an express authority in the deed by which it was created. *Palliser v. Ord*, Bunb. 166. But the person to whom such a power is delegated must come within the express words authorising the delegation. *Cole v. Wade*, 16 Ves. 27.

Where a power is exceeded, the excess only is void. *Adams v. Adams*, Cowp. 651. *Brudenell v. Elwes*, 1 East, 442. But a condition annexed to an appointment, where the power does not authorise such condition, will be deemed inoperative. *Pawlet v. Pawlet*, 1 Wils. 224.

It is no objection to a power that the party exercising it has a fee or other interest in the land. *Logan v. Bell*, 1 C. B. 872.

If a party has an estate in lands, and also a power of appointment for his own benefit, he cannot, after entering into a bond to the Crown, divest the right of the Crown to extend the lands for the bond debt by executing the power of appointment, even in favour of a *bonâ fide* purchaser, without notice. *Ellis v. Reg.* 6 Ex. 921; 20 L. J. Ex. 348.

A bankrupt, after assignment to his assignees, cannot execute a power of appointment. *Badham v. Mee*, 8 Bing. 695; 1 M. & Scott, 14. A power to husband and wife is not well executed by the husband alone to his assignee. *Jones v. Winwood*, 3 Mee. & W. 653.

[1] Powers are to be construed in the same manner in a court of law as in equity (*Rex v. Bulkeley*, Dougl. 293); namely, by the intention of the parties (*Pomery v. Partington*, 3 T. R. 665. *Doe d. Devonshire v. Cavendish*, 4 id. 743, n); which is to be collected from the instrument creating the power (*Griffith v. Harrison*, id. 748), using as a medium of interpretation the circumstances under which the power was given. *Doe d. Bartlett v. Rendle*, 3 M. & S. 99. And where a qualification nullifies the power, it ought to be dispensed with. *Goodtitle v. Funucan*, Dougl. 574.

Power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children. *Goodtitle d. Russell v. Weal*, 2 Wils. 369. And a similar power to give to the children of the marriage in such shares, &c., and for such estate, &c., and there is but one child, such child must have the whole estate which was settled. *Roe d. Buxton v. Dunt*, 2 Wils. 336. So, a power to appoint to children extends to grandchildren, where the children were in being when the power was created (*The Duke of Devonshire v. Cavendish*, 2 T. R. 244); *secus*, where they are not in being. *Robinson v. Hardcastle*, id. 241. And a power

given to appoint to children may extend to grandchildren, if an intention to that effect can be made out. *Doe ex dem. Devonshire v. Cavendish*, 4 T. R. 741, n.; *see* 1 id. 432.

An exclusive appointment under a power of appointing to and amongst such of his relations, &c., is good. *Spring ex dem. Titcher v. Biles*, 1 T. R. 435.

Where, by a settlement in contemplation of marriage, the estates were given to trustees for the use of such of the children, child, and issue of the body of the settlor, by his intended wife, and in such shares, &c., as he and his wife, or the survivor of them, should by deed or will appoint: — *Held*, that an appointment of the whole estate to one of the children by the widow was valid, and that the words "such shares," &c., did not import that it was necessarily to be divided, and some part appointed to each child. *Doe v. Alchin*, 2 B. & A. 122.

A power given to an executrix by that name to charge the testator's estate, only applies to that portion of it which comes to her as executrix, namely, the personal estate, even though she be trustee of the real. *Doe ex dem. Milburne v. Milburne*, 2 T. R. 721.

An estate is limited to uses, and a power given to revoke those uses, by selling and conveying the estate to a purchaser, so as that the purchase-money should be paid into the hands of A., and not of B., to be laid out in lands, to be settled like uses: — *Held*, that the power of revocation was conditional only, upon payment of the purchase-money in the manner directed. *Doe ex dem. Willes v. Martin*, 4 T. R. 39.

So, where real and personal property are bequeathed to A., subject to a power of appointing unto B. and C. in such proportions as he shall think proper, the power is well executed, though the personalty (or a portion of it) is appointed to one and the realty to the other. *Morgan ex dem. Surman v. Surman*, 1 Taunt. 289.

A. devises, after certain legacies, all the residue of what he dies possessed of, or in expectancy, to his wife B., for her life, reserving to her full power to will away any part or proportion of his said residue at her decease, and after that period to his daughter. A. dies, and B. devises away the whole of her property: — *Held*, that this was a good execution of the power. *Cooke v. Farrand*, 2 Marsh. 421; 7 Taunt. 122.

[1] In whatever mode the power is executed, whether by an act *inter vivos*, as grant, bargain and sale, lease and release, covenant to stand seised, feoffment, or by a will, the instrument in every case operates strictly as an appointment or declaration of the use; and as there cannot be a use upon a use, the bargainee, &c., takes the legal estate, the appointment being made to him; and if any ulterior use is declared it operates merely as a trust in equity. Sugd. Pow. 320; 2 Prest. Com. 483. And an appointment in pursuance of a power operates under the Statute of Uses, not as a conveyance of the land, but as a substitution of a new use in the place of a former one; and in general a deed executing a power cannot be considered as a new alienation, or independent conveyance (*Lady Gresham's case*, Moo. 261); but there are cases in which a deed executing a power is for many purposes considered as a substantive independent instrument. Thus, an appointment under a power is considered as a conveyance within the register acts; and if not registered, will be postponed to a subsequent mortgage duly registered. *Scrafton v. Quincey*, 2 Ves. 413. And a deed executing a power has been deemed a conveyance within the statute 27 Eliz. c. 24; 2 Ves. 65; and see *Bartlett v. Ramsden*, 1 Keb. 570. So, although the estate did not originally belong to the donee of the power, and the estate created by the appointment is considered as limited by the deed creating the power; yet a person deriving title under an appointment is considered as claiming under the donee, within the meaning of a covenant by him for quiet enjoyment against any person claiming under him. *Hurd v. Fletcher*, Dougl. 43; Sugd. Pow. 324, 325. It is also observable, that estates created by the execution of a power take effect precisely in the same manner as if created by the original deed. As, if a general power of appointment be given to a man by deed, and he by virtue of his power limit the estate to A. for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed, and in exactly the same way as they would have done had they been limited in that deed by the grantor of the power. *Middleton v. Crofts*, 2 Atk. 661. The appointee takes under the power as if inserted therein; but not so as to take by relation from the creation of the power, as in case of an assignment formerly under a commission of bankruptcy, that was by force of the statute, and to avoid mesne wrongful acts. *Per Lord Hardwicke: Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. But it is clear that a power to create leases, or any other estate, to take effect in possession, will control and overreach all the estates in the settlement. *Bosworth v. Farrard*, Park, 111. *Talbot v. Tippers*, Skin. 427. *Beale v. Beale*, S. P. Wms. 244. *Mosley and Mosley*, 3 Ves. 248. *Stackhouse v. Burnstor*, 10 id. 433. But the execution of a power will not defeat an estate previously created by a person who executes it. *Goodright v. Cartor*, Dougl. n. 53.

An appointment, when executed, is to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created. *Venables v. Morris*, 7 T. R. 342. And the execution of a power may have the effect of defeating the right to dower. *Ray v. Pung*, 5 B. & A. 561. A judgment and *elegit* thereon does not defeat a prior appointment. *Doe d. Wigan v. Jones*, 10 B. & C. 459. A statute making the doing of the thing

IV. Relief in Equity and by Statute in case of Defective Execution of Power.[1]

impossible does not necessarily dispense with the doing of it. 6 C. B. 1; 29 L. J. C. P. 34.

[1] It is the duty of the courts to support the execution of a power if possible. 29 L. J. Ch. 357; id. 169; id. 886.

There are three cases in which equity will relieve against a defective execution:—1. Where there is a consideration, as in favour of a purchaser (*Fothergill v. Fothergill*, 2 Freem. 257; 3 Ch. Ca. 8; Cowp. 257), which includes a mortgagee or a lessee (*Barker v. Hill*, 2 Ch. Rep. 113. *Bradley v. Bradley*, 2 Vern. 163. *Taylor v. Wheeler*, 1 id. 564. *Jennings v. Moore*, id. 609. *Reid v. Shergold*, 10 Ves. 370. *Marnell v. Blake*, 4 Dow, 264); or a creditor (*Pollard v. Grenvil*, 1 Ch. Ca. 10. *Wilkes v. Holmes*, 9 Mod. 485. *Ithel v. Beane*, 1 Ves. 216; 2 Bro. C. C. 325; 2 Dick. 698); wife (Cowp. 267. *Fothergill v. Fothergill, supra. Lady Clifford v. Earl of Burlington*, 2 Vern. 397. *Coventry v. Coventry*, 2 P. Wms. 222, 705. *Wykham v. Wykham*, 18 Ves. 423); or a legitimate child (*Sarth v. Lady Blanfray*, Gilb. Eq. Rep. 166. *Sneed v. Sneed*, Ambl. 64; Coop. 264, 265, 267); or in favour of a marriage consideration, and although the power was executed after the marriage (*Fothergill v. Fothergill, supra. Hervey v. Hervey*, 1 Atk. 561. *Churchmen v. Hervey*, Ambl. 355); but the same equity is not extended to a natural child (*Fursaker v. Robinson*, Prec. Ch. 475. *Fudor v. Anson*, 2 Ves. 582); nor to a husband (*Moodie v. Reid*, 1 Mad. Rep. 516), unless he is a purchaser by marriage (*Sergison v. Sealey*, 2 Atk. 412); or a mere volunteer (*Smith v. Aston*, 2 Freem. 309; 3 Ch. Ca. 113, 126. *Sargison v. Sealey*, 2 Atk. 415. *Godwin v. Kilsha*, Amb. 684); and it seems that a defective execution in favour of a stranger cannot be supplied so as to give the fund to creditors. *See* Sugd. Pow. 343. The person applying for relief must have a preferable equity to the person against whom he seeks relief. *Jevers v. Jevers*, Dom. Proc. 1734; Sugd. Pow. 344. *Mortlock v. Butler*, 10 Ves. 292. Where there are several defective executions, equity will supply the defect in the last, in order to effectuate the intent of the parties (*Hervey v. Hervey, supra*); and generally, if the intention to execute the power clearly appears in writing, it is sufficient, whether it be by covenant (*Fothergill v. Fothergill, supra. Sergison v. Sealey, supra;* and *see* 15 Ves. 1731); bequest by will (*Vernon v. Vernon*, Ambl. 1); or by a written contract not under seal. *Shannon v. Bradstreet*, 1 Rep. Temp. Redesdale, 52. *Mortlock v. Buller*, 10 Ves. 292. So, equity will supply the defect where a man promises by letters to grant an estate, which he can only do by the exercise of his power. *Campbell v. Leach*, Ambl. 740. So, if the intention appear from a recital in the deed of appointment (*Wilson v. Piggott*, 2 Ves. jun. 351), or from an answer to a bill in Chancery (*Carter v. Carter*, More, 365. *Fortesque v. Gregor*, 5 Ves. 553); or from a covenant in the original deed (*Sarth v. Lady Blanfray, supra*), it will amount to an equitable execution of the power. But there must be a reference to the fund to show the party's intention to execute the power, or the party must be in possession of no other fund upon which the covenant can operate. *Jackson v. Jackson*, 4 Bro. C. P. 462. *Hele v. Hele*, 2 Ch. Ca. 28, 29, 87; 1 Vern. 406. *Jones v. Tucker*, 2 Meriv. 533. (2.) Equity supplies a defective execution where there is any fraud (*Warde v. Booth*, 3 Ch. Ca. 69. *Piggott v. Penrice*, Com. 250; Prec. Ch. 471. *Stills v. Cowper*, 3 Atk. 699. *Shannon v. Bradstreet, supra. Anon.* Bunb. 53. *Stradford v. Lord Aldborough*, Ridgw. P. C. 281), or circumvention. 3 Ch. Ca. 114, 115. (3.) So, equity will relieve where the party was prevented from executing his power by accident or disability. *Earl of Bath's case*, 3 Ch. Ca. 68; and *see* Cowp. 267. *Piggott v. Penrice, supra.* Lastly. Equity will relieve against a defective execution, although it be by deed instead of will (*Tollet v. Tollet*, 2 P. Wms. 489; S. C. More, 46. *Sneed v. Sneed*, Ambl. 66; Cowp. 264, 265); or although there are two witnesses instead of three (*Parker v. Tucker*, Gilb. Eq. Rep. 168. *Colter v. Layer*, 2 P. Wms. 623; More, 227. *Seryison v. Sealey, supra. Godwin v. Fisher*, 1 Bro. C. C. 367. *Wade v. Paget*, id. 365); or though a seal be wanting (*Smith v. Aston*, Finch, 253; 3 Keb. 551; 1 Ch. Ca. 263, 264; 1 Freem. 308; 3 Ch. Ca. 69, 106); although the subject of the power be real estate, yet this relief is afforded where the defective instrument is a will, as where it is an act *inter vivos. Wilkes v. Holmes*, 9 Mod. 485; 1 Rep. Temp. Redesdale, 60, n; 1 Dick. 105; 2 P. Wms. 228; Sugd. Pow. 360. But the non-execution of a power is, in general, never aided (*Munder v. Philpot*, 2 Vern. 69. *Tomkyn v. Sandys*, 2 P. Wms. 228; Wilm. 33. *Bull v. Vardy*, 1 Ves. jun. 272. *Piggot v. Penuce*, Com. 250; Gilb. Eq. Rep. 138), unless the power is in nature of a trust. *Garfoot v. Garfoot*, 1 Ch. Ca. 35. *Gwilliams v. Rowell*, Hard. 204. *Anly v. Doyl*, 1 Ch. Ca. 180; 1 Ch. Rep. 89, nom. *Ainly v. Gower; Witchcot v. Souch*, id. 97. *Hyer v. Wordall*, 2 Freem. 135. *Locton v. Locton*, id. 136. *Carvil v. Carvil*, 2 Ch. Rep. 156; Golds. Eq. 77.

The 12 & 13 Vic. c. 26, recites, "that through mistake or inadvertence in the persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the sucessors in estates of such persons, by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers. And that leases

granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same, by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power." The act then provides by sect. 2, "that where in the intended exercise of any such power of leasing as aforesaid, whether derived under an act of parliament or under any instrument lawfully creating such power, a lease has been or shall thereafter be granted, which is by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion as against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport or effect as such invalid lease as aforesaid, save so far as any variation may be necessary, in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract, provided that no lessee under any such invalid lease as aforesaid, his executors, administrators, or assigns, shall be entitled, by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease where the persons who would have been bound by such contract are willing to confirm such lease without variation."

This statute includes corporations aggregate or sole (sect. 1), but it does not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation (sect. 7), nor does it extend to Scotland (sect. 8).

By 13 & 14 Vic. c. 17, s. 3, it is enacted, "that where, during the continuance of the possession taken under any such invalid lease as in the first act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly, and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised, and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had, from the granting thereof, the same effect as if the same had been originally valid."

By 13 & 14 Vic. c. 17, s. 2, it is enacted, "that where, upon or before the acceptance of rent under any such invalid lease, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease."

By the 12 & 13 Vic. c. 26, s. 4, "where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that, at the time of granting thereof, the power granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then, and in every such case, such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time, and all the provisions therein contained shall apply to every such lease."

By sect. 5 of the same act, "when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person, or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease."

By sect. 6 the rights and remedies of lessees under any covenant for title or quiet enjoyment, and the rights and remedies of lessors or reversioners for breach of covenants, conditions, or provisoes in the leases, and on the part of the lessees to be observed and performed, are saved.

"Under the provisions of these important acts," says Lord St. Leonards, "every *bonâ fide* lease under a power, where the lessee has entered under it, which is invalid as an exercise of the power (whatever is the deviation from the terms of the power which occasions such invalidity), will operate as a binding contract at the will of the lessee, subject to such variations as may be necessary in order to comply with the terms of such power. But the person bound to give effect to such a contract with variations may prevent the lessee from obtaining a new lease with variations, if he is willing to confirm such lease without variations, and he

V. Extinguishment of Powers.[1]

VI. Of Particular Powers.

(A) *To Devise.*[2]

may compel the lessee to accept a confirmation of the lease without variation." Sugd. Vend. & P. 571, 8th ed.

[1] By complete execution, there being no object for the execution (4 Cruise, 18, s. 1; *Roe v. Dunt*, 2 Wils. 336), by death of the party whose consent is required, by release, by merger, or cesser, or conveyance by operation of law, or revocation. 7 H. L. C. 241. *Doe v. Britain*, 2 B. & A. 93.

[2] By 1 Vic. c. 26, s. 23, "a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, is to be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he shall have power to appoint, in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention shall appear by the will. And in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, is to be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he shall have power to appoint, in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention shall appear by the will. And no conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised (except an act by which such will shall be revoked by force of the act), shall prevent the operation of the will, with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death."

The statutable provision extends to such cases only where the testator has power to appoint, "in any manner he may think proper;" general powers only, therefore, are within the statute, and a general power of disposition is for this purpose deemed equivalent to a fee. A general devise standing unexplained will now pass the fee-simple estates, and estates over which the testator has a general power; the former will pass under the general provision in the statute, the latter under the special clause. The rule will in like manner prevail as to personal estate. Sugd. Pow. 301, 8th ed.

A power to appoint amongst children is not within the above section of the Wills Act; and a mere general devise or bequest to a child will not operate as an execution of such a power. *Clowes v. Awdry*, 12 Beav. 604. See *Doe d. Beech v. Nall*, 6 Ex. 102; 20 L. J. Ex. 161. *Lloyd v. Lance*, 14 L. J. Ch. 456.

Although the testator has the entirety of of an estate, yet if any share is vested in him only for life, with a power of appointment, a general devise of all his estates will only pass the share of which he is seised in fee, and a direction which might properly be applied to the entirety will not be construed to enlarge the gift. Sugd. Pow. 323. *Nowell v. Rooke*, 2 Bing. 497; 10 Moore, 113. *Doe d. Caldecott v. Johnson*, 8 Scott, N. R. 761; 7 Man. & G. 1047.

A power annexed to a devise *in fee* to a married woman, that she may dispose of the estate without the control of her husband, is void, as being inconsistent with the giving of the fee. *Goodhill v. Brigham*, 1 B. & P. 192.

Under a devise of an estate to A. during her life, and at her disposal afterwards to leave it to whom she pleases, the appointment can only be executed by will. *Doe d. Thorley v. Thorley*, 10 East, 438. See *Power v. Lonsdale*, 2 Black. 291.

A power given to a *feme covert* to be executed by will is sufficient, if done by a writing purporting to be a will. *Driver d. Berry v. Thompson*, C. P. 4 Taunt. 294.

Under a power to appoint copyhold by deed or will, signed in the presence of three witnesses, the will need only be attested by three witnesses, and not the deed. *Doe d. Harman v. Morgan*, 7 T. R. 103. See *Moodie v. Reid*, 7 Taunt. 355.

Where, by the words of a power of appointment given to a married woman, she could appoint by will, "signed and published" in the presence of two witnesses, and she made a will which professed to be "signed and sealed" in the presence of three witnesses, the will was held to be a good execution of the power. *Warren v. Postlethwaite*, 2 Eq. Rep. 222; 9 Jur. 721. *See* also as to the attestation of a will in compliance with a power, *Burdett v. Spilsbury*, 6 Man. & G. 386; 7 Scott, N. R. 66; 10 Clark & Fin. 340) of a will (*Perry v. Watts*, 4 Scott, N. R. 366; 3 Man. & G. 775. *In re Wrey*, 19 L. J. Ch. 183.)

A power was reserved to a married woman to dispose of personal property by her last will and testament, to be by her duly made and published in the presence of, and to be attested by, two or more credible witnesses. The donee, by her will, without any reference to the power or the subject-matter, bequeathed to her husband "all that she did and should or would thereafter be entitled to, or should possess;" concluding thus: "Signed by me, C. J., February 24th, 1831, in the presence of two witnesses." It was held that this was not a due execution of the power. *Johns v. Dickenson*, 8 C. B. 934.

Where the wife's mother had devised her estate to her son-in-law and her daughter for their lives, and then to their children as they or the survivor should by deed or will ap-

(B) *To Lease.*[1] See Statutes, *ante*, p. 203.

point, and in default of appointment to uses in strict settlement, a devise by the husband, the survivor, of all the residue of his personal estate, and of all his real estate over which he had any disposing power, to his eldest son in fee, was held not to be an execution of the power, as he had a fee-simple estate of his own, which it was held was sufficient to satisfy the devise. *Cooke v. Cunliffe*, 17 Q. B. 245.

Where, previously to marriage, an agreement is made generally that the woman may dispose of her property, she cannot after the agreement, and before the marriage, make a binding will, unless expressly authorised to do so. *Hodsden v. Lloyd*, 2 Bro. C. C. 534. *Doe d. Staple*, 2 T. R. 684. But where the intended wife's real estate was limited to herself in fee till the marriage, and after the marriage to such persons, &c., as she, notwithstanding her intended, or any future coverture, and whether she should be covert or sole, and without the consent of her husband, or with such consent, at any time or times, and from time to time, should appoint by deed or will or codicil, &c., it was held that a codicil made by the lady in execution of the power after the settlement, and before the marriage, was not revoked by the marriage. *Logan v. Bell*, 1 C. B. 872; Sugd. Pow. 264.

Where the donee of a power of appointment over personal estate exercised the same, and reserved a power of revocation merely, it was held that the power of revocation included in it the power of limiting new uses. *Sheffield v. Von Donop*, 7 Hare, 42; 17 L. J. Ch. 481. See *Montague v. Kater*, 8 Ex. 507; 22 L. J. Ex. 154.

[1] A power to make leases not being expressed, cannot be implied under a private act of parliament. *Roe d. Bolton v. Granthum*, 3 Burr. 1259. *See* Statutory Provisions, *ante*, p. 203; 1 Platt on Leases, 394.

A lease by tenant for life, under a power not pursuant to the authority, is void against the remainderman, and incapable of confirmation by him. *Doe d. Martin v. Watts*, 7 T. R. 83. A power of this kind can be exercised by a *feme covert*, even without the concurrence of her husband. *Harris v. Graham*, Com. 496. An infant cannot convey under a power of this kind without a special act of parliament (Bac. Abr. Lease); for he can only execute a power where he is a bare instrument or conduit-pipe, not where he has an interest, or where it is to be exercised over real estate. *How v. Whitfield*, T. Jon. 110; 1 Vent. 339; 2 Show. 57. The authority being merely personal cannot be delegated, unless the power be given to the donee or his assigns. (Id.) But in a case where, by a settlement, a father was tenant for life, with remainder to his son for life, with a power of leasing to each when in possession, although the son obtained an assignment of his father's life-interest, it was held that he could not exercise either his father's power of leasing or his own, till he came into possession in his own right, as tenant for life in remainder. *Coxe v. Day*, 13 East, 118. The instrument must expressly follow the power. *Doe d. Pulteney v. Cavan*, 5 T. R. 567.

If a man being tenant for life has a power to lease for twenty-one years for his own benefit, he may renounce a part of the right so given, and grant a lease for any number of years short of the twenty-one; *i. e.* he may either exercise his right to the utmost extent of the power, or he may stop short of that; and then, every part of which he abridged himself would be for the benefit of the next in remainder. He would throw back upon the inheritance that portion which he did not choose to absorb for his own use. *Isherwood v. Oldknow*, 3 M. & S. 392.

An agreement to grant a new lease entered into during the currency of an existing lease, is not an agreement to grant a reversionary lease, but is within the terms of a power of a party to make leases in possession only. *Dowell v. Dew*, 12 L. J. Ch. 158; 7 Jur. 117.

As to the Lands leased.—A covenant to stand seised is considered as evidence of the usual manner of demising, and an objection that the covenant to stand seised in question was by way of provision for a younger child, was deemed to be of no weight. *Right v. Thomas*, 3 Burr. 1441; 1 Platt on Leases, 411.

Where there appears an intention that the tenant for life shall have power to lease all the lands, and a proviso is inserted that the annual rents shall be reserved, this shall not confine the power to those lands which have been usually let, but will be construed to extend to all the lands. *Walker v. Wakeman*, 1 Vent. 294; 2 Lev. 150; 1 Platt, 397.

A power to make leases, excepting the ancient demesnes, does not authorise the demising of copyhold. *Winter v. Loveden*, 1 Ld. Raym. 267; Com. 37. But a power to demise all the manors, &c. and hereditaments, comprehends a fishery. *Goodtitle d. Clarges v. Funucan*, Dougl. 565. A power may, however, be taken to be special, and not allowed to extend to all the property comprised in the deed wherein the authority is given, if it appear from the nature of the power, compared with that of the property, to have been the intention of the parties that it should be special. *Pomery v. Partington*, 3 T. R. 665.

As to when the Lease is to Commence.—A., under a power in his marriage settlement to lease for twenty-one years in possession, but not in reversion, grants a lease to his only daughter for twenty-one years, to commence from the day of the date: the lease is good. *Pugh v. Leeds*, Cowp. 714. But a power to lease generally does not authorise the donee to make a lease to commence after the determination of a lease in being. *Slocomb v. Hawkins*, Yelv. 222; Brownl. 148. *Doe d. Cavan*, 5 T. R. 567. And a power to lease

indefinitely, without mentioning the time when they are to commence, shall be taken strictly against the donee of the power, and consequently be construed so as only to authorise leases in possession, and not leases reversion. *Suffolk v. Wrath*, Cro. Eliz. 36; Rep. 33, a.; 1 Platt, 404.

Under a power to tenant for life to lease for ninety-nine years, determinable on one, two, or three lives, a lease for ninety-nine years, if E. H. should so long live, to commence from the death of S. L. and M. B. (two lives, on which a subsisting lease for years was determinable), was held ill. *Doe d. Copleston v. Hiam*, 5 M. & S. 40.

Where a person has a general power to make leases, he may make a concurrent lease to commence immediately, although the lands are then held under an existing lease, made either by a former proprietor or the person making such lease. It was adjudged by the Court of Common Pleas, about 17 Car. 2, that if a man had power to make a lease for years, when there was another lease in being, then, if he made a lease to commence *in præsenti*, the power was well executed; and the second lease should continue as long as it might, taking effect in possession after the determination of the first lease. *Read v. Nash*, 1 Leon. 147.

Where the power was to lease in possession, and not in reversion, a lease for years to commence forthwith as to part, and in future as to the residue, was deemed void. *Doe d. Allen v. Calvert*, 2 East, 376.

As to the Duration of the Lease. — The lease is good for the time or number of lives specified in the power (*Winter v. Lovedore*, 2 Salk. 537); or for a shorter period than that named in the power. *Sikewood v. Claknon*, 3 M. & S. 382.

A power to grant leases, provided they do not exceed thirty-one years, or three lives, will warrant a lease or thirty one years, whichever shall last longest. *Commons v. Marshall*, 6 Bro. Parl. Ca. 168.

Where, by a marriage settlement, estates were limited to A. for life, with remainder to trustees for 600 years, to be computed from decease of A., to raise portions for younger children, and power was given to A. to create a rent-charge in favour of any second wife, and for securing it to grant the estate for a term of years, to take effect immediately after his decease; it was held, that the term created in pursuance of this power had priority over the term of 600 years, and that the person in whom the former term was vested might sue without joining the trustees of the other term. *Bailey v. Tennant*, 11 Ex. 776.

As to the Rent. — A power to lease all or any of the said hereditaments, &c., so as the usual rents, &c., be reserved, is confined to such parts of the premises as had been demised before. *Pomery v. Partington*, 3 T.R. 665. But under a power to lease all manors, messuages, lands, &c., so as there be reserved as much rent as was then paid for the same, such parts of the estates enumerated in the power as have never been demised may be let. *Goodtitle d. Clarges v. Funucan*, Dougl. 565; 1 Platt, 465.

The least of two offers may be the best rent that can be obtained within the meaning of a leasing power, since regard may be paid to the qualifications of the tenant. *Doe d. Lawton v. Radcliffe*, 10 East, 278.

A testator by his will empowered his devisee for life of real estate to demise and lease for twenty-one years, "so as, upon such lease, there were reserved and made payable during the continuance thereof the best improved yearly rent that could reasonably be had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases; and that in every such lease there should be contained a clause of re-entry for non-payment."

In exercise of this power, a lease was made for twenty-one years, to hold from the 11th October, 1833, at the yearly rent of 902*l.*, payable by equal half-yearly payments, namely, on the 6th of April and on the 11th of October in every year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the first of August next before the determination of the term. It was held that this lease was a valid execution of the power. *Rutland v. Doe d. Wythe*, 12 Mee. & W. 355; 10 Clark & Fin. 419.

A tenant for life with a power to lease for three lives, reserving "the ancient and accustomed heriots, or more," granted a lease reserving 6*l.* 13*s.* 4*d.* as a heriot in the falling of each life. The ancient heriot was the three best beasts, or the 6*l.* 13*s.* 4*d.* at the lord's option, on the falling of each life, but contingent on a certain order of survivorship. It was held in ejectment against the lessee, that as the lease was avowedly varied from the ancient leases, the *onus* was on the lessee to show that the new reservation, without the option, was as beneficial to the lord as the ancient reservation. *Doe d. Egremont v. Crazebrook*, 4 Q. B. 406; 3 Gale & D. 334; 12 L.J.Q.B. 221. See *Doe d. Biddulph v. Hole*, 15 Q. B. 848; 20 L. J. Q. B. 57.

Where the lease comprised lands not comprised in the power, and also lands within the power, but the latter had not before been let together, but had been usually let separately, and the rents and heriots reserved were in fair proportion to the rents and heriots which had been reserved in respect of all the several estates, the court held the lease bad because it contained property not within the power. *Doe v. Stephens*, 6 Q. B. 208. But where a tenant for life under the limitations of a devise had power to lease for terms of years, determinable upon two or three lives, any part of the premises usually so leased, so that there were reserved the ancient and accustomed rents and heriots of the premises therein contained, or more, and so that in every of the leases there were contained the usual and reasonable covenants, it was held that two tenements, which had previously been leased

separately, might be leased together under a single demise, no objection being made that the rents, &c., reserved were not in proper proportion. *Doe d. Eyremont v. Williams,* 11 Q. B. 688; 17 L. J. Q. B. 154.

The rent must be reserved at the time named in the power. *Doe d. Harries v. Morse,* 2 C. & M. 247. But under a power of leasing at a yearly rent, it may be executed by making the rent payable at particular times of the year. *Doe d. Wythe v. Rutland,* 2 Mee. & W. 661.

Where a leasing power directs the best rent to be obtained, evidence may be adduced to show the rent reserved was the best. *Doe d. Rogers v. Rogers,* 2 Nev. & M. 550. Where the power prohibited the taking of a fine (see *Doe d. Hopkinson v. Ferrand,* 20 L. J. C. P. 202. *Clark v. Smith,* 9 Clark & Fin. 126), the acceptance of one invalidated the demise.

As to the Covenants.— All clauses, reservations, and covenants required by the power, must be inserted. *Cardigan v. Montague,* cited 1 Burr. 122. As a covenant for payment of rent, or re-entry, Id. 125. *Doe v. Smith,* 1 B. & B. 97; 3 Moore, 339; 2 B. & B. 473. *Doe v. Wilson,* 5 B. & A. 363. As the omission of a usual covenant will vacate a lease, so the introduction of an unusual covenant will have the same effect. *Doe d. Ellis v. Sandham,* 1 T. R. 705; 1 Platt, 493.

If A., under a general power to make leases, make a lease for twenty-one years, and then a second lease to begin before the expiration of the first, it is good as a current lease. *Goodtitle d. Clarges v. Funucan,* Dougl. 565.

If the lease be void, an acceptance of rent by the remainderman will not make it valid. *Wallis v. Wood,* 3 Salk. 4. As, where it was not properly executed (*Ludford v. Barber,* 1 T. R. 90. But see *Goodtitle v. Straphan,* Dougl. 52, n.; Cowp. 201), though it seems it might raise a tenancy from year to year. *Roe v. Ward,* 1 H. Black. 97. At all events it is strong evidence for a jury. *Roe v. Prideaux,* 10 East, 163.

Where a power of leasing requires that the usual covenants shall be inserted in the lease, with a condition of re-entry "for non-performance of the covenants therein to be contained," and the lease contains a general covenant to repair and keep in repair; but by the clause of re-entry the right to re-enter is not, in general terms, in case the lessee shall not repair, but in case the lessee shall not repair "within six calendar months next after notice;" there the lease is not in compliance with the power. *Doe d. Egremont v. Burrough,* 6 Q. B. 229; 7 Jur. 954.

A marriage settlement reserved to the wife, tenant for life after the death of her husband, power of leasing by indentures under her hand and seal to any person for twenty-one years, so as upon every such lease there shall be reserved the best rent, and so as none of the lessees be made dispunishable of waste by any express words to be therein contained, and so as in the leases there shall be a clause of re-entry for non-payment of rent, and so as the lessee do seal and deliver a counterpart thereof. It was held that a lease granted in pursuance of this power was void as against a remainderman. *Doe d. Hartridge v. Gilbert,* 5 Q. B. 423; 13 L. J. Q. B. 21.

Where the power of leasing is to be exercised in the same form as leases of the same kind in A., an omission of an important kind avoids the power. *Doe d. Douglas v. Lock,* 2 Ad. & E. 705; 4 Nev. & M. 807. And under a power to demise part, granting with that part a right of shooting over the whole is bad. *Dayrell v. Hoare,* 4 Per. & D. 114. *Fryer v. Coombs,* 11 Ad. & E. 403; 4 Per. & D. 119, n.

Construction of Powers to lease.— A power to lease is to be construed liberally (*Right d. Bassett v. Thomas,* 1 Black. 446; 3 Burr. 1441); and according to the intention of the parties. *Ren v. Bulkeley,* Dougl. 292. Hence, a power to lease for one, two, or three lives, such lands as were then demised for any such term, applies to such lands only as the lives on which they are held are certain and co-existing. *Doe d. Wyndham v. Halcombe,* 7 T. R. 713; 1 Platt, 297.

A power to lease for any term not exceeding twenty-one years, or three lives, so as no greater estate than for three lives be in being, does not warrant a lease for 99 years determinable upon three lives. *Roe d. Bruce v. Prideaux,* 10 East, 158.

Although there is no express proviso as to waste in the power, it must be implied. *Doe v. Bettison,* 12 East, 305; *see* 3 H. & N. 473; 27 L. J. Ex. 481.

Extinguishment of Powers.—These powers are liable to be destroyed or suspended by the release or feoffment of the donee of the power; or by any other conveyance (*Cook v. Bromhill,* Noy. 66) which does not operate by transmutation of possession: any assurance, therefore, which carries the whole estate of the grantor may destroy it; and by parity of reason, any such assurance as carries a part of the estate will suspend the exercise of the power during the continuance of such partial alienation. Co. Litt. 342, b; Dougl. 293; Sugd. Pow. 55. But where a tenant with such a power conveyed his life estate to trustees, to pay an annuity during his life, Lord Mansfield thought that the conveyance being only intended to let on a particular charge, did not extinguish the power. *Ren v. Bulkeley, supra. Seville v. Blackett,* 1 P. Wms. 777; Gill's *Uses,* 5. *Foster v. Graham,* 2 Stra. 962; 1 Platt, 525.

Though a tenant for life, with power to grant leases in possession for twenty-one years, convey his life estate to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished; he may still grant leases agreeably thereto. *Ren v. Bulkeley, supra.*

Statuteable Power.— Where, by a statute, a special authority is delegated to particular persons affecting the property of individuals, it must be strictly pursued, and appear to

(C) *Power of Tenant for Life to Lease.*[1]

PRACTICE. *See*

Abatement of Suit, vol. i. p. 6
„ Pleas in, id. p. 13
Affidavit, id. p. 239
Amendment, id. p. 323
Appearance, id. p. 389
Arbitration, id. p. 427
Arrest of Judgment, id. 521
Attachment, id. p. 575
Attorney, vol. ii. p. 5
Bail, id. p. 74
Capias, Writ of, vol. iii. p. 22
Capias ad Satisfaciendum, id. p. 22
Compounding Penal Action, id. p. 161
Consolidating Actions, id. p. 178
Costs, id. p. 287
Damages, id. p. 546
Death of Party. *See* Abatement, vol. i. p. 6.
Discontinuance, vol iv. p. 73
Distringas, id. p. 120
Error, id. p. 246
Essoign, id. p. 268
Interpleader, vol. v. p. 224
Irregularity. *See* Setting Aside Proceedings
Judge, vol. v. p. 257
Money into Court. *See* Payment of, id. p. 489
New Trial. *See post*, Trial
Nolle Prosequi, vol. v. p. 539
Non Obstante Veredicto, id. p. 543
Non Pros, Judgment of, id. p. 544
Nonsuit, id. p. 545
Nonsuit, Judgment as in case of. *See* Trial
Notice of Action, vol. v. p. 547
„ *See* according to subject-matter
Outlawry, *ante*, p. 26
Oyer, id. p. 41
Particulars, id. p. 75
Parties to Actions, id. p. 60
Pauper, id. p. 111
Postea, id. p. 192
Prisoners
Profert
Returns. *See* different writs
Rules and Motions
Security for Costs. *See* Costs
Set-off
Setting Aside Proceedings
Special Case
Staying Proceedings
Striking Out Pleas. *See* Pleas, *ante*, p. 143
Summons, Writ of
„ and Orders. *See* Judge's Order, vol. v. p. 258
Sunday
Term
Terms' Notice
Trial
„ at Bar
„ Writ of
Venue
Verdict
Warrant of Attorney

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have been so adhered to on the face of the proceedings. *Rex v. Croke*, Cowp. 26.

A power to demise premises, with the consent of A. B. duly attested, is not well executed by a demise which professes to be made with the consent of A. B., "testified by his being a party to those presents;" the meaning being, that the written consent should be signed in the presence of a witness. *Freshfield v. Reed*, 9 Mee. & W. 404.

Where lands are conveyed by settlement to trustees in fee upon the trusts of the settlement, with power of sale with consent of the tenant for life during his life, and after his death at the discretion of the trustees for the time being:—*Held*, that the trustees, with consent of the proper parties, might, during the life of the tenant for life, make a valid lease and assurance. *Boyce v. Hanning*, 2 C. & J. 334; 2 Tyr. 327.

[1] *Lease by Tenant for Life.*—The 19 & 20 Vic. c. 120, s. 1, authorises any person entitled to the possession or to the receipt of the rents and profits of any settled estates (*see* 21 & 22 Vic. c. 77, s. 1), for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court of Chancery to demise the same or any part thereof (except the principal mansion-house and the demesnes thereof, and other land usually occupied therewith from time to time) for any term not exceeding twenty-one years, to take effect in possession, provided that any such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine, or any benefit in the nature of a fine, which rent will be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period of not less than twenty-eight days of the rent thereby reserved, and non-performance of any of the covenants or conditions therein contained, and provided a counterpart of every deed of lease be executed by the lessee.

Every such demise is made valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person, under or by virtue of the same settlement if the estates be settled, and in case of unsettled estates, against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same (19 & 20 Vic. c. 120, s. 33); and also against the wife of any husband making such demise of estates to which he is entitled in right of such wife (21 & 22 Vic. c. 77, s. 8); and also against

PRÆMUNIRE.[1]

PRECEDENCE.[2]

the wife of any husband making such demise of estates to which he is entitled in right of such wife. (Id.) And the execution of any lease by the lessor or lessees will be deemed sufficient evidence that a counterpart of such lease had been duly executed by the lessee as required by the act. 19 & 20 Vic. c. 120, s. 34.

These powers include powers to the lords of settled manors to give licenses to their copyhold and customary tenants to grant leases of lands held by them of such manors, to the same extent and for the same purposes as leases may be granted of freehold hereditaments under the act 21 & 22 Vic. c. 77, s. 3. *See* 19 & 20 Vic. c. 120, s. 43.

The above powers may be exercised by guardians on behalf of infants, by committees on behalf of lunatics, and by assignees of bankrupts or insolvents. 19 & 20 Vic. c. 120, s. 36. But no lease is authorised beyond the term of twenty-one years of any settled estate in which, under any act of parliament, the tenants in tail are restrained from leaving or defeating their estates in tail, or where the reversion is vested in the Crown. (Id. s. 41.) And the act does not authorise the granting of a lease of any copyhold or customary hereditament not warranted by the custom of the manor, without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor. (Id. s. 43.)

No obligation is created by the above acts at law or in equity on any person to exercise any power. (Id. s. 43.) As to leases by tenant by life under a private act, *see* 5 H. & N. 53; 29 L. J. Ex. 105.

[1] Corrupted from *præmoneri*, to be forewarned; so named from the words of the writ, preparatory to the prosecution thereof, "*Præmunire facias* A. B."—cause A. B. to be forewarned; that he appear before us to answer the contempt wherewith he stands charged," which contempt is particularly recited in the preamble to the writ. It imports an offence against the Crown and government not subject to capital punishment. 4 Bl. Com. 103; 4 Steph. Com. 215.

[2] The ensuing elaborate and accurate table is extracted from Sir Bernard Burke's *Peerage and Baronetage*, ed. 1863.

The precedence given in the following scales is that which is known as general or social precedence, and which is admitted on all occasions and in all society. The Clergy, the Bar, the Military, and also other classes, have amongst themselves a certain precedency and relative rank; but such precedency and rank are peculiar to each of these classes, and give them no position on the general or social scale. To be upon that, the party must enjoy a dignity, or (in case of men) an official appointment coming within some of the authorities here cited of statute, patent, or usage; on these rests the following:—

Table of General or Social Precedence.

The marks, or absence of marks, show the authorities. * Denotes by stat. 31 Hen. 8, c. 10; † denotes by stat. 1 Wm. & M. c. 21; ‖ denotes by letters patent, 9, 10, & 14 Jac. 1; ¶ denotes by stat. 1 Edw. 6, c. 7, s. 3, which enumerates the then names of dignity thus: "Duke, Archbishop, Marquis, Earl, Viscount, Baron, Bishop, Knight, Justice of either Bench, or Serjeant-at-law;" the absence of a mark denotes by ancient usage and established custom.

The Sovereign
The Prince of Wales
Leopold, King of the Belgians, by royal warrant, dated 3d May, 1816, pursuant to 56 Geo. 3, c. 13
* The Sovereign's younger sons
* ——————— grandsons
* ——————— brothers
* ——————— uncles
* ——————— nephews
¶ * Archbishop of Canterbury, Primate of all England
* Lord High Chancellor, or Lord Keeper, being a Baron
¶ * Archbishop of York, Primate of England
Archbishop of Armagh, by the Act of Union
Archbishop of Dublin, by the Act of Union
* Lord High Treasurer
* Lord President of the Privy Council } if of Baronial rank.
* Lord Privy Seal, }
* Lord Great Chamberlain (*a*) } Above all Peers of their own degree.
* Lord High Constable
* Earl Marshal
* Lord High Admiral
* Lord Steward of Her Majesty's Household
* Lord Chamberlain of Her Majesty's Household
¶ * Dukes of England
* Dukes of Scotland
* Dukes of Great Britain
* Dukes of Ireland
* Dukes of the United Kingdom and of Ireland, created since the Union
* Eldest Sons of Dukes of Blood Royal
¶ * Marquesses of England
* Marquesses of Scotland
* Marquesses of Great Britain
* Marquesses of Ireland
* Marquesses of the United Kingdom and of Ireland, created since the Union
Dukes' eldest sons
¶ * Earls of England
* Earls of Scotland
* Earls of Great Britain
* Earls of Ireland
* Earls of the United Kingdom and Earls of Ireland, created since the Union
Younger sons of Dukes of Blood Royal
Marquesses' eldest sons

(*a*) Lord Great Chamberlain, when in actual performance of official duty, stat. 1 Geo. I.

Dukes' younger sons
¶ * Viscounts of England
* Viscounts of Scotland
* Viscounts of Great Britain
* Viscounts of Ireland
* Viscounts of United Kingdom and Viscounts of Ireland, created since Union
Earls' eldest sons
Marquesses' younger sons
¶ * Bishop of London
¶ * ——— Durham
¶ * ——— Winchester
¶ * English Bishops, according to seniority of Consecration
Bishop of Meath, and then the other Irish Bishops according to seniority of creation, by the Act of Union
Secretary of State, if a Baron
¶ * Barons of England
* Barons of Scotland
* Barons of Great Britain
* Barons of Ireland
* Barons of United Kingdom and Barons of Ireland, created since the Union
† Speaker of the House of Commons
† Commissioners of the Great Seal
Treasurer of the Household
Comptroller of the Household
Master of the Horse
Vice-Chamberlain of the Household
* Secretary of State, being under the degree of a Baron
Viscounts' eldest sons
Earls' younger sons
Barons' eldest sons
‖ Knights of the Garter and St. Patrick
‖ Privy Councillors
‖ Chancellor of the Exchequer
‖ Chancellor of the Duchy of Lancaster
¶ ‖ Lord Chief Justice of the Court of Queen's Bench
‖ Master of the Rolls
¶ ‖ Lord Chief Justice of the Court of Common Pleas
‖ Lord Chief Baron of the Exchequer
Lords Justices of the Court of Appeal in Chancery, according to the time and order of their appointment. [14 & 15 Vic. c. 83, s. 3.]
Vice Chancellors. [5 Vic. sess. 1, c. 5, s. 25.]
¶ ‖ Puisne Judges of the Queen's Bench
¶ ‖ Puisne Judges of the Common Pleas
Barons of the Exchequer.
} who take rank among each other according to seniority of appointment
Judge of the Court of Probate, who ranks with the Puisne Judges of the Courts of Westminster according to the date of his appointment. [20 & 21 Vic. c. 77, s. 8.] In court, as Judge Ordinary of the Divorce Court, he ranks next after the Lord Chief Baron. [22 & 23 Vic. c. 61, s. 3.]
Bannerets made by the Sovereign, in person, under the royal standard, displayed in an army royal, in open war
‖ Viscounts' younger sons
Barons' younger sons
‖ Baronets (*a*)
Bannerets not made by the Sovereign in person
Knights Grand Crosses of the Bath
Knights Grand Crosses of St. Michael and St. George
Knights Commanders of the Bath
Knights Commanders of St. Michael and St. George
Knights Bachelors
¶ Serjeants-at-law (*b*)
Masters in Chancery and Masters in Lunacy (the latter pursuant to the 8 & 9 Vic. c. 100)
Companions of the Bath
Companions and Cavalieri of St. Michael and St. George
Eldest sons of the younger sons of Peers
Baronets' eldest sons
Eldest sons of Knights of the Garter and St. Patrick
Bannerets' eldest sons
Eldest sons of Knights of the Bath, St. Michael, and St. George
‖ Knights Bachelors' eldest sons
‖ Baronets' younger sons
Esquires (*c*)
Gentlemen

(*a*) The baronets of England, of Scotland, of Great Britain, and of Ireland, take rank among themselves, according to the dates of their respective patents.

(*b*) The Serjeants-at-law (with the exception of Masters in Chancery, now nearly obsolete, and Masters in Lunacy accorded precedence by statute) are the only members of the legal profession below the Judges who have a position on the general or social scale, and this arises, first from the *status* of a serjeant-at-law or of the coif being not an office, but a dignity and degree; and secondly, from the place given to that *status* as a dignity by the above-cited statute of Edw. 6. The serjeants are in that act placed close to knights, and they have, according to such act and to ancient custom, always claimed to be of knightly order, as is shown by their having from the remotest period borne the open-vizored helmet over their coat armour, and from knightly precedence having been accorded to them on various public ceremonies and solemnities, such as the funeral of James I.; the opening of Parliament, 3 Charles I., 17th March, 1628; at many subsequent coronations; and at the funeral of Lord Nelson. It appears from the argument in *Serjeants' case*, 8 Scott's Reports, App. p. 265, in confirmation of their knightly position, that "if serjeants be made knights, they do not precede or take of other serjeants who are not knights, being their ancients."

(*c*) Esquires.—*Armiger*, or Esquire, is not, like those names given in the stat. 1 Edw. 6, c. 7, s. 3, a name of dignity, but is (as is also, according to Sir Edward Coke, gentleman or yeoman) a name of worship, and cannot be attached to any of the dignities mentioned in the stat. of Edw. 6. The different classes to whom the title of Esquire belongs are:—

1. The sons of all the peers and lords of parliament during the lives of their fathers; the younger sons of peers after the death of their fathers; the eldest sons of the younger sons of peers, and their eldest sons in perpetual succession.

TABLE OF GENERAL OR SOCIAL PRECEDENCE OF LADIES.

Married ladies and widows are entitled to the same rank amongst each other as their husbands would respectively have borne between themselves, provided such rank arises from a dignity, and not from an office or profession. Unmarried ladies have the same rank (provided it arises from a dignity) as their eldest brother would bear amongst men. It, however, should be clearly understood, that by rank through dignity alone, and not by profession or office, is precedence conferred upon a lady.

The Queen Consort
The Princess of Wales
The Sovereign's daughters
Wives of Sovereign's younger sons
The Sovereign's granddaughters
Wives of the Sovereign's grandsons
The Sovereign's sisters
Wives of the Sovereign's brothers
The Sovereign's aunts
Wives of the Sovereign's uncles
The Sovereign's nieces, brothers' or sisters' daughters
Duchesses of England
Duchesses of Scotland
Duchesses of Great Britain
Duchesses of Ireland
Duchesses of the United Kingdom of Great Britain and Ireland
Wives of the eldest sons of Dukes of the Blood Royal
Marchionesses of England
Marchionesses of Scotland
Marchionesses of Great Britain
Marchionesses of Ireland
Marchionesses of the United Kingdom of Great Britain and Ireland, and Marchionesses of Ireland
Wives of the eldest sons of Dukes
Daughters of Dukes
Countesses of England
Countesses of Scotland
Countesses of Great Britain
Countesses of Ireland
Countesses of the United Kingdom of Great Britain and Ireland and Countesses of Ireland
Wives of the younger sons of Dukes of the Blood Royal
Wives of the eldest sons of Marquesses
Daughters of Marquesses
Wives of the younger sons of Dukes
Viscountesses of England
Viscountesses of Scotland
Viscountesses of Great Britain
Viscountesses of Ireland
Viscountesses of the United Kingdom of Great Britain and Ireland and Viscountesses of Ireland
Wives of the eldest sons of Earls
Daughters of Earls
Wives of the younger sons of Marquesses
Baronesses of England
Baronesses of Scotland
Baronesses of Great Britain
Baronesses of Ireland
Baronesses of the United Kingdom of Great Britain and Ireland, and Baronesses of Ireland
Wives of the eldest sons of Viscounts
Daughters of Viscounts
Wives of the younger sons of Earls
Wives of the eldest sons of Barons
Daughters of Barons
Wives of Knights of the Garter and St. Patrick
Wives of "Justices of either Bench"
Wives of Bannerets made by the King in person
Wives of the younger sons of Viscounts
Wives of the younger sons of Barons
Wives of Baronets according to the dates of their husbands' creations
Wives of Bannerets not made by the King in person
Wives of Knights Grand Crosses of the Bath
Wives of Knights Grand Crosses of St. Michael and St. George
Wives of Knights Commanders of the Bath
Wives of Knights Commanders of St. Michael and St. George

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2. Noblemen of other nations.
3. The eldest (and we think, if any, all the) sons of baronets, and the eldest sons of knights.
4. Esquires created expressly with a collar of SS., and spurs of silver — now obsolete.
5. Persons to whom the Queen gives arms by her own letters patent, with the title of Esquire.
6. Esquires of the Bath, and the eldest sons of those Esquires, pursuant to the statutes of the order.
7. Barristers-at-law, by their office or profession.
8. Justices of the peace, and mayors, while in the commission, or in office.
9. Persons chosen Esquires to the body of the Prince — now obsolete.
10. Persons attending on the Sovereign's coronation in some notable employment, or persons employed in any superior office of trust (where they have discretionary power, and are not, such as clerks, merely ministerial) under the Crown, or serving in some place of better note in the Queen's household.
11. Persons who are styled Esquires by the Queen in their patents, commissions, or appointments, such as sheriffs of counties, or captains in the army and navy.
12. Attorneys in colonies, where the departments of counsel and attorney are united.

VALVASORS.—The first name of dignity, next beneath a peer, was anciently that of *Vidames*, *Vicedomini*, or *Valvasor*, who are mentioned by our ancient lawyers as *viri mayna dignitatis*, and Sir Edward Coke speaks highly of them. Yet they are at present entirely out of use; and our legal antiquaries are not agreed upon even their original or ancient office. Now, therefore, the first personal dignity after the nobility is a knight of the order of St. George, or *of the Garter*, first instituted by Edward III., anno 1344.—*Blackstone.*

PREROGATIVE. *See post*, Sea and Sea-shores ; Titles of Honour.

I. Of the Royal Prerogatives in General, p. 213.
II. With Reference to the Administration of Justice, p. 214.
III. „ the Conferring of Honours, p. 214.
IV. „ Ecclesiastical Affairs, p. 214.
V. „ Suits at Instance of the Crown, p. 215.
VI. Relative to Process against the Crown, p. 216.
VII. „ Grants from the Crown, p. 217.
VIII. Privileges of the King, and what Statutes bind the Crown, p. 217.

I. Of the Royal Prerogatives in General.[1]

Wives of Knights Bachelors
Wives of Serjeants-at-Law
Wives of Companions of the Bath
Wives of Companions of St. Michael and St. George
Wives of the eldest sons of the younger sons of Peers
Daughters of the younger sons of Peers
Wives of the eldest sons of Baronets
Daughters of Baronets
Wives of the eldest sons of Knights of the Garter
Wives of the eldest sons of Knights Bannerets
Wives of the eldest sons of Knights Bachelors
Daughters of Knights Bachelors
Wives of the younger sons of Baronets
To these are usually added the wives of Esquires and Gentlemen; but the *status* of an Esquire or Gentleman is not a dignity, and therefore the wife of either has, strictly speaking, no peculiar place on the General Scale of Precedence.

[1] *See* Staunf. *Prer. of the Crown*; Chitty, id.; Com. Dig.; Bac. Abr.; Ven. Abr. Prerogative. In England, the supreme government, that is, the power of making and enforcing laws, is divided into two branches; the one legislative, consisting of king, lords, and commons; the other executive, consisting of the king alone.

The executive, or regal office, is hereditary on certain conditions; but the right of inheritance may be changed or limited by act of parliament. The principal duty of the sovereign is to govern the people according to the laws. "But although the king," says Lord Bacon, "is the fountain of justice, and is entrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern." The king owns no superior but God and the laws. It is a maxim of the constitution, that the king in his political capacity can do no wrong, because he acts only by officers responsible to the law. The king never dies; that is, the executive authority never ceases to exist. The king is head of the church, but he cannot alter the established religion. He is also generalissimo of all the forces, but he cannot raise an army without the consent of parliament, nor can he maintain it without that consent being renewed from year to year. He has the power of coining money, but he cannot alter the standard. He is the sole representative of the people with foreign states, having the power of sending ambassadors, concluding treaties of alliance, and making peace or war. The king has the power of summoning, proroguing, or dissolving the parliament; but he is bound to summon a new parliament at least every seven years. He is also bound to administer justice in the established course in his courts of law, not as a free gift, but as the due of his people. The king is the fountain of mercy; he alone can pardon all public offences, either absolutely or conditionally: and of honour, as the constitution has entrusted him with the sole power of conferring titles, dignities, and honours. He is also entrusted with the immense patronage of the church, the army, the navy, the excise, and the colonies. As first magistrate of a great and free people, he is invested with many other splendid marks of regal dignity and pre-eminence, all intended by the constitution to be employed for the good of the people. The legislative authority is vested in a parliament, consisting of the king, the lords spiritual and temporal, and the commons. Though new laws may be proposed by any member of either house, the consent of all the three constituent parts of the legislature is necessary to make them binding on the subject; and though any part of the legislature may, by withholding its consent, prevent the enactment of a law, it requires the agreement of all the three to repeal an existing statute. The Crown cannot, of its own authority, part with any portion of its prerogative, unless under the sanction of parliament. 5 Moo. P. C. C. 276; 11 Jur. 855.

The rules of inheritance, which govern the descent of private estates, are in general equally applicable to the descent of the Crown. 5 Bac. Abr. 591, Prerogative, c. 1. The few differences which exist were introduced on grounds of a political necessity. the general doctrine, that all the daughters of the father, who died seised, are entitled to his estate on failure of a male heir (Lit. sect. 241), does not apply to the descent of

II. With Reference to the Administration of Justice.[1]
III. „ „ the Conferring of Honours.[2]
IV. „ „ Ecclesiastical Affairs.[3]

the Crown, so that the eldest daughter of the last king is, under such circumstances, exclusively heiress to the throne. Co. Litt. 15 b.; 7 Co. 12 b.; 1 Bl. Com. 194; 1 Wooddr. 69. So, the rule of *possessio fratris* does not hold on the descent of the Crown, nor is half-blood any impediment in such case. Therefore, if a king has issue a son and a daughter by one *ventre*, and a son by another *ventre*, and die, on the death of the eldest son without issue the younger brother is entitled to the Crown, to the exclusion of the daughter. Plowd. 245; 4 Inst. 206; Co. Litt. 15 b; 1 Wooddr. 69. Even the doctrine which anciently prevailed in the law of descents, that, when the eldest son was already provided for, the next brother should take the rest of their father's inheritance, was never adopted as a rule of public succession. 1 Bl. Com. 200.

It should, however, be remarked, that even a king *de facto*, or one in the actual exercise of sovereignty, whilst he remains on the throne, is by law entitled to the royal prerogatives (Plowd. 245; 4 Inst. 206; Co. Litt. 15 b; 1 Wooddr. 69); and is so far king, that treason may, legally speaking, be committed against him. 1 Hawk. P. C. b. 1, c. 17, s. 11; Hal. Hist. P. C. 102; 4 Bl. Com. 77.

Immediately on the demise of the king, his successor is entitled to the prerogatives attached to the Crown: no coronation, no formal recognition of the claim of the successor, is necessary to the perfection of his title: he becomes, instantly on the dissolution of his ancestor, a king for every purpose. *Calvin's case*, 7 Co. Rep. 12; Plowd. 213; 3 Inst. 7; Hal. P. C. 101; Fost. R. 189; 1 Bl. Com. 195, 369; 1 Wooddr. 73. It may safely be advanced that a king who resigns the throne, and whose resignation is confirmed in parliament, cannot afterwards resume those prerogatives which he has previously renounced by his own voluntary act; and *see* 2 Hal. P. C. 104.

The king is generalissimo throughout all his dominions: in every part of them his majesty is alone entitled to make war and peace; but in countries which, though dependent on the British Crown, have different and local laws for their internal government, as, for instance, the colonies, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place, though, if such law be silent on the subject, it would appear that the prerogative as established by the English law prevails in every respect; subject, perhaps, to exceptions which the difference between the constitution of this country and that of the dependent dominion may necessarily create. By this principle many difficulties which frequently arise as to the king's foreign prerogative may be readily solved.

The constitution has made the king the delegate or representative of the people, with regard to foreign affairs; and has invested his majesty with the supreme exclusive power of managing them. 1 Bl. Com. 252.

[1] The prerogative of creating courts and offices has been immemorially exercised by the kings of England, and is founded on the capacities of executive magistrate and distributor of justice, which the constitution of the country has assigned to the sovereign. Finch, L. 162; 1 Bl. Com. 226, 272. The judges can, generally speaking, derive their authority only from the Crown. 27 Hen. 8, c. 24; Co. Litt. 260; 2 Bac. Abr. 97. And those who claim a prescriptive right to hold a judicial office, impliedly hold by royal grant. 1 Bl. Com. 24. The Lord Chancellor is appointed by the delivery of the king's great seal into his custody. Lamb. Archeion, 65; 1 Rol. Abr. 385. The Chief Justice of the Court of King's Bench is created by writ. 4 Inst. 74, 75. The Vice-Chancellor (5 Geo. 3, c. 24), and the rest of the judges (4 Inst. 74, 75), are named by letters patent.

[2] The Crown alone can create and confer dignities and honours. The king is not only the fountain, but the parent of them. 3 Bl. Com. 271; 3 Cruise, Dig. 171. Nor can even an ordinance of the House of Lords confer a peerage. 1 Ld. Raym. 16. *See post*, Titles of Honour.

[3] The supremacy of the Crown in all matters of an ecclesiastical nature is, as observed by Lord Hale (Fortes. R. 388), a most indubitable right, which may be proved by records of unquestionable truth and authority; and though the popes made great usurpation and encroachments on this right, they were ever complained of and resisted as illegal (2 Burn. Ecc. 35, 36; Ld. Raym. 25); and were effectually destroyed in the reign of Henry VIII. 26 Hen. 8, c. 1.

Ecclesiastics, and the ecclesiastical laws affecting them, are peculiarly subject to the royal authority and superintendence, though the king does not exercise this prerogative in person. Thus the king has, in general, the power of visiting and reforming abuses in the church (Stra. 1056), through the medium of the Lord Chancellor or commissioners appointed under the Great Seal. Free chapels, hospitals, and donations of the king's foundation, are visitable only by his majesty; and where a king and a subject join in a foundation, the king shall visit, for he is founder. 2 Inst. 68.

The right and power of the Crown to dispense with the ecclesiastical law in matters not repugnant to the law of God, existed before the time of Henry VIII. (Dav. 70, b, & 73; Godb. 108; Com. Dig. Prerogative, D. (D. 29); 6 V. 38; Vin. Ab. Prerogative 31, f. 17, 255; 2 Burn's *Eccl. Law*, 164), and still exists, notwithstanding the stat. 25 Hen. 8, c. 21, which vests a right to grant dispensations in the Archbishop of Canterbury; for there are no words in the statute

V. With Reference to Suits at the Instance of the Crown.[1]

expressly depriving the king of his prerogative, who enjoys it concurrently with the Archbishop of Canterbury. Hob. 146; Cro. Eliz. 542, 601; Moore, 542; Com. Dig. *ubi supra*, D. This power is confined to ecclesiastical regulations, and does not apply where any express provisions are pointed out by a statute, with which the king cannot dispense; but in most ecclesiastical affairs the power extends. Thus, the king may grant an exemption from the visitation and jurisdiction of the ordinary (Dav. 72), which might enable a bastard to be a priest (Hob. R. 147; 17 Vin. Abr. 255; 1 Burn's *Eccl. Law*, Benefice, 3, p. 156; 1 Bl. Com. 458, 459); and may grant dispensations *in commendam*. The right of the king to appoint and direct superstitious uses to such uses as are truly charitable, and to pardon offences against the ecclesiastical laws, flows from the same principle. So the king may, by a proclamation, appoint fasts and days of thanksgiving and humiliation, and issue proclamations for preventing and punishing immorality and profaneness, and enjoin the reading of the same in churches and chapels. Comp. Incumb. 354; 10 Anne, c. 7, s. 11; 32 Geo. c. 63, s. 5.

On the same principles the king was, at common law, and is, the ultimate judge and *dernier ressort* in ecclesiastical causes, though he does not exercise this jurisdiction in person. 1 Wooddr. V. E. 77; 1 Bl. Com. 280. *See* stat. 25 Hen. 8, c. 19.

The disposal of the principal ecclesiastical preferments belongs also to the king as the head of the national church. The stat. 25 Hen. 8, c. 20, enacted, "that on every avoidance of every archbishopric or bishopric within this realm, or in any other the king's dominions, the king may grant to the prior and convent, or the dean and chapter of the cathedral churches or monasteries where the see of such archbishopric or bishopric shall happen to be void, a license under the Great Seal, as of old time hath been accustomed, to proceed to the election of an archbishop or bishop of the see so being void, with letters missive, containing the name of the person which they shall elect and choose," &c. This statute was afterwards repealed by Edw. 6, c. 2, which enacted, that all bishoprics should be donative as formerly. It states in the preamble, that these elections are *in very deed* no elections; but only by a writ of *congé d'élire* have colours, shadows, or pretences of election. 1 Burn's *Eccl. Law*, 202. This is certainly good sense; for the permission to elect where there is no power to reject is irreconcilable with the freedom of election.

In consequence of his prerogative in church matters, and as founder of archbishopries and bishopries, the king is entitled to the custody, and is seised of the freehold (1 Woodr. V. L. 297); of the temporalities of bishops, that is, the lay revenues, lands, and tenements, which belong to the archbishop's or bishop's see (1 Bl. Com. 282), during the vacancy of the archbishopric or bishopric. This prerogative is of so high a nature that a subject cannot claim the temporalities during the vacancy by grant or prescription. 2 Inst. 15. But now, by stat. 14 Edw. 3, s. 4, cc. 4, 5, the king may, after the vacancy, lease the temporalities to the dean and chapter, saving to himself all advowsons, escheats, and the like. During the vacancy, the Crown has the right of presenting to such benefices and other preferments as fall within the time of vacation. 17 Edw. 2, c. 14; 1 Bl. Com. 282; 2 Com. Dig. 45. *See* 17 Edw. 2, s. 2, c. 14.

[1] Though justice flows from the king as its fountain, he cannot administer it personally, or authorise any deviation from the laws. The first principles of equity forbid that any one should be judge in his own cause; which may be one reason that the constitution has, by an indiscriminate dictate, deprived the Crown of the power of personally interfering with the administration of justice. If this were not the case, the prerogative, instead of being, in fact, subservient to, would be above, the laws, and the property of the subject would be defenceless. Hence the Crown has no precedence in a criminal court, though it has in the Exchequer in revenue cases. 1 F. &. F. 381. As to the right to reply, *see* id. 535.

There are certain substantial and important peculiarities in favour of the king, with respect to legal proceedings, which will be here mentioned; others of less importance will be incidentally stated in the course of this and the following paragraph. Extraordinary remedies are assigned to the king. Co. Litt. 131, b. In the first place, though his subjects are in many instances under the necessity of suing in particular courts, the king has the undoubted privilege of suing in any court he pleases. 4 Inst. 17; Plowd. 243; Roll. R. 290; Finch, L. 84; Fortescue, R. 101; Blac. Rep. 131, 132. The Crown possesses also the power of causing suits in other courts to be removed into the Court of Exchequer, where the revenue is concerned in the event of the proceeding, or the action touches the profit of the king, however remotely, and though the king be not a party thereto. 15 Mee. & W. 97; 15 L. J. Ex. 246; 17 id. 312; 2 Ex. 453; Parker, 143; Anstr. 205, 214. And an account with the king can only be enforced in this his court of revenue; and since the abolition of the equity jurisdiction of the Court of Exchequer (5 Vic. c. 5, s. 1), the Crown, in matters of revenue, may sue in Chancery. 9 Jur. 626; 14 L. J. Ch. 305. By the 24 & 25 Vic. c. 62, s. 1, the Crown is not to sue after sixty years, by reason of land having been in charge of the queen or standing in shape of record. This act applies to suits by the Duke of Cornwall.

The modes of redress which the Crown may adopt against a subject are—1st, by the usual common-law actions; 2d, by inquisition, or inquest of office; and under this

VI. Relative to Process against the Crown.[1]

head may be included extents in chief and in aid. *See* Extents, vol. iv. p. 408, and the writ of *diem clausit extremum;* 3d, by *scire facias*, to repeal grants, &c.; 4th, by information of *intrusion* (*Attorney-Gen. v. Hallett*, 1 Ex. Rep. 211; 16 L. J. Ex. 262), or debt, and *in rem.;* 5th, by *quo warranto*; 6th, by *mandamus*. The general rule is, that the king may waive his prerogative remedies, and adopt such as are assigned to his subjects. He may maintain the usual common-law actions, as trespass *quare clausum fregit*, or for taking his goods. 1 Rol. Abr. 373. The only exception seems to be in the case of actions, which suppose an eviction or disseisin as an assize, or, it seems, an action of ejectment. 12 East, 96. The king cannot maintain such actions, they being inconsistent with his royal dignity, and contradictory to the fiction of law, that the king cannot be dispossessed of property once vested in him. 3 Bl. Com. 257. Proceedings under an inquisition of office, or an office, as it is termed in the old books, is a peculiar prerogative remedy for the benefit of the Crown. One of entitling and another of instruction. Gilb. Ex. 109, 113, 114; 16 Vin. Abr. 79, Office B.; 12 East, 102; Finch, L. 3, 24; 2 Atk. 399. The object evidently is to support that fundamental principle of English law, that the king may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury. Magna Charta; 9 Hen. 3, 29; 2 Inst. 46; Gilb. Ex. 132; Hob. 347; 1 Bl. Rep. 130; 3 Bl. Com. 259. And the object is attained by the opportunity afforded the subject of interpleading with the Crown, by traversing its title, or setting up a better in a *monstrans de droit*, or petition of right. For, in cases where an office is a necessary preliminary, the king and his officers cannot seize the property without it; nor has the king a title for many purposes. 12 East, 90. The inquiries are, whether the king's tenant for life died seised, whereby the reversion accrues to the king. Whether A., who held immediately of the Crown, died without heirs, in which case the lands belong to the king by escheat. 12 East, 96. Whether B. is attainted of treason, whereby his estate is forfeited to the Crown. Whether C., who has purchased lands, be an alien, which is another cause of forfeiture. Whether D. be an idiot, *a nativitate*, and therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenants and the value or identity of the lands. 3 Bl. Com. 258. The principal rule with respect to offices is, that they are not necessary when the king's title already appears in any shape of record. 12 East, 95.

With respect to the necessity of having an office, the rule is, that in all cases where a common person cannot have a possession, neither in deed nor in law, without an entry, the king cannot have it without an office or other record. 12 East, 113.

As to personalty, the general rule seems to be that the king is entitled without office, or other matter of record, as in the case of goods and choses in action of felons, wreck of the sea, treasure trove, the profits of lands, of clerks, &c. convicted of felony, or of persons outlawed in a personal action. 2 Vent. 270; 2 B. & A. 258. So, in the case of simony, the king shall present without office; and it is unnecessary on the nomination of the Crown to an office void by the stat. 5 & 6 Edw. 6, c. 16. 3 Com. 259. The rule that the Crown neither pays nor receives costs has been much modified by recent stats. *See* Marsh. on Costs, 540; 19 L. J. Ch. 315. Thus, by 18 & 19 Vic. c. 90, in suits and informations by the Attorney-General relating to revenue, a successful defendant is entitled to his costs against the Crown. *See* 7 E. & B. 192; 4 Ex. 606; 28 L. J. Ch. 511. So in proceedings under certain acts, 16 & 17 Vic. c. 127, s. 26; or as to entry of satisfaction in Crown debts, *see* 16 & 17 Vic. c. 107; 23 & 24 id. c. 115, s. 1.

[1] The *petition de droit*, or petition of right, is an ancient common-law remedy for the subject against the Crown, and it is said to owe its origin to Edward I. 3 Bl. Com. 256. The proceedings in a petition of right are now regulated by the 23 & 24 Vic. c. 34. *See ante*, Petition of Right, p. 128; and 7 Jur. 224; 12 L. J. Ch. 281.

Also, on account of the dignity of the king, he is not bound to offer an acquittance to any man; but the subject who pays to the king ought to bring with him the acquittance, and demand it of the king. Bro. Ab. Prerog. pl. 11, cites 2 Hen. 7, 8. Nor can the king be a copyholder; and, therefore, where a person who holds a copyhold estate becomes king, the copyhold is suspended, for it would be beneath the dignity of a king to perform such services as those to which copyholds are subject. The king is not bound by fictions or relations of law, or by estoppels (1 Co. R. 43); even though such estoppels would affect the party through whom the Crown claims. But this does not prevent the king from taking advantage of estoppels, though they ought in general to be mutual. Co. Lit. 352, a, b. It is also an established principle, that where the king's right and that of a subject meet at one and the same time, the king's shall be preferred. Co. Litt. 306; 4 Co. 55; 9 Co. 129; 3 Leon. 251. To an information by the Crown, the defendant may plead not guilty. *Attorney-General v. Brown*, 14 Mee. & W. 301; 14 L. J. Ex. 265.

The general rule clearly is, that, though the king may avail himself of the provisions of any acts of parliament (11 Co. 68, b), he is not bound by such as do not particularly and expressly mention him. See *Doe v. Archbishop of York*, 14 Q. B. 81; 19 L. J. Q. B. 242. To this rule, however, there is an exception; namely, that the king is impliedly bound by statutes passed for the public good; the relief of the poor, the general

VII. Relative to Grants from the Crown.[1]

VIII. Privileges of the King, and what Statutes bind the Crown.[2]

advancement of learning, religion, and justice (*Baron de Bode v. Reg.* 13 Q. B. 364; 14 Jur. 970), or to prevent fraud, injury, or wrong. Therefore the king, though not named, is bound by the statute *De donis* to prevent wrongful alienation (11 Co. 68, b); the statute of Hen. 6, against discontinuances or alienations by husbands of their wives' estates, and the statutes of Eliz. against leases of ecclesiastical lands (11 Co. 76); simony (Co. Litt. 120); and fraudulent conveyances to defraud purchasers, &c. 11 Co. 74, b. But acts of parliament which would divest or abridge the king of his prerogatives, his interests, or his remedies in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect. Therefore, the statutes of limitation, bankruptcy, insolvency, set off, &c., are irrelevant in the case of the king; nor does the Statute of Frauds (29 Car. 2, c. 3), relate to him. 1 Salk. 162.

In equity, where discovery is sought, the Crown and a subject litigating together are precisely on the same footing as ordinary parties. 19 L. J. Ch. 314; 14 Jur. 205. A succeeding sovereign cannot be held responsible for money paid over to and spent by a predecessor. *Att.-Gen. v. Kohler*, 8 Jur. N. S. 467. By the 20 & 21 Vic. c. 43, writs given on appeal against an order of justices bind the Crown. 5 Jur. 892.

[1] It is a clear rule, that as well for the protection of the king as the security of the subject, and on account of the high consideration entertained by the law towards his majesty, no freehold, interest, franchise, or liberty, &c. can be transferred from the Crown but by matter of record. This is effected by letters patent under the great seal, which is a record and evidence *per se* without further proof; and that such seal may not be affixed without due caution and consideration, certain preliminary steps are requisite. It also appears that chattels real can in general only pass from the Crown under the great seal; but it is a general rule, that personal things, as goods or choses in action, or the discharge of a debt, need not be granted by the Crown under the great seal, but may be legally transferred under the privy seal. Crown grants have at all times been construed most favourably for the king where a fair doubt exists as to the real meaning of the instrument, as well in the instance of grants from his majesty as in case of transfers to him. 3 T. R. 279; 4 East, 338; 5 Taunt. 751; 2 Roll. Abr. 106; Plowd. 336; Dav. 17, 57; 2 Roll. 195, b. 20; 1 Bl. Rep. 120; 17 Vin. Abr. 130. General words in the king's grant never extend to a grant of things which belong to the king by virtue of his prerogative, for such ought to be expressly mentioned (Roll. Abr. 130; Com. Dig. G. 7); in other words, if under a general name a grant comprehends things of a royal and base nature, the base only shall pass. 1 Bl. Rep. 181.

If the king grant that which he cannot, it will be presumed that he was deceived. Thus, where a grant was made of property of the Duchy of Lancaster, then out on lease, which was not recited in the grant, the court held it void, as the king must be taken to be deceived where the king grants that which he cannot give according to the terms of the grant. *Alcock v. Cooke*, 5 Bing. 340. As to revoking grants, 1 E. & B. 310; 2 id. 568; 22 L. J. Q. B. 196; 18 Jur. 481.

A charter imposing duties on vessels passing near a certain place does not apply to the Crown. *Smithett v. Blythe*, 1 B. & Adol. 509.

The Crown cannot make a grant of a public river in derogation of the public right. *Williams v. Wilcox*, 8 Ad. & E. 314. A grantee of the Crown of the "sea-shore" is entitled to the accretions by imperceptible increase. *Scratton v. Brown*, 4 B. & C. 485; 6 D. & R. 536. *See* Hall on Seashores, 15. A grant by the Crown of land in tail to an illegitimate child, is barred by a bargain and sale enrolled under the 3 & 4 Wm. 4, c. 74, s. 15. *Duke of Grafton v. London and Birmingham Railway Co.* 5 Bing. N. S. 27; 6 Scott, 719. Choses in action of a *felo-de-se* vest in the Crown, and the assignee of the Crown may sue, and is not barred by the Statute of Limitations. *Lambert v. Taylor*, 4 B. & C. 138.

[2] The dignity of the sovereign and the safety of the state necessarily free the person of the king from liability to be arrested on any occasion (2 Inst. 50); neither can he be amerced or nonsuited. Bro. Abr. Prerogative, pl. 110; Vin. Abr. Prerog. T. 2. As the law cannot presume indiscretion or imbecility in the king, however young, his not being twenty-one years of age does not avoid his acts (Co. Litt. 40); and his nonage does in no case operate as a disability. The king's goods are also exempt from various liabilities which affect the personalty of his subjects. Even if a subject succeed in a petition against the king, his majesty's goods are not liable to be taken in execution. The king is not liable to pay taxes, toll (Palmer, 85), pontage, passage (Jenk. 83, pl. 62; Vin. Abr. Prerog. T. 2), custom (Bro. Abr. Prerog. pl. 112; Fitz. Abr. T. 5), or poor-rates; nor is his personal property subject to the laws relative to wreck, estrays, waifs (Vin. Abr. Prerog. T. 2), sale in market overt (2 Inst. 713; Plowd. C. 243, b), distress, damage feasant (2 Manning, P. E. 551), or the like. It is, indeed, generally laid down, that no custom which goes to the person or goods of the king shall bind him. Vin. Abr. Prerog. T. 2. But the king is not, it seems, by virtue of his prerogative, discharged of tithes for the ancient demesne lands of the Crown; but his majesty, being *persona mixta*, is capable of a discharge *de non*

PRESCRIPTION. *See* Adverse Possession, vol. i. p. 208; Common, vol. iii. p. 143; Custom, id. p. 533; Easement, vol. iv. p. 149; Lights, vol. v. p. 389; Markets and Fairs, id. p. 441; and *post*, Tithes; Tolls; Watercourses; Ways.

PRIMAGE.[1] *See* Bill of Lading, vol. ii. p. 490; Charter-Party, vol. iii. p. 79; Freight, vol. iv. p. 552.

PRINCIPAL and ACCESSORY.

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(*a*) *Who are*, p. 219.

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I. Who are Accessories in Felonies.

(A) *Of the different Degrees of being Accessory.*[2]

(B) „ *Accessories before the Fact.*

(*a*) *Who are.*[3]

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decimando, by prescription, which in effect operates as a general discharge from tithe. Hardw. 315; Sir Wm. Jones, 307; 2 Bl. Com. 31; 3 Cruise, 60. But this privilege does not extend to the king's grantee.

[1] An allowance paid by the shipper or consignor of goods to the master of a vessel, beyond the freight, for his care and trouble as to the goods. 3 Kent's Com. 232, n.

[2] These are—1. The principal in the first degree; 2. In the second degree; 3. The accessory before the fact; 4. The accessory after the fact. The first is he who commits the act; the second is the aider and abettor; the third, absent at the time, has yet counselled the commission of it; and the fourth is he who, cognisant of the offence, receives, relieves, comforts, or assists the felon after the deed. Woolr. *Cr. Law*, p. 76.

There can be accessories in felonies only: every instance of incitement, &c. in high treason, which, if it were a felony, would make a man an accessory before the fact, will make him a principal traitor (Fost. 341), and he must be indicted as such. 1 Hale, 238. And in offences under felonies, those who in felonies would be accessories before the fact are principals, and must be indicted in that character (*Reg. v. Moland*, 2 Moo. C. C. 276. *Reg. v. Clayton*, 1 C. & Kir. 128. *Reg. v. Greenwood*, 2 Den. C. C. 453; 4 Bl. Com. 36); except in manslaughter, in which, as the offence is sudden and unpremeditated, there can be no accessories before the fact. 1 Hale, 347.

[3] An accessory before the fact is he who incites (1 Car. & M. 215) or consents to the felonious design of another, but is so far absent at the time of its perpetration as to be unable to render any aid to the principal, either in that or in any other felony which might ensue in consequence. 2 Hawk. c. 29, s. 16. *R. v. Soares*, Russ. & R. 25. *R. v. Tuckwell*, Car. & M. 215. The offence is complete upon agency. As if in arson A. commissions B. to procure the aid of another, it is sufficient to make A. accessory before the fact that he employs an agent, without naming the person to be procured. 2 Hawk. c. 29, s. 16. The principal may not obey, or may exceed his instructions. If there is a substantial compliance that is enough; as, if A. should counsel B. to poison C., and B. should shoot him instead of using poison, A. would be accessory (Id. s. 20); but if the plan of A. and B. be to burn C.'s house, and B., the principal, burn the house of D., without any mistake, A. is not accessory. (Id.) As to the excess, if the consequence be a probable event, the procurer is liable. As if A. should counsel B. to rob C., and in so doing B. should kill C. (id. sect. 18), or should procure the burning of D.'s house, in doing

(C) *Of Accessories after the Fact.*

(*a*) *Who are.*[1]

II. Of the Trial and Punishment of Accessories.

(A) *In General.*[2]

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which the house of E. is burnt. (Id.) Where A. invited B. to a house with a view of murdering him, A. was held to be accessory to the murder. *R. v. Manning*, 2 C. & Kir. 903. If A. desire a child under the age of discretion to commit an offence, A. is a principal; but if the child be of capacity, A. is accessory. *R. v. Course*, Fost. 349.

And it is essential to constitute the offence of accessory, that the party should be absent when the offence was committed (1 Hale, 615); if it appear that he was present, he must, if indicted as an accessory, be acquitted. *R. v. Gordon*, 2 Leach, 518.

[1] An accessory after the fact (he may be so as to manslaughter as other felonies. *R. v. Greenacre*, 8 C. & P. 35) is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (1 Hale, 618; 4 Bl. Com. 37; 2 Hawk. c. 29, s. 1; 3 P. Wms. 475), as by concealing the felon in his house to prevent his apprehension (Dalt. 530), or supplying him with money, a horse, or other necessaries, in order to enable him to escape (2 Hawk. c. 29, s. 26), or supplying him with instruments to enable him to break out of prison. 1 Hale, 621. But merely suffering the principal to escape does not make the person omitting to capture an accessory after the fact. Id. 619; 9 H. 411. Neither is the supplying him with victuals in prison (1 Hale, 620), or maintaining him when bailed out (Id.), or the attendance professionally of a physician or surgeon upon a felon sick or wounded. (Id. 332.)

It is not sufficient, to constitute a person an accessory after the fact, that he has spoken or written in order to obtain the pardon of a felon (26 Ass. 47), or advised his friends to write to the witnesses not to appear against him at the trial, and they have written accordingly (3 Inst. 139; 1 Hale, 620); or, even if he have himself agreed for money to abstain from giving evidence against the felon (Moore, 8), or, knowing of the felony, does not discover it. 1 Hale, 371, 618. He must do some act to assist the felon personally (see *Reg. v. Chapple*, 9 C. & P. 355), or employ another to do so. *R. v. Jarvis*, 2 M. & Rob. 40.

Although the wife of a felon know that her husband has committed the felony, she cannot be indicted as an accessory after the fact for receiving or assisting him, it being presumed that she acts under his coercion. 1 Hale, 48, 621. *Reg. v. Manning*, 2 C. & Kir. 903, n. But this immunity does not extend to any other relation; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master a servant, or a servant his master. 1 Hale, 48. A man may even make himself an accessory after the fact to a larceny of his own goods, by harbouring the thief, or assisting him to escape. Fost. 123; Cromp. 41 b. pl. 4 & 5. If the wife, without the knowledge or consent of the husband, receive the felon, she is accessory, and not the husband. 1 Hale, 621. But if both receive him, it shall be adjudged the act of the husband alone. (Id.)

There must be notice, express or implied, that the person assisted has committed a felony (2 Hawk. c. 29, s. 32); and the felony must be complete. Thus, if one wound another mortally, and after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues, no felony is committed. Id. sect. 35; 4 Bl. Com. 38. He cannot be convicted upon an indictment charging the commission of the felony only; he should be indicted as an accessory after the fact. *Reg. v. Fullon*, 8 Jur. 1217.

[2] By 24 & 25 Vic. c. 95, s. 5, "if any principal offender shall in anywise be convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if the said principal felon had been attainted thereof, notwithstanding such principal offender shall die or be pardoned, or otherwise delivered before attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted."

By sect. 5, "any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

By sect. 7, "where any felony shall have been wholly committed in England or Ireland, the offence of any person who shall be an accessory, either before or after the fact, to any such felony, may be dealt with, inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed; and in every other case the offence of every person who shall be an accessory, either before or after the fact, to any felony, may be dealt with, inquired of,

(B) *In the case of Accessories before the Fact.*[1]
(C) „ „ *after the Fact.*[2]
(D) *In Misdemeanors.*[3]

PRINCIPAL and AGENT. *See* also Master and Servant, vol v. p. 461; Power of Attorney, *ante*, p. 196.

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tried, determined, and punished, by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, and whether within her majesty's dominions or without, or partly within her majesty's dominions and partly without: Provided that no person who shall be once duly tried, either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence."

As to Cases within the Jurisdiction of the Admiralty.—By sect. 9, "where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas:' Provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

[1] By 24 & 25 Vic. c. 95, s. 1, "whosoever shall become an accessory before the fact to any felony, whether the same be a felony by common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished, in all respects as if he were a principal felon."

By sect. 2, "whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted, as an accessory may be punished."

[2] By 24 & 25 Vic. c. 95, s. 3, "whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished."

By sect. 4, "every accessory after the fact to any felony, except where it is otherwise specially enacted, whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any term exceeding one year."

[3] By 24 & 25 Vic. c. 95, s. 8, "whosoever

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I. Of the Appointment and Authority of the Agent.

(A) *Of the different Kinds of Agents.*[1]

(B) *Who may be Agents.*[2]

(C) *Of the Appointment of Agents.*[3]

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shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender." *See* Aiders and Abettors, vol. i. p. 271.

[1] Agents are persons authorised to do some act or acts in the name of another who is called the principal. There are different classes.

A broker is a person not intrusted with the possession of the goods, but is merely employed in making contracts, relative either to the purchase or sale of chattels, and usually discloses the name of his principal. *Baring v. Corrie*, 2 B. & A. 137. All persons are brokers who contrive, make, and conclude bargains between merchants and tradesmen, for which they have a fee or reward. *Milford v. Hughes*, 16 Mee. & W. 177. But it seems that neither auctioneers (*Wilks v. Ellis*, 2 H. Black. 55), nor merchants acting by commission from correspondents abroad are so. *See* 2 Bac. 2163; 16 Mee. & W. 174.

A factor is a party to whom goods are consigned for sale by a merchant or other party residing abroad, or at a distance from the place of sale, and he usually sells the goods in his own name.

Factors are either foreign or home factors.

A foreign factor is a person who resides in one country, with an authority from a principal residing in another. A home factor is a person residing in the same country with the principal, from whom he derives his authority.

A factor or broker is generally paid for his trouble by a commission of so much per cent on the goods he sell or buys; but sometimes in sales he acts under what is called a *del credere* commission.

Del credere is an Italian mercantile phrase, which has the same signification as the Scotch word "warrandice," or the English word "guarantee." *See* Paley on Agents; Russell on Factors, 2; Story on Agency, s. 33. A *del credere* commission is a premium paid to the agent for guaranteeing the responsibility of the purchaser. *Morris v. Cleasby*, 1 M. & S. 576.

As a *del credere* commission indemnifies the principal against the losses which may happen from the sales negotiated by his agent, so there is also a species of contract indemnifying the principal against any loss which may happen in consequence of his agent's purchases through a loss or failure on the re-sale. *Curry v. Edenson*, 3 T. R. 524.

[2] All persons are competent to be agents, agency being a mere ministerial office; infants, *femes covert*, persons attainted, outlawed, excommunicated, aliens, and others, may be agents (Co. Litt. 52, a); for the privileges and disabilities of those parties are merely personal, and the execution of a naked authority is not necessarily attended either with the advantages to those upon whom the former are conferred, or prejudices to those upon whom the latter are imposed. But one of two contracting parties cannot be agent for the other, so as to bind the latter within the Statute of Frauds. *See* 2 Camp. 203; 5 B. & A. 333; 4 B. & Adol. 448.

[3] In general, where a parol or unsealed authority is sufficient from the principal to the agent, such authority is not required by the common law to be in writing, although that mode may, in transacting matters of

importance, be preferable.

Sir Edward Coke says, in his Commentaries upon Littleton (Co. Litt. 52, b), that, regularly, the authority should be by letter of attorney or deed; and this doctrine is recognised in other works, but it is obviously rather matter of prudence than of necessity (Co. Litt. 52, b; Com. Dig. Attorney, c. 5; Beawes' *Lex Merc.* pl. 86; Marius, 2d ed. p. 104; *Davison v. Robertson*, 3 Dowl. Rep. 229. *Porthouse v. Parker*, 1 Camp. 82; 12 Mod. 564. *Harrison v. Jackson*, 7 T. R. 209. *Rex v. Brigg*, 3 P. Wms. 432; Bac. Abr. Corporations, E. 3; Payley, 117; and *see* 3 & 4 Ann. c. 9; Bac. Abr. Authority, A. cites Co. Litt. 48, b; 2 Roll. Abr. 8; Salk. 96, *contra*); and for the ordinary purposes of commerce it would be very inconvenient if a regular power of attorney were required in every transaction. The legislature have, indeed, required, by the Statute against Frauds (29 Car. 2, c. 3), that in some cases the authority delegated to an agent shall be in writing; but those provisions are principally directed to the transfer of an interest in land, or other real property, and do not affect the sale of goods or other mercantile transactions. *See ante*, Power of Attorney, p. 195.

Where an agent is entrusted to execute a deed, the authority is absolutely required to be under seal, for it would not be reasonable that the power to execute so solemn an instrument should be transferred by any medium less solemn and deliberate. *Harrison v. Jackson, supra.* The agent of a corporation must always have been appointed by deed, where the agency concerned the interest or title of the corporation, as to let lands even from year to year. 12 Mod. 584; 1 Roll. Abr. 514; 5 East, 239. Grant on Corp. 61. But for ordinary services, the agent need not be constituted by deed. Plowd. 91; 2 Camp. 96. And a notice to quit, given by an agent for a corporation, verbally authorised, is valid; and it has even been held, that the Bank of England, or any similar corporation, may, without deed, empower its servants to make bills of exchange or promissory notes in its name, as is the usual practice; for this is not a matter in itself connected with its title or interest, but merely the ordinary course of its business. Co. Litt. 94, b; Salk. 191, pl. 3. *Rex v. Bigg*, 3 P. Wms. 423; 3 Moore, P. C. C. 87; 1 E., B. & S. 290.

Except for the purposes described in the 1st, 2d, and 3d sections of the Statute of Frauds, namely, for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal; and in the great majority of instances, an authority binding one man by the acts of another is raised by implication of law. *Ridgway v. Wharton*, 6 H. of L. C. 296; 27 L. J. Ch. 46. *Darrell v. Evans*, 6 H. & N. 660. *See* Master and Servant, vol. v. p. 461; Frauds, Stat. of, vol. iv. 548.

A remittance by bills directing payment to a third person out of the proceeds, does not constitute an agency in the absence of a consent by the receiver. *Williams v. Everett*, 14 East, 582.

The relation of principal and agent may also be implied from the conduct of the parties; and this implied authority may arise where the principal, by his former course of dealing (*Pole v. Leask*, 28 Beav. 562), has sanctioned the inference that the agent had authority; and as against persons dealing with the agent on the faith of these appearances he may be bound, notwithstanding the agent acted contrary to his instructions. 5 Esp. 76; 2 Selw. 992; 13 Moore, P. C. C. 87.

A general agent is one who is authorised by his principal to transact all his business, either universally or in one particular department. A special agent is one who is authorised to execute for his principal only something in particular, and he is under a limited and circumscribed power. The difference in the effect of these two kinds of authority is this: that the principal is bound by all the acts of a general agent which are not inconsistent with the nature of his employment, however prejudicial they may be to the principal, and even though the principal may have expressly forbidden the particular act upon which the question may arise. *Caldwell v. Ball*, 1 T. R. 205; 2 Salk. 233; 1 Ld. Raym. 225. *Hensley v. East India Co.* 1 Esp. R. 111. *Fenn v. Harrison*, 3 T. R. 757; 10 Mod. 109. *Clive v. Eames*, 2 Stark. 281; 5 Esp. R. 72; 2 Ld. Raym. 928. But no acts of a special agent beyond the limits of his authority, or necessarily implied by it, will bind the principal. The differences between these agencies will be illustrated by the following instance:—Where a person keeping livery-stables and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognisant of any private conversation between the master and the servant. *Fenn v. Harrison, supra.* But if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment. 1 Camp. 43, n; Esp. R. 75. The authority even of a special agent may possess some of the characteristics of a general agency; that is, though he be appointed agent only for a specific purpose, the directions for effecting that purpose may not be specific (Chitty on Bills, 6th ed. 23); and in this case, upon the same principles which govern the case last cited, the principal will be responsible for all the acts done *bonâ fide* in the exercise

II. How Authority must be Executed.[1]

of the discretionary agency. 4 Esp. R. 114. The nature of an agent's authority must depend upon the express or implied directions or consent of the principal; and in the construction thereof, regard must be paid to the intention of the principal, and the nature of the commission. A general agent, therefore, is not, by virtue of his commission, effecting what he is employed to accomplish; of permitted to depart from the usual manner and although a factor may sell goods upon credit, that being the ordinary course of conducting mercantile affairs, yet a stock-broker, though acting *boná fide*, and with a view to the benefit of his principal, cannot do so with stock, unless he have special instructions to that effect, that being contrary to the usual course of business. *Wiltshire v. Sim*, 1 Camp. 258; id. 43, n.

The agent may bind his principal as far as his authority goes, however imprudent or injurious the acts may be. *Young v. Wright*, 1 Cramp. 143. Hence, if a person be directed to get a bill discounted, and he has had no order to the contrary, he may indorse the name of his employer. *Fenn v. Harrison*, 4 T. R. 177. And if a servant be directed to sell a horse, and have no orders not to warrant him, his master will be bound by his warranty. *Hellyear v. Hawke*, 5 Esp. 75. Whether an agent has a general or special authority is properly matter of evidence. *Thorold v. Smith*, 11 Mod. 88. On admission by a principal that he had authorised the act, the law will presume a proper authority. 2 *F.* & F. 166.

An authority is to be construed so as to comprehend all necessary or usual means of executing it with effect (*Collis v. Ement*, 1 H. Black. 313. *See* 2 id. 618; 1 Camp. 45; 8 De Gex, M. & G. 5; 28 Beav. 562), but is strictly confined to matters necessary to the execution of the business. *Hillyear v. Finlason*, 1 H. Black. 155. Hence, if a broker be employed to make one particular purchase of goods of a certain description and price, the principal will not be bound if the broker depart from his instructions. *East India Co. v. Hensley*, 1 Esp. 111.

[1] An agent cannot delegate his authority. *Solly v. Rathbone*, 2 M. & S. 299. *See* 27 Beav. 177; *ante*, p. 195. The authority can be executed only by the person to whom it is given; for the confidence, being personal, cannot be assigned to a stranger. Roll. Abr. 330; 9 Co. 47, b; 2 Roll. Abr. 9; 2 M. & S. 298; id. 301; 2 Mee. & W. 385; 3 id. 319; 3 Q. B. 845. Therefore, if an agent be appointed to sell, he cannot depute the power to a clerk or under-agent, notwithstanding any usage of trade, unless by express assent of the principal. *Coles v. Trecothick*, 9 Ves. jun. 251, 236. Therefore the sub-agent has no remedy against the principal for work done. *Schmaling v. Thomlinson*, 1 Marsh. 500; 6 Taunt. 147. And if property in the hands of a sub-agent be destroyed, the immediate agent is answerable to his principal. *Catlin v. Bell*, 4 Camp. 184. But an agent authorised to accept bills in the name of his principal may, it seems, without violating this rule, select the hand of another person to carry the intention into effect. *Lord v. Hall*, 8 C. B. 630; 19 L. J. C. P. 46.

The manner of executing the authority must be strictly consistent with the power given. *Parker v. Kett*, Salk. 96; Co. Litt. 258, b; 303, b; 6 T. R. 591. *Howard v. Baillie*, 2 H. Black. 623. And in the case of a power, it should be executed in the name of the person who gives the power, and not in that of the agent. *Braceby v. Dalton*, 1 Stra. 705. *De Meridycourt v. Ashley*, Moore, 818. So, the execution and delivery of a deed must be in the name of the principal; and if it be the execution of the agent only, it is void as to the principal: as, where the king granted authority to one to make leases, a lease made by him in the king's name, but executed by himself, was held void, for the execution ought to have been with the king's seal, thus: "The king, by A. B., puts his seal," &c. See *Anon.* Moore, 70, pl. 191. In the application of this rule, however, a difference is to be observed between a bare act, such as a deed, &c., and the form of a contract. It is equally necessary in both, that the thing be done in the principal's name; but in the former it is sufficient if it be stated to be done by the agent, for or on behalf of the principal: as in the case of a surrender of a copyhold estate by attorney, the entry being that W. and S., by virtue of a letter of attorney from J. C., surrendered, &c., it was held sufficient. 9 Co. 77. *Parker v. Kett*, Salk. 95. So, if the execution of a deed really appear to be in the name of the principal, the form of words used in the execution is not material, for, in a late case, where the principle was recognised and affirmed, it was deemed sufficient that opposite the seal was written "for S. B. (the principal), M. W. (the attorney)." *Wilks v. Backs*, 2 East, 142. The most advisable way is, "A. B. (the principal), by C. D. (the attorney)," and this is certainly good. *Per Grose, J.*, 2 East, 144. A bond, reciting certain differences between the obligee and the obligor, as attorney for T. F., was conditioned that the obligor should perform such award as the arbitrators therein named should make upon the premises. It was agreed that the submission in this form was not binding upon the principal, though it was resolved to be so upon the obligor. *Bacon v. Dubarry*, 1 Ld. Raym. 246; Salk. 70; 12 Mod. 129.

An agent's authority may be defined by writing, by oral instructions, or by the course of trade. *Poole v. Leask, supra. Dingle v. Hare*, 7 C. B. 145; 29 L. J. C. P. 143. *Sweeting v. Pearce*, 7 C. B. 449. *Howard v. Baillie*, 2 H. & N. 518. A general bailiff of a manor may make leases at will without any special authority; the reason assigned is, because great prejudice and inconvenience would ensue to the lord by absence, sickness, or other incapacity, if he had not that power. 1 Bac. Abr. Leases, s. 8. But he has no general

III. Liability of Principal as regards Third Persons.

(A) *Responsibility for Acts of Agent pursuant to his Authority.*[1]

power to make leases for years, to which the same reasons do not apply. So, a letter of attorney to sue for, receive, and recover a debt, authorises the attorney to arrest the debtor. 1 Roll. Rep. 390; Palm. 394. *Bailey v. De Walkiens*, 10 Ves. 441. And so a broker, employed to get a policy effected, may adjust the loss. 1 Camp. 43. *Goodson v. Brooke*, 4 Camp. 163. But an authority to receive and pay partnership debts on a dissolution of partnership, does not give authority to accept or indorse bills in the joint names of the partners (1 H. Black. 155); neither does a letter of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases and appoint substitutes, authorise the attorney to negociate bills received in payment, or to indorse them in his own name; and a general power to transact all business has no greater effect. *Hogg v. Snaith*, 1 Taunt. 347. *Hoy v. Goldsmid*, 2 Smith's Rep. 79, 80. *Venning v. Bray*, 31 L. J. Q. B. 181.

The extent or scope of an authority is to be gathered from the commission by which it is given, and the construction of mercantile commissions, like that of other mercantile instruments, is to be assisted by the usages of trade, and for that purpose the evidence of persons conversant in mercantile affairs is resorted to; therefore, a commission to a factor to sell is now held to give him a power to sell upon credit, in those trades where that is the usual course of dealing. Where the authority is in writing, it must be construed by the court and not by the jury. *Berwick v. Horsfall*, 27 L. J. C. P. 193.

The fact of a landlord employing a steward to let and manage his property, does not clothe the steward with a general authority to grant leases, or to enter into agreements for lease, without the sanction of the landlord, or contrary to his express directions. *Collen v. Gardner*, 21 Beav. 542.

Where an agent, with a general authority to receive monies and invest them on behalf of his principal, received the redemption-money of a mortgage, and delivered up the mortgage-deed without exacting from the mortgagor six months' notice, which by the terms of the mortgage was to be given, it was held that he had authority to waive the notice. *Webber v. Granville*, 30 L. J. C. P. 92; 7 Jur. N. S. 420. See *Breming v. Mackie*, 3 F. & F. 197.

An agent has in general no implied authority to borrow money on account of his principal, so as to render the latter responsible as the borrower, unless it can be proved that the principal had previously sanctioned such a course of dealing on the part of the agent, or had subsequently adopted and ratified the loan. *Hawtayne v. Bourne*, 7 Mee. & W. 599.

There are many cases in which the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left in such cases to seek his remedy against his own agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special. *Foster v. Green*, 31 L. J. Ex. 158. *Oxenham v. Smythe*, id. 110. *Smith v. M'Quin*, 3 H. & N. 555; 27 L.J.Ex. 465. *Sickens v. Irving*, 29 L.J.C.P. 25.

By "a general agent" is understood, not merely a person substituted in the place of another for transacting all manner of business, since there are few instances in common use of an agency of that description (1 Salk. 96); but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negociate certain contracts, and the like. *Whitehead v. Tuckett*, 15 East, 408. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent. *Rothes v. Soame*, Goldsb. 138. *Dickinson v. Lilwall*, 4 Camp. 279. And this seems to be founded, not so much upon the presumption of an authority given, as upon the principle that, where one of two innocent persons must suffer by the fraud of a third, he who enabled that person, by giving him credit, to commit the fraud, ought to be the sufferer. 3 Salk. 233; 1 Ld. Raym. 225; 15 East, 400. But a special agent who is employed about one specific act, or certain specific acts only, does not bind his employer, unless his authority be strictly pursued. A general power to buy or sell binds the person giving it as to all other dealings *bonâ fide*, however disadvantageous the terms of the contract may be. Where the authority given has been exceeded, the subsequent assent of the principal has the same effect as it has already been observed to have in cases where no previous authority has been given.

[1] In point of law, the principal and his agent are considered as one and the same person. *Caldwell v. Ball*, 1 T. R. 205. And therefore a sale by the agent creates a contract between the principal and the buyer, even though the factor acts under a *del credere* commission. *Scrimshire v. Alderton*, 2 Stra. 1182. Hence, if a factor sells goods, and the owner gives notice to the buyer to pay the price to him, and not to the factor, the buyer will not be justified in afterwards paying the factor, and the owner may bring his action against the buyer for the price, unless indeed the factor has a lien thereon (*Drinkwater v. Goodwin*, Cowp. 251); and though an agent departs from his authority, so as to discharge the principal, or the agent does not disclose his principal's name, yet the latter may in general adopt the contract, and sue for any breach of it. *Taylor v. Plumer*, 3 M. & S. 562); but there must in all cases exist an authority, which must be collected from the nature and circumstances of the case under which the contract was entered into. *Bell v. Jutting*, 1 Moore, 155. Contracts, indeed, made for the benefit of an-

other, though without his actual privity and directions, may be rejected or affirmed at his election; but some degree of agency, however trifling, must always exist. By making the election, he adopts the agent's contract, and will be liable. 2 Stra. 859. Even under a *del credere* commission the buyer is not justified in paying the price to the factor, if he has notice from the principal not to do so. But in cases where the buyer, at the time of the sale, knows nothing of the relation between the factor with whom he deals, and the principal by whom the factor is employed, the buyer will be protected by the law in case of misadventures occurring by the default of the factor; and where a factor, acting under a *del credere*, or the usual commission, sells goods as his own, and the buyer does not know that any principal exists, the buyer will be permitted, in an action brought against him, to set off a debt due to him from the factor (*George v. Clagett*, 7 T. R. 359); and, indeed, it is a general rule that where two persons equally innocent are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver shall be the loser. *Guerriero v. Peile*, 3 B. & A. 616. See *Swan v. Australian Co.* 7 C. B. 400; 31 L. J. Ex. 425. But this rule does not hold in the case of a broker employed under the usual commission, on the ground of the difference between the characters of factor and broker, for in general the principal, by his conduct, allows the factor to hold himself out to the world as the owner of the goods, by suffering him to have them in his possession, and the principal must take the consequence of the factor's misconduct in the sale. But a broker is not trusted with the possession of the goods; and, in general, nothing is given him by the principal, whereby he can appear as the owner thereof, to have a right to sell them in his own name; and, therefore, where such broker sells goods without disclosing the name of his principal, he acts beyond the scope of his authority, and the vendee reposes more confidence in him than he ought to do; and therefore the buyer cannot set off a debt due from the broker to him against the demand of the principal. *Baring v. Corrie*, 2 B. & A. 137. If an agent do not disclose the name of his principal, and no prejudice arises to the buyer in consequence of such concealment, the principal may sue. *Grojan v. Wade*, 2 Stark. 443. The risk which a principal runs through the inadvertence or misconduct of his agent may be avoided by the purchaser's having notice, at any time before the completion of the purchase or delivery of the goods, of the agency. Peake's Rep. 177. *Maanss v. Henderson*, 1 East, 335. *Escott v. Melward*, 7 T. R. 361, b.

An authority to receive the interest of a sum of money invested on mortgage or other real or personal security, does not carry with it an authority to receive the principal, unless the party receiving the interest was himself previously intrusted with possession of the principal, and has himself invested it, and dealt with it in pursuit of the ordinary trade or calling of a scrivener or money-lender. *Wilkinson v. Candlish*, 5 Ex. 91; 19 L. J. Ex. 166.

Where the known agent of a wine merchant sold wine to a customer, who paid for it by returning to the agent his own cheque, which the customer had cashed a few days previously, it was held that this was not, as between the principal and the customer, a payment for the wine sold to the latter through the medium of the agent. *Underwood v. Nicholls*, 17 C. B. 239; 25 L. J. C. P. 79.

If the principal is not disclosed at the time of the contract, and the agent deals in his own name, and is debited accordingly, and the principal, in ignorance of the intention of the creditor to look to him for payment, has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterwards, if the agent dies or becomes insolvent, resort to the principal for payment. *Smyth v. Anderson*, 7 C. B. 36; 18 L. J. C. P. 109. *Heald v. Kenworthy*, 10 Ex. 739; 24 L. J. Ex. 76. But the mere fact of a balance being due from the agent to the principal at the time of the agent's death, will not have this effect. *Waring v. Favenck*, 1 Camp. 85.

As soon as a party, dealing with an unknown agent, discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent. *Cornish v. Abington*, 4 H. & N. 557; 28 L. J. Ex. 262.

If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may in general, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it: but he is of course bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself. *Smethurst v. Mitchell*, 28 L. J. Q. B. 94. *Fish v. Kempton*, 7 C. B. 692. *Phelps v. Prothero*, 16 C. B. 370; 24 L. J. C. P. 225.

The undisclosed principal who comes forward to adopt the contract, must adopt it *in omnibus*, and if it were coupled with an agreement giving the defendant certain rights as against the agent, the principal must take the contract subject to these rights. *Ramazotti v. Bowring*, 7 C. B. (N. S.) 856; 29 L. J. C. P. 30.

The vendor of goods to the agent of an undisclosed principal, must make his election to charge the principal within a reasonable time after he has been discovered. *Smethurst v. Mitchell*, 28 L. J. Q. B. 241.

The principal may be sued for money borrowed by the agent on his behalf, and received by him, although the lender, at the time he lent the money, supposed the agent was the borrower. *Samuel v. Green*, 10 Q. B. 262.

It being a general rule that all contracts by an agent, within his authority, bind the principal, the owner of a ship is liable for the repairs (*Garnam v. Bennet*, 2 Stra. 816. *Webster v. Seekamp*, 4 B. & A. 352); or other necessaries furnished at the request of the agent (*Rich v. Coe*, Cowp. 636), or by the master's or captain's order; and he is even liable for money borrowed (*Evans v. Williams; Abbot v. Shilling*, 1 Stark. 117); or any other act done (id. *Jackson v. Vernon*, 1 H. Black. 114. *See* 2 Camp. 42; 11 East, 435; 5 B. & A. 617; and *post*, Ship and Shipping) by the master or captain for the necessary use of the ship, the authority in these cases being implied. Public boards, and agents of government, bind by their contracts, if done within the authority granted to them. 6 Price, 209. But in the construction of this liability strict attention must be paid to the extent of the agent's authority, and that he has not deviated from it in such a degree as to discharge the principal. In the instance before mentioned, as to the owner of a ship, he will not be liable if the repairs or other articles furnished for the use of a ship were not actually necessary; neither would he be liable for the money borrowed, nor for any such other act of the master or captain, unless urgent cases should require it. *See post*, Ship and Shipping. And where the authority is particular, the agent must pursue it, and if the act varies from the authority which he does, it is void (6 T. R. 591); unless the variance be merely circumstantial (2 H. Black. 623); or the principal by his conduct has sanctioned the deviation. *See* 7 Moo. P. C. C. 35.

A transfer of property by an agent not authorised by his commission to do so, passes no property in the thing transferred, and it may be reclaimed by the owner; as if a master trusts his servant with plate or other valuables, and the servant sells them, unless they are sold in market overt, the master may recover them from the innocent purchaser. *See* Markets and Fairs, vol. v. p. 442.

An act by the agent may bind his principal, even to take a case out of the Statute of Limitations. *Burt v. Palmer*, 5 Esp. 145.

A delivery of property to an agent is equivalent to a delivery to the principal. *Stafford v. Forcer*, 10 Mod. 311; Stra. 807. *Matthews v. Haydon*, 2 Esp. 509; 1 Camp. 339.

To release the principal, the vendor must have done some act to make him believe that he intended to charge the agent. *Kymer v. Suwercropp*, 1 Camp. 109. And the principal cannot, to protect himself, set up a balance due to him from his own broker. *Waring v. Favenck*, id. 85. But if the seller, knowing of the agency, expressly give credit to the agent, he cannot resort to the principal. *Paterson v. Gandasequi*, 15 East, 62.

Where the principal is not disclosed at the time of the purchase being made by the agent, yet the latter will alone be responsible if, by the usage of trade, the credit is understood to be confined to the agent so dealing, as in the case of principals residing abroad. *Addison v. Gandasequi*, 4 Taunt. 574. But if the principal and agent concert to obtain a sale of goods from a third person, and the principal intermeddle with the sale, although the goods be in form sold to the agent, and the contract of sale be made out in his name as the buyer, yet, if it were a contrivance between them to purchase the goods in extinction of a debt due from the agent to the principal, the latter is responsible to the seller on the ground of its being a fraud practised upon him. *Wilson v. Hart*, 7 Taunt. 295.

Notice to the agent is notice to the principal (*Fitzherbert v. Mather*, 1 T. R. 16. *Doe v. Martin*, 4 id. 66), provided he were agent at the time it was given. *Right v. Cuthell*, 5 East, 498. *Coore v. Callaway*, 1 Esp. 115.

Payment.—In general a payment to an authorised agent is payment to the principal (*Drinkwater v. Goodwin*, Cowp. 256. *Moore v. Clemenson*, 2 Camp. 24. *Venning v. Bray*, 31 L. J. Q. B. 181), if the usual mode of dealing warrant it (*Favenck v. Bennett*, 11 East, 38), provided he be possessed of and produce the necessary security (*Whitlock v. Waltham*, 1 Salk. 157), and the money be due; for a payment before the time named and without consent, is at the risk of the payer. *Parnther v. Gaitskell*, 13 East, 432.

In the case of payment, however, upon written securities, the debtor is always bound to see that the party to whom he pays it is in the possession of the security; and the payment, it seems, to an agent not so possessed, will not bind the principal, unless, indeed, some special authority from the obligee be shown which would be sufficient without the custody of the security. Payley, 181. *See ante*, Payment, p. 117.

In ordinary cases, the mere production of a bond (1 Salk. 157), bill of exchange, note, or check, is in general sufficient to warrant the payment to the person who produces it, and this without reference to the circumstance of his being the habitual agent of the same party. *Owen v. Barrow*, 1 N. R. 103; Paley, 181; Chitty on Bills, 6th edition, 281. But the presumption of authority, from the possession of the instrument, may be repelled by evidence of its being obtained by fraud, or for some other special purpose than receiving payment. Paley, 181. Though an agent be not actually possessed of such security at the time of the payment to him, yet, if the principal afterwards deliver it over to him, to return it to the obligor, it suffices.

The subsequent act confirms the propriety of the payment to the agent, so far as to bind the principal, although the principal never receives the money. *Abington v. Orne*, 1 Eq. Ca. Abr. 145.

The buyer, in general, after notice, must not pay the factor. *Scrimshire v. Alderton*, 2 Stra. 1182. *Escot v. Milward*, 1 Esp. 107. *Morris v. Cleasby*, 4 M. & S. 566. *Grove v. Dubois*, 1 T. R. 112. *Houghton v. Matthews*, 3 B. & P. 489.

Wherever payment to an agent would be sufficient, a tender to him has the same ef-

(B) *Responsibility for Warranties and Representations of Agent.*[1]

fect. *Goodland v. Blewith*, 1 Camp. 477. But a tender by an agent does not discharge the principal if the money be refused and the agent fails. *Dent v. Dunn*, 3 Camp. 296.

Pledges by Agent. — An agent authorised to sell at common law had no power tortiously to pledge. *Paterson v. Tash*, 2 Stra. 1178. And the pledgee's ignorance of the factor not being owner made no difference. *Newsom v. Thornton*, 6 East, 17. *Daubigny v. Duval*, 5 T. R. 604. *M'Combie v. Davies*, 6 East, 538. *Martini v. Coles*, & S. 140. *Pickering v. Busk*, 15 East, 38. *Hartop v. Hoare*, Stra. 1187. This doctrine being prejudicial to credit, it was essentially modified by stats. Geo. 4, c. 83 ; 6 id. c. 94 ; and by 5 & 6 Vic. c. 39. By the latter act it is provided, that *bonâ fide* advances to persons intrusted with the possession of goods or documents of title, though known to be agents, shall be protected. (Sect. 1.) So *bonâ fide* deposits in exchange, but no lien beyond the value of the goods given up. (Sect. 2.) The statute to be construed to protect only transactions *bonâ fide*, without notice that the agent pledging is acting without authority or *malâ fide* against the owner. (Sect. 3.) Meaning of the term "document of title," and when agent intrusted, and when in possession : what to be deemed a "contract or agreement," and "advance:" possession *primâ facie* evidence of intrusting. (Sect. 4.) Agent's civil responsibility not to be diminished. (Sect. 5.) Agent making consignments contrary to instruction of principal, guilty of misdemeanor. (Sect. 6.) Right of owner to redeem ; or to recover balance of proceeds. In case of bankruptcy, owner to prove for amount paid to redeem, or for value of goods, if unredeemed. (Sect. 7.) Not to affect any contract made before the passing of this act. (Sect. 9.) The acts do not extend to the case of master and servant; a clerk, therefore, is not an agent within them. *Lamb v. Attenborough* (1 B. & S. 831 ; 31 L. J. Q. B. 41) ; nor are certificates of railway stock "goods" (*Nieman v. Appleyard*, 7 L. T. (N. S.) 282), but bonds are securities within the statute. *Mocatta v. Bell*, 24 Beav. 585 ; 27 L. J. C. P. 237. When *malâ fide* is relied on to defeat a lender's right, actual notice should be shown. 8 Jur. 343 ; 5 L. T. 559 ; 7 H. & N. 661 ; 31 L. J. Ex. 157.

Where the money of the principal has been applied by the agent to an unlawful purpose, and without the principal's privity or consent, it may be recovered back from the party who holds it. *Clarke v. Shee*, Cowp. 197.

Receipt or Discharge by Agent.—Where an agent has authority to receive payment, his receipt is a discharge. *Sir Charles Thorold v. Smith*, 11 Mod. 88. But if he give a receipt without having in fact received the money, that is no answer to the principal ; for it would not be a bar if given by the principal himself, upon proof of the actual non-payment. 2 P. Wms. 295 ; Amb. 269 ; 5 East, 230.

Accounts settled between two agents without vouchers, will not be considered as binding upon the principals, but liberty will be allowed in equity to discharge and falsify. *Beaumont v. Boultbee*, 7 Ves. jun. 617. And under a general authority to receive payment, the agent may acquit the debtor in what manner he pleases (*Thorold v. Smith, supra*), even by giving a release. *Bacon v. Durbarry*, Salk. 70 ; 12 Mod. 129 ; 1 Ld. Raym. 246.

But an agent specially employed to receive payment in money, cannot vary from his authority by receiving a bill (2 Ld. Raym. 430 ; 2 Salk. 442) ; and even a general agent cannot, without particular authority, commute the payment by receiving another thing, as a horse, &c., in discharge of the debt, unless it be delivered over to the employer, who agrees to it. Nor can an agent, without an express authority, compound a debt. 1 Ch. Rep. 104 ; 1 Ch. Cas. 86.

A scrivener on behalf of his client having agreed to a composition, it was held to bind the scrivener, but not the client. 2 Vern. 127. But a broker employed to subscribe a policy of insurance has authority to adjust the loss. 2 Esp. Cas. 269 ; 1 Camp. 43. *Goodson v. Brooke*, 4 Camp. 163. *See* Insurance, vol. v. p. 174.

[1] Representations made by an agent generally bind the principal (*Peto v. Hague*, 5 Esp. 135), whether express or implied, if within the scope of his authority. *Helyear v. Hawke*, 5 id. 72. *Udell v. Atherston*, 30 L. J. Ex. 337.

Although a vendor who employs an agent to sell gives the latter no authority to warrant, yet if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent has exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction altogether, but if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty. *Parke, B.: Cornfoot v. Fowke*, 6 Mee. & W. 373. See *Udell v. Atherston, supra.*

If the servant of a manufacturer or tradesman, employed to sell his goods, sell them under a warranty, although he has no authority to give the warranty, yet if his master does not repudiate the contract, but receives the price, he will be responsible for the warranty. Thus it has been laid down, that the servant of a horse-dealer or livery stable-keeper can bind his master by a warranty, though, as between themselves, there was an order not to warrant. *Helyear v. Hawke, supra. Alexander v. Gibson*, 2 Camp. 555. *Fenn v. Harrison*, 3 T. R. 759. In these cases the servant was in the position of a general agent, employed for a principal to

(C) *Responsibility for Negligence or Wrongful Acts of Agent.*[1]

carry on his business. But the same rule is not applicable to an agent employed on a particular occasion; for no such implied authority is created. Thus, where a person, not a horse-dealer, sent his servant with his horse to sell it, with no authority to warrant, yet the servant sold it with a warranty; the court held that the buyer, taking a warranty from such an agent, takes it at the risk of being able to prove that he had the principal's authority; and if there was no authority in fact, the law does not create it. *Brady v. Tod*, 30 L. J. C. P. 223; 9 C. B. 592.

Where a purchaser, after the delivery of the abstract, having made an objection thereto, entered into possession, and thereby waived it, and the clerk of the vendor's solicitor, without any express authority, made an offer of compensation, it was held that such offer was of no effect. *Burnell v. Brown*, 1 J. & W. 168.

To bind an employer by a warranty made by his agent on a sale, it must be made at the time of the sale. Thus, an agent employed to sell a horse stated the age to the buyer at the time of showing the horse; but nothing was then said as to the price. It was held, in an action upon the warranty of the age, that there being no complete contract of sale at the time of making the statement, for want of a price being fixed, it did not amount to a warranty at the time of the sale so as to bind the master. *Helyear v. Hawke*, 5 Esp. 72. But when a sale is made under written particulars, the verbal declarations of the agent or auctioneer at the time of sale are not admissible to contradict the particulars. *Gunnis v. Eschart*, 1 H. Black. 289. *Powell v. Edmunds*, 12 East, 6. *Howard v. Braithwaite*, 1 Ves. & B. 210. *Jones v. Edney*, 3 Camp. 285; 3 Meriv. 53.

The misrepresentation or concealment of an agent in the case of contracts of insurance, has the same operation in avoiding the contract as if the principal himself had misrepresented or concealed the fact. *Seaman v. Finnerean*, 2 Stra. 1183; Parker, 207. *See* vol. v. p. 205.

If the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposed to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation. *Per Lord Abinger, C.B.: Cornfoot v. Fowke*, 6 Mee. & W. 385.

Wherever an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot approbate and reprobate the contract. He must adopt it altogether, or not at all; he cannot at the same time take the benefit which it confers, and repudiate the obligation which it imposes. *Per Lord Kingsdown: Bristowe v. Whitmore*, 9 W. R. 621.

The statements of the agent, which are involved in the contract as its foundation or inducement, are, in law, the statements of the principal. *Per Wilde, B.: Udell v. Atherston*, 30 L. J. Ex. 340; 7 Jur. N. S. 779. See *Brady v. Tod*, 9 C. B. 592; 30 L. J. C. P. 223. *Shurnock v. Lock*, 10 B. Moore, 39. But where a pawnbroker's shopman was heard to state that his uncle had lent money on witness's plate, this was rejected as against the master. *Garth v. Howard*, id. 451. So as to letters written by the agent. *Kahl v. Jansen*, 4 Taunt. 565; *see* 10 Ves. 128; Gow. 45.

In order to be binding upon the principal, the representations of the agent must be the foundation of the contract. Accordingly where an agent, employed to find parties willing to contract, sent them to the principal to conclude the bargain with him, and he made, in the course of conversation with them, statements and representations respecting the subject-matter of the contract which were not included in the contract afterwards entered into with the principal himself, it was held that the latter was not bound by them. *Knight v. Barber*, 16 Mee. & W. 69. *Cornfoot v. Fowke*, 6 id. 358.

If a fraud practised by an agent is not within his actual or implied authority, and the contract with reference to which it was practised is not adopted by the principal, the latter will not be responsible. For example: it was held that a shipowner was not responsible for the fraud of the captain in signing bills of lading, without having received any goods on board (*Grant v. Norway*, 10 C. B. 688); nor a wharfinger for a false receipt given by his agent, representing that certain goods had been received at the wharf, when, in truth, no such goods had been received. *Coleman v. Riches*, 16 C. B. 104.

If a principal, desirous of selling or letting property, knows of a latent defect, and expressly authorises his agent to state that it does not exist, or to make any statement of similar import; or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing; in either of these cases, the representation of the agent would be the representation of the principal, and, coupled with his knowledge of its falsehood, would be a fraud. *Cornfoot v. Fowke, supra.*

[1] A principal being responsible for the acts of his agent (*Lane v. Cotton*, 12 Mod. 490), he is answerable for his negligence or unskilfulness. *Aberville v. Slampe*, 1 Ld. Raym. 264. Thus, a smith, whose servant injures a horse brought to him to be shod, or a surgeon, whose servant treats a patient with gross want of skill, is liable to answer for the injury. 4 Bac. Abr. 405. So an action lies against the master for damage occasioned by his servant in exercising an unruly horse in an improper place, or by negligence in keeping a fire used in the master's service. 1 Ld.

IV. Rights of Principal with regard to Third Persons.[1]

Raym. 264; Salk. 13. And similar actions for negligence in driving carriages (6 T. R. 661; 2 Salk. 441; 1 Camp. 167), or navigating ships, &c. (6 T. R. 188); or negligently packing goods to be carried by the master as a common carrier (1 Wils. 182), are in frequent use. And though the injury be not occasioned by the person immediately employed, but by another whom he employs under him, or with whom he contracts for the performance of what he has undertaken; yet the responsibility of the first employer reaches through all the stages of the service, as the following case exemplifies:—A. employed B. to repair a house; B. contracted with C. to do the work, who engaged D. to furnish the materials. D.'s servant, by negligently leaving the materials in the road, occasioned an injury to the plaintiff, who was held entitled to recover against A. *Bush v. Steinman*, 1 B. & P. 429. *Leslie v. Pounds*, 4 Taunt. 469. *Stone v. Cartwright*, 6 T. R. 44. But the responsibility of the master for the servant's negligence or unlawful acts is limited to cases properly within the scope of his employment. See *Coleman v. Riches*, 16 C. B. 104; 24 L. J. C. P. 125. *See* Master and Servant, vol. v. p. 461; Negligence, id. p. 517.

Further, the principal is responsible for frauds committed by the agent in his employment. *Grammer v. Nixon*, 1 Camp. 127. Hence, the owner of counterfeit jewels, knowing them to be so, sent an agent abroad with them, to be disposed of, but without directions either to represent them as genuine, or to sell them to any one in particular. The agent, however, representing them as good jewels, procured a person to sell them as such, who was imprisoned by the laws of the country for deceit, for which injury he brought an action against the owner of the jewels, and recovered. *Southern v. How*, Bridgm. 126, 127; 2 Moll. 330; Cro. Jac. 468.

The principal is not, in general, liable for the criminal acts of his agent. *Grammer v. Nixon*, 1 Stra. 653.

Any unlawful meddling with, or conversion of property by a servant, or an agent in the service of his employer, subjects the latter to an action. 1 Stra. 505. As if a servant, employed in the management of business, purchase goods which have been stolen, the owner may recover the amount from the master, after a demand and refusal. 12 Mod. 521. Thus, also, where an agent for the East India Company purchased a ship for the use of the company of the master, who had no power to sell it, on a bill filed against the company, a decree was made that they should account for the ship and cargo, though the purchase was without their privity. 1 P. Wms. 396. So, a servant selling the goods of an intestate, and paying over the money to his master, makes the master liable as executor *de son tort*. 2 T. R. 97. Upon an action of trover against a person, a pawnbroker, it was held sufficient for the plaintiff to prove that he tendered the money for which the article was pawned to the pawnbroker's servant, who said he had lost it. 2 Salk. 441.

The previous command (4 Inst. 317), or subsequent assent (6 Com. Dig. 393) of the master to the trespass of the servant, makes him liable as trespasser. But he is not liable for trespasses committed by his servants beyond what his directions extend to (2 Leon. 75; Plow. 18; Eliz. 437); nor is he answerable for any excess committed in the execution of his lawful commands. Skin. 228; Lane, 90.

The responsibility of the principal is confined to acts done either under his express direction or in his service, and, therefore, under his constructive command. In all the cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury.

No wilful trespass of a servant, not arising out of the execution of his master's orders or employment, will make him responsible. 8 T. R. 533; 1 East, 106; 6 T. R. 135.

A factor employed by several, strangers to each other, cannot make them jointly liable by any act of his. *Pinckney v. Hall*, 1 Ld. Raym. 175.

It is alleged by Molloy, "that where one and the same factor acts for several merchants in the same transaction, they must run the joint risk of his actions, though they be strangers to each other; as if five merchants remit to one factor five distinct bales of goods, and the factor make one joint sale of them to one man, who is to pay a moiety down, and the other at six months' end; if the vendee fail before the second payment, each man must bear an equal share of the loss." 2 Moll. 331; 2 Atk. 622.

It has been decided, that where several persons employ a broker to buy one lot of goods, each agreeing to take an aliquot part, but without any mutual interest in the re sale, this does not make them partners. *Hoare v. Dawes*, Dougl. 356. *Cope v. Eyre*, 1 H. Black. 45.

[1] An action lies by the principal on a promise to pay his agent. *Mantrington v. Verron*, 1 B. & P. 101. *Seyneer v. Walmer*, Godb. 360); but it must be shown that the contract was made on his behalf. *Watson v. Swan*, 11 C. B. 756; 31 L. J. C. P. 210. An agent receiving a *del credere* commission does not change the responsibility of the buyer to the employer. *Grove v. Dubois*, 1 T. R. 113.

On enforcing contracts entered into by agents, the principal is subject to have them impeached, the same as if made by himself. *Thornton v. Moulton*, 1 Stra. 533. And, therefore, if an agent be permitted to deal as if he were principal, that which is a bar to the agent's right applies to his principal. *Coppin v. Walker*, 2 Marsh. 497; S. C. 7 Taunt. 237. And a payment to an agent, knowing him to be such, discharges the payer. *Rabere v. Williams*, 7 T. R. 360, n. And in an action by the principal, he may

V. Of the Responsiblity of the Agent towards his Principal.[1]

set off the money so paid to the agent (*George v. Clagett*, id. 359), in the absence of fraud and collusion. *Escott v. Millward*, id. 361, n. And the mere circumstance of the vendee knowing the agency does not raise the implication of fraud, without express knowledge that he acted as agent in that particular instance. *Anon.* Peake, N. P. C. 177.

The principal is entitled to recover back money paid by his agent on a failure of consideration (*Duke of Norfolk v. Horsley*, 1 Camp. 337. *Dalzell v. Mair*, id. 532); or paid by mistake (*Amber v. Bank of England*, 2 Dougl. 637). So, he may sue for money extorted from the agent (*Stevenson v. Mortimer*, Cowp. 805); or applied by the agent to an illegal purpose. *Clark v. Shee*, id. 197.

Where an agent misapplies property, it confers no better title on the receiver than he possessed himself. *Lee v. Lagary*, 1 Moore, 556.

[1] If the agent deviates from his principal's instruction he is responsible to his principal for any damage sustained by him in consequence (*Sheills v. Blackburne*, 1 H. Black. 159); as if goods be delivered to an agent to to sell at a particular place, and he sends them elsewhere. *Catlin v. Bell*, 4 Camp. 183.

If a house-agent lets a house to a notoriously insolvent person, or to one whom he knows to be insolvent, he will be responsible in damages to his employer. *Heys v. Tindall*, 30 L. J. Q. B. 362; 1 E. B. & S. 296.

An action will not lie against an agent for merely omitting to perform a commission, unless he is bound by some contract or duty to undertake it; and if he does undertake it, though gratuitously, he is liable to an action for misfeasance in the performance. B. & L. Pl. 51. See *Hart v. Miles*, 4 C. B. (N. S.) 371; 27 L. J. C. P. 218.

A mere forwarding agent is under no obligation to see whether the quality of the goods he is employed to ship or to forward corresponds with a contract which he has been instrumental in negotiating. *Zuilchenbart v. Alexander*, 29 L.J.Q.B. 236; 30 id. 254.

To support the action, the principal must have sustained actual damage. The loss of a supposed or probable advantage is not sufficient; and, therefore, in an action against an agent for not procuring an insurance, it is sufficient defence that the insurance, if made, could not have been enforced by law: nor is it any answer to that defence that, by usage and courtesy, such insurances are generally paid. 7 T. R. 157. An agent is bound to conduct the transaction entrusted to him in the usual way. 2 F. & F. 726.

Gratuitous agents are not responsible if they take the same care as they would of their own affairs (*Wilkinson v. Caveddale*, 1 Esp. 75. *Coggs v. Barnard*, 2 Ld. Raym. 909); and they are not liable for a mere nonfeasance. 2 Ld. Raym. 209. See Bailment, vol. ii. p. 98.

Any agent or factor who has general orders to dispose of goods for his principal to the best advantage, is bound to exercise that degree of diligence which a prudent man usually exercises in his own affairs; and consequently, he is authorised to dispose of the goods according to the best terms which can be obtained at the time; and if it shall appear that he has done so, and he has sold the goods, even upon credit (*Scott v. Surman*, Willes, 400), to persons in reputed good circumstances at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal, although some of these should fail. *Mackenzie v. Scott*, Beawes, 43. Where, however, the price is fixed, or orders have been given by the principal to sell for ready money only, from which he is not at liberty to depart, he will not be justified in selling for a less sum, or upon credit. Cowp. 395. So, where the usage of business does not authorise the giving credit, it cannot be given without subjecting the agent to liability; and an auctioneer is liable for neglect of duty, if he sells and delivers the goods of his principal otherwise than for ready money. *Brown v. Staton*, 2 Chit. Rep. 353. And necessity will, perhaps, on some occasions, justify a factor in deviating from his qualified authority, as if he be limited to sell goods at a fixed price, and the goods are of a perishable nature; here, perhaps, when they are no longer in a condition to be kept, the factor, if he have no opportunity of consulting his principal, may sell them at a less price to prevent a total loss. 2 Mod. 100; Comyn on Contracts, 236.

The time of credit must, in all cases, be reasonable and customary (Bulst. 103; Moll. 328), and the security such as the principal may avail himself of by reasonable diligence, and without extraordinary risk or trouble. The agent under a commission to sell or dispose of his principal's property must conform in all things to his authority, and any unauthorised disposal or adventure of such property, and not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent.

The agent cannot himself become the purchaser of the property intrusted to him to sell, unless he deals for it with the principal openly and fairly, and after a full disclosure of everything he knows concerning it. *Murphy v. O'Shea*, 2 J. & L. 95. *Trevelyan v. Charter*, 9 Beav. 140. And he cannot purchase his own goods for his principal. *Bentley v. Craven*, 18 Beav. 76.

The agent is bound to render just and true accounts, and to keep the property of his principal unmixed with his own property, or the property of other parties (*Thorn v. Bigland*, 8 Ex. 725. *Gray v. Haig*, 20 Beav. 238. *Clarke v. Tipping*, 9 id. 284); and he must account for the produce of all sales effected by him when called upon so to do. *Boorman v. Brown*, 3 Q. B. 515. *Boden v. French*, 10 id. 886. See *Leask v. Pole*, 29 L. J. Ch. 677. *Tindal v. Powell*, 4 Jur. 944.

An ordinary agent is not bound to pay purchase monies to his principal till he receive them. *Varden v. Parker*, 2 Esp. 710. But an agent who receives a *del credere*

VI. Of the Responsibility of the Principal towards his Agent.

(A) *To Pay Commission.*[1]

commission is liable to his principal, though he never receives the money. *Grove v. Dubois*, 1 T. R. 112. *Bize v. Dickanson*, id. 285. *Gall v. Comber*, 1 Moore, 279. And if such an agent receive the price in bills, and remit them to his principal, his liability will continue should they not be paid. *Lucas v. Groning*, 7 Taunt. 164; 2 Marsh. 460.

The agent is bound to keep a clear account, and communicate the results of it from time to time; and, when called upon, to account without suppression, concealment, or overcharge. 8 Ves. jun. 49. *Lord Hardwick v. Vernon*, 14 Ves. 510. *Topham v. Braddick*, 1 Taunt. 572. *See* vol. i. p. 126.

If the agent effects a contract of sale at a high price, in consequence of a fraudulent representation made by him, and receives such price, but is afterwards compelled to refund the money to the purchaser, the principal cannot maintain an action for money had and received against the agent to recover the price; inasmuch as the sale is avoided by the fraud of the agent, the money received under it becomes the property of the purchaser, and is not money had and received to the use of the principal. *Per Parke, B.: Murray v. Mann*, 2 Ex. 541; 17 L. J. Ex. 256.

An agent is responsible for money received by a sub-agent employed by him for the purpose of receiving the money, whether the principal had or had not reason to suppose that there was any necessity for the employment of a sub-agent. *Mackersey v. Ramsays*, 9 Clark & Fin. 845. *Ireland v. Thompson*, 4 C. B. 149.

[1] The right to commission may either be the subject of a special contract or rest on the *quantum meruit*. *Child v. Morley*, 8 T. R. 610. *Lockwood v. Levick*, 8 C. B. 603. The amount of the commission is either regulated by a particular contract in each instance, or determined by the usage of trade (*Eicke v. Meyer*, 3 Camp. 412. *Cohen v. Paget*, 4 id. 96. *Roberts v. Jackson*, 2 Stark. N. P. C. 225. *Levi v. Barnes*, 1 Holt's N. P. C. 412); or, in certain cases, it is settled by act of parliament.

An agent who negotiates an illegal transaction is entitled to no commission. *Stackpole v. Earl*, 2 Wils. 133. *Haines v. Busk*, 5 Taunt. 521; 1 Marsh. 191. *Smith v. Lindo*, 27 L. J. C. P. 335. Nor is one who has neglected his duty entitled to compensation. *Hurst v. Holding*, 3 Taunt. 32. Thus, an agent whose duty it is to keep an account cannot support a charge for his labour if he have kept none. 8 Ves. 371. *White v. Lady Lincoln*, 11 id. 355. So, if the agent be guilty of such negligence as to render his services nugatory, and of no avail to his employer, he is not entitled to any compensation (*Denew v. Daverell*, 3 Camp. 451); and, although negligence is not attributable to the agent, yet, if his services be rendered abortive, he cannot claim commission. Thus, where A. commissioned B. to sell for him, and the ship, when put up to sale, was bought in, it was held that B. was not entitled to a commission on the sale for her. *Mestaer v. Atkins*, 1 Marsh. 76.

If an agent be made executor to his employer, the character of agent and the right to commission ceases.

If a man having a house or estate to sell or let, places it in the hands of several house-agents, with instructions to procure a purchaser or tenant, the successful house-agent is alone entitled to commission upon the purchase-money or rent, unless instructions have been given to the other house-agents to advertise the house, or render some particular or special services in the matter entitling them, by the custom of the trade, to some remuneration for their services. *Prickett v. Badger*, 1 C. B. (N. S.) 296; 26 L. J. C. P. 33. *Gibson v. Crick*, 2 F. & F. 766.

Where A. promised to pay B. a sum of money if he would procure him a tenant at a certain rent, it was held that B. was entitled to the money as soon as a person introduced by him had been accepted by A., and a binding agreement for the tenancy had been entered into. *Horford v. Wilson*, 1 Taunt. 15.

When a commission agent employed by a manufacturer to obtain orders, is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid bargain of purchase and sale has been made between the manufacturer and the purchaser introduced by such agent, whether the goods are at the time in existence or not in existence, and whether the contract is not ultimately carried into effect, and whether it turns out to be a bad bargain productive of loss, or an advantageous transaction. *Lockwood v. Levick*, 8 C. B. (N.S.) 603; 29 L. J. C. P. 340.

If the commission be payable on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal, after deducting all charges and expenses. *Caine v. Horsfall*, 1 Ex. 519. As to different scales of commission, see *Biggs v. Gordon*, 8 C. B. 638.

The right of an agent to be reimbursed upon the revocation of his authority depends upon the terms of the contract by which his services were retained, and the custom and usage of the trade in which he is engaged.

When an agent is employed to sell or let, on the terms that he is to be paid a certain per-centage on the price or the rent, the general understanding is that he takes the chance of a large remuneration in case he finds a purchaser or a tenant, but gets nothing if he fails in so doing; but if trouble and expense have been properly incurred by the agent in endeavouring to carry into effect the instructions of the principal, and the latter revokes the authority, and prevents the agent from reaping the expected reward, the principal is bound to remunerate

him for his trouble and expense in the matter. *Simpson v. Lamb*, 17 C. B. 616. *Topping v. Healey*, 2 F. & F. 325. *Green v. Reed*, id. 226. In accordance with this principle, if, after the house-agent has found a purchaser willing to purchase at the price stipulated by the principal, the principal decline, without any sufficient excuse, to accept of him, and revoke the authority of the agent, the latter will be entitled to sue for a reasonable remuneration for his services, and the amount of his commission on the price would seem to afford the measure of damages; but if the authority is revoked before it is executed, and a purchaser has been found, it does not follow that he is entitled to sue upon an implied contract for remuneration for his work and labour in endeavouring to find a purchaser or a tenant. *Prickett v. Badger*, *ante*. *Campanari v. Woodburn*, 15 C. B. 407. But, notwithstanding a revocation of authority before any beneficial service has been rendered by the house-agent, if, either by agreement or custom of trade, a fee is payable for entering the property in the register-book, such fee will be demandable, and, in general, such registration fee is all that the house-agent is entitled to charge for the ordinary services, in the absence of any special instruction for advertisements. *Simpson v. Lamb*, 17 C. B. 616.

[1] If an agent, in execution of his duty, conducts himself so unskilfully as to incur unnecessary expenses, he is not entitled to reimbursement (*Capp v. Topham*, 6 East, 392); nor can any claim be made for advances in an illegal transaction. (Id. 391.) But if there be any subsequent acquiescence of the principal in any disbursement or act of the agent, he will be chargeable therewith, though it were not warranted by his directions or otherwise. 5 Burr. 3727; 4 Taunt. 165.

Agents are entitled, besides their commission, to be reimbursed all advances made in the regular course of a legal employment, such as the incidental charges for duties, warehouse-room, &c., and all payments made for the necessary preservation of property committed to their care (Paley, 79; 1 Roll. Abr. 124, pl. 7): and cases frequently occur in which they are justified in making advances without particular directions, and under exigencies not provided for by the regular rules of their business, and particularly where they act for the best, and where, from the circumstances of the case, the principal's authority to the disbursements might be reasonably inferred. 1 Bro. 323. But mere voluntary and officious payments of an agent, not warranted as being agent's principal's interest, or otherwise, or against express directions, cannot be recovered by him. *Edmiston v. Wright*, 1 Camp. 88; *see* 8 T. R. 610; 1 id. 112. And an agent is not justified in embarking the property of his principal in any manner not authorised by the terms of his employment, however beneficial to the principal the prospect may be. Thus, if a factor lends his principal's money without instructions, though for his benefit, he has no claim to have it allowed in his account.

The principal is bound to indemnify the agent in respect of all payments which may be made by him in the due course of his employment. *Risbourg v. Bruckner*, 3 C. B. (N. S.) 823; 27 L. J. C. P. 90. *Taylor v. Stray*, 2 C. B. (N. S.) 175.

If the agent has necessarily incurred liabilities and expenses in following out his instructions *bonâ fide*, he may sue the principal upon an implied promise of indemnity (*Adamson v. Jarvis*, 4 Bing. 71. *Betts v. Gibbins*, 2 Ad. & E. 57; 4 Nev. & M. 64. *Rawlings v. Bell*, 1 C. B. 960); and he may recover money he has been compelled to pay for his principal, although the latter has not derived any advantage from such payment. *Brittain v. Lloyd*, 14 Mec. & W. 762; 15 L. J. Ex. 43. *Pettman v. Keble*, 9 C. B. 701. But he cannot resort to his principal for an indemnity against the consequences of his own wrongful act, or want of skill and caution in the execution of his commission. *Toplis v. Grane*, 7 Scott, 641. An agent occupying premises for the convenience of the business acquires no estate therein. *White v. Bayley*, 10 C. B. 227.

[2] In general, an agent acting as such is not liable to be sued on contracts which he makes on behalf of his principal (*Paterson v. Gandesequi*, 15 East, 61. *Everth v. Smith*, 2 M. & S. 278), unless his principal be unknown to the other party (*Rann v. Hughes*, 7 T. R. 350, n. *Walsh v. Whitcomb*, 2 Esp. 567. *Paterson v. Gandesequi*, *supra*. *Milvain v. Perez*, 30 L. J. Q. B. 90. *Deslander v. Gregory*, id. 36); or, where there is no responsible principal to resort to, as where the commissioners of a navigation act entered into an agreement with the engineer (Paley, 251); or where the agent enters into an agreement as if he were the principal, and the credit is given to him, though he describe himself as an agent, and particularly in contracts under seal, he is personally liable, and he alone can be sued. 5 East, 148; 2 id. 142; 6 T. R. 176; 1 id. 674; 15 East, 62; 6 Taunt. 147; 1 Marsh. 500. And where an agent individually binds himself, as if a servant lease land for his master, reserving the rent to his master, and, to invite the lessee to take the lease, promise that he shall enjoy it without incumbrance, if the land be incumbered an action lies against the servant. 3 T. R. 264. And masters of ships are liable for necessaries, &c. furnished abroad, or in this country, unless they are furnished on credit of the owners (Cowp. 639; 7 T. R. 302; Carth. 58); and where an agent does not pursue in any degree the principal's authority, or so far exceeds it as to discharge the principal from responsibility for his acts (3

T. R. 761); or where he acts under authority which he knows the principal has no right to give, as an agent selling property under a notice that it does not belong to his principal, he is personally liable. Cowp. 565, b. So, where an agent has been authorised to do an act for a third party, and he is put in possession of everything that will enable him to complete it, and he neglects so to do, he will personally be liable to the third person; as if an agent receives money from his principal to pay to A., and promises A. to pay him, the latter may sue him on his neglect to pay it, for the agent is considered to hold it on the party's account.

Whenever an agent contracts in his own name for the fulfilment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfilment of the act undertaken to be done, although he is known to be acting only as an agent for some third party (*Reid v. Draper*, 30 L. J. Ex. 268), unless it be expressly agreed that he was not to incur any personal liability upon the contract. *Wake v. Harrop*, 30 L. J. Ex. 273. And notwithstanding he signs by procuration of or for a named principal, or declares at the time that he contracts on behalf of a named principal, yet if in the body of a written contract he contracts in his own name, and signs his name to the contract, he may render himself personally responsible. *Parker v. Winlo*, 7 E. & B. 942; 27 L. J. Q. B. 49. *Lennard v. Robinson*, 5 E. & B. 126; 24 L. J. Q. B. 275. See *Tanner v. Christian*, 4 E. & B. 597; 24 L. J. Q. B. 91. The question of his liability depends upon the terms of the particular contract, construed in connexion with the surrounding circumstances and the relative situation of the parties at the time the contract was entered into. *Dowman v. Williams*, 7 Q. B. 109. See *Oglesby v. Yglesias*, E., B. & E. 930; 27 L. J. Q. B. 356. And where the agent contracts avowedly as such, and adds the words "as agent" or "by procuration," to his signature, and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally liable upon the contract. *Deslandes v. Gregory*, 29 L. J. Q. B. 95; 30 id. 36. *Green v. Kopke*, 18 C. B. 549. *Mahoney v. Kekule*, 14 C. B. 390.

Although brokers contract as such on the face of their bought-and-sold notes, yet if they do not name their principals they are in general liable to be treated as principals, and sued as such. *Humfrey v. Dale*, 7 E. & B. 278; 26 L. J. Q. B. 138.

When a written contract has been entered into by an agent on behalf of his principal, and the agent's representative character is not disclosed on the face of such written contract, the agent is entitled to maintain an action thereon, unless the principal interferes to prevent him. *Schmalz v. Avery*, 16 Q. B. 659; 20 L. J. Q. B. 228.

When an English agent is contracting on behalf of a foreign principal, it will in general be presumed that the intention of the parties was that the agent should be personally responsible. *Wilson v. Zulueta*, 14 Q. B. 405; 19 L. J. Q. B. 49. *Cooke v. Wilson*, 1 C. B. (N. S.) 164. *Reid v. Draper*, 6 H. & N. 813; 30 L. J. Ex. 208. *See* id. Q. B. 254; 3 Ex. 207.

If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not in such a case be liable upon the contract. *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J. Q. B. 311. *Wake v. Harrop*, 30 L. J. Ex. 273.

The liability of an agent under a *del credere* commission arises under an original independent contract, and is not a promise to answer for the debt of another within the Statute of Frauds; it is only another form of selling goods. *Couturier v. Hastie*, 8 Ex. 40. *Wickham v. Wickham*, 2 K. & J. 478.

If an agent is duly authorised by power of attorney, under seal, to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, the principal and not the agent is bound by the deed. See *Jenkins v. Hutchinson*, 13 Q. B. 744; 18 L. J. Q. B. 274. *Delandes v. Gregory*, 30 L. J. Q. B. 36. *Mahoney v. Kekule*, 14 C. B. 390; 23 L. J. C. P. 54.

If a person without authority falsely represent that he is authorised as agent for another to contract on his behalf, and induces another to enter into a contract with him on behalf of such his represented principal, he is liable in an action of tort for such false representation; or in *assumpsit* for breach of such warranty. *Collen v. Wright*, 8 E. & B. 647; 27 L. J. Q. B. 217. *Simons v. Patchett*, 26 L. J. Q. B. 195. *Oxenham v. Smythe*, 31 id. Ex. 110. *Pow v. Davis*, 30 id. 257; 1 E. B. & S. 220.

A person who contracts in his own name on behalf of another, but who is really a principal, cannot shelter himself from responsibility by describing himself on the face of the contract as an agent, and providing that he shall not be personally responsible. *Schmalz v. Avery*, 20 L. J. Q. B. 229. See *Owen v. Van Uster*, 10 C. B. 324. *Carr v. Jackson*, 7 Ex. 382; 21 L. J. Ex. 137. See *Wake v. Harrop, supra.*

If a party bids at an auction, and gives his own name to the auctioneer as the purchaser, he may be treated as the contracting party, although he made the purchase as agent for another. *Williamson v. Barton*, 31 L. J. Ex. 170.

If a party describes himself on the face of a written contract as agent, but does not disclose who his principal is, he may repudiate the agency, and claim the benefit of the contract as the principal, if he is in reality the principal. *Schmalz v. Avery*, 16 Q. B. 663; 20 L. J. Q. B. 231.

If an agent receives money in the name of his principal by fraud, extortion, or deceit, if he detain goods which he has no right to detain, and compels the owner to pay him money as the price of their restoration, he

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IX. „ Termination or Revocation of the Agent's Authority.[1]

cannot shelter himself from responsibility on the ground that he is an agent. *Smith v. Sleap*, 12 Mee. & W. 588. *Wakefield v. Newbon*, 6 Q. B. 276. *Ashmole v. Wainwright*, 2 id. 837. *Oates v. Hudson*, 6 Ex. 346. See *Sharland v. Mildon*, 10 Jur. 771.

The agent may be sued if he has money in his hands not paid over, which has been paid to him by mistake (*Cox v. Prentice*, 3 M. & S. 344. *Buller v. Harrison*, Cowp. 565); but if it has been paid over, the principal must be sued. *Cary v. Webster*, 1 Stra. 480. *Whitbread v. Brooksbank*, Cowp. 69.

A public officer of the state, acting in a public capacity, does not incur a personal liability to third persons. *Macbeath v. Haldemond*, 1 T. R. 172. *Unwin v. Wolseley*, id. 674. *See* 1 East, 135–579; 5 id. 148; 7 Price, 2; 3 B. & A. 47. Thus, the Secretary of War is not liable to a retired clerk of the War-Office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such Secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the Secretary, who is the agent and officer of the Crown, and responsible only to the Crown for the due execution of the trust committed to him. *Gidley v. Lord Palmerston*, 7 Moore, 91.

The clerk of a county court, who gave orders for the fitting up of a building for the sittings of the court, was held not to be a public officer acting in a public employment, so as to be exonerated from liability in respect of the orders so given. *Autey v. Hutchinson*, 17 L. J. C. P. 304.

An agent cannot, in general, be sued by a third person for a neglect or nonfeasance in the business of his principal. Thus, if a coachman lose a parcel, his master is liable, and not himself (Say. 41); neither is he liable for any deceit or false warranty in the case of a sale, but he is liable for all tortious acts and wilful trespasses, whether by authority of his principal or not (3 P. Wms. 379); as, if goods are delivered to A. to keep, who delivers them to B., to keep to the use of A., and B. wastes or destroys them, the owner may have an action on the case against B., for the agent thereby becomes a wrongdoer. 1 Bl. Com. 430. And in every case where a master has not power to do a thing, whoever does it by his command is a trespasser. 2 Mod. 67; 2 Lev. 172.

To discharge a party from liability for a nonfeasance on account of his agency, he must show that he was actually an agent, and not nominally such; for if he be really a person acting for himself, and is always looked upon as if he were a principal, he will be liable. A servant or agent is, however, liable to a third party for a misfeasance. *Lane v. Cotton*, 12 Mod. 488.

[1] Completion of the object determines the agent's authority. *Blackburn v. Scholes*, 2 Camp. 343.

A power of attorney or other authority is in general revocable from its nature, but there is this exception, viz. where a power of attorney is part of a security for money, there it is not revocable. The principle is applicable to every case where the power is necessary to effectuate any security; therefore, where a man assigned all his effects in trust for the benefit of the trustee and his other creditors, and executed a power of attorney to the trustee to call in his debts for the purposes of that trust, it was held to be part of the security for the payment of the creditors, and therefore not revocable. *Walsh v. Whitcomb*, 2 Esp. Cas. 565. So, where a power of attorney is executed for a valuable consideration, a court of equity will not permit it to be revoked. *Bromley v. Holland*, 7 Ves. jun. 28.

The agent's power is determined by the bankruptcy of the principal (*Hovill v. Lethwaite*, 5 Esp. 158); but this does not extend to his authority to perform a mere formal act, as a power to sign a deed or other instrument, which he may do with effect, notwithstanding his bankruptcy. 3 Mer. 322. *Hudson v. Granger*, 5 B. & A. 31. An agent's authority is determined by his death, and his personal representatives can take no step therein.

An agent's power, though coupled with an interest, ceases on the death of the principal. *Rex v. Corporation of Bedford Level*, 6 East, 356. *Hammonds v. Barclay*, 2 East, 227. And if an agent agrees to act for a firm for a term of years, the contract will be dissolved before the term has expired by the death of one of the partners. *Tasker v. Shepherd*, 30 L. J. Ex. 207. The death of the principal unknown to the agent will not render the latter liable. *Smout v. Ilbury*, 10 Mee. & W. 1.

Where the principal dies before the agent has acted, and after the death he sell the principal's goods, he will not be entitled to agreed commission, unless the personal representative has renewed the authority with knowledge of the contract. *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13.

An agent's power may be countermanded before execution; but if coupled with an interest, he must consent. *Watson v. King*, 4 Camp. 272. *Hovill v. Lethwaite*, *supra*. *Farmer v. Robinson*, 2 Camp. 339, n.

If the principal furnishes his agent with a sum of money, to be expended in the purchase of property, the principal may, at any time before the purchase is made and the money expended, revoke the authority, and require the money to be repaid to him. *Fletcher v. Marshall*, 15 Mee. & W. 763. So, where goods are entrusted for sale to a commission-agent, the principal may at any time before the agent has sold them require him to return them. *Raleigh v. Atkinson*, 6 id. 670. And the agent has no right, after his authority has been thus countermanded, to sell the goods for the purpose of repaying

X. Of Actions connected with.

(A) *Of the Parties.*[1]

himself his advances. *Smart v. Sandars*, 3 C. B. 380; 16 L. J. C. P. 39. *Chinnock v. Sainsbury*, 30 L. J. Ch. 409. But this power of revocation does not exist if the agent is himself interested in, or responsible for the payment of the money, according to the directions he received when it was placed in his hands (*Yates v. Hoppe*, 9 C. B. 541); or if he has done anything to render himself personally liable to the third party in consequence of the orders of the principal. *M'Ewen v. Woods*, 11 Q. B. 13; 17 L. J. Q. B. 207.

Where a debtor handed to his creditor a power of attorney, authorising him to sell certain lands of the debtor, and pay the debt out of the proceeds of the sale, it was held that the power of attorney could not be revoked. *Gaussen v. Morton*, 10 B. & C. 731. *Clerk v. Laurie*, 2 H. & N. 200.

[1] The general rule is, that where a contract is entered into with A., as agent for B., it is in contemplation of law entered into with B., and B. alone can sue for a breach of it; but in most cases it is a question for the jury with whom the contract declared upon was in fact made; and evidence is admissible on behalf of the defendant to show that it was really entered into with some third party, and that the plaintiff on the record was an agent merely, and not a principal.

A mere agent, with whom a contract is made on behalf of another, cannot support an action thereon. *Pigott v. Thompson*, 3 B. & P. 147. Hence, a captain of a ship cannot maintain an action in his own name upon an implied promise to pay demurrage, though he may on an express contract with him to pay it. 4 Taunt. 152. But when the agent has any beneficial interest in the performance of the contract, as for commission as a factor or broker (*Grove v. Dubois*, 1 T. R. 112); or an auctioneer (*Williams v. Millington*, 1 H. Black. 81. *Coppin v. Walker*, 2 Marsh. 497), he may sue in his own name.

A policy-broker, whose name is on the policy, or the captain of a ship for freight (6 Taunt. 62); or where he has exceeded his authority, and thereby made himself a principal; and in some cases, where he has rendered himself liable to his principal by his negligence or otherwise, if he were to pay money under circumstances which give a right to recover it back (Cowp. 804), may bring the action in his own name, though the principal or owner in all these cases might sue.

Any agent who has the possession of his principal's property, and is not a mere bailee, but has some interest therein, can bring an action for any injury affecting the possession. 1 H. Black. 81; 4 East, 228. Where a factor or any other agent has a lien upon goods entrusted to him for sale, and which he has sold pursuant to that trust, the lien attaches upon the price, and the factor has a right to enforce the payment of the money to himself, in opposition to the claim of the principal. Cowp. 256. But to entitle the agent to this privilege, the debtor should have notice of this lien previously to his payment over to the principal, and the agent is bound to offer an indemnity. (Id. 225.) If an agent is answerable to his principal for the payment of the price of his goods sold, or any other debt, he may claim the right of suing for it as an agent acting under a *del credere* commission: in which case, indeed, he may be considered as the owner of the goods. 3 B. & P. 489.

Where there is an express contract under seal with the agent, and his signature to the same is general, without any qualification of his acting as agent, or where the credit is given to him alone, he alone can sue and be sued. 3 Camp. 320; 5 East, 148; 2 id. 142; 1 T. R. 674. And if the agent has paid money under a mistake, an action will lie in his own name to recover it back. *Stevenson v. Mortimer*, Cowp. 805.

There is nothing, either in law or in mercantile practice, to prevent one known to be a broker from entering into an agreement in his own name, so as to make himself the contracting party, with the rights and liabilities of a contractor.

An agent may lawfully say, "I act for A. B., but I will make the contract myself, though on his account, so that you shall have me responsible, as if I were myself the contracting party." Such a bargain is in effect made whenever the agent enters into a written contract in his own name, though he be known to be an agent. In such a case he may sue on it; but if by the terms of the contract the agent contract expressly for the principal, any personal liability on the part of the agent will be negatived, and the principal, and not the agent, must sue on the contract. *Fawkes v. Lamb*, 31 L. J. Q. B. 98.

If there has been a fraudulent or collusive concealment of the principal, he will not be allowed to come forward and claim the benefit of the contract; for example, if it appear that an agent, treating for the purchase of land, contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal considerations, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal cannot come forward and enforce the contract so obtained. See *Humble v. Hunter*, 17 L. J. Q. B. 350.

The possession which a factor, or other agent, has of his principal's property, entitles him to bring an action of trespass or trover (1 H. Black. 81) for injuries affecting the possession. *Solomons v. The Bank of England*, 13 East, 135, n. And it has been said, that a factor to whom goods have been consigned, and who has never received them, may maintain trover. 1 B. & P. 47. A doubt has been expressed whether a mere

(B) *Pleadings.*[1] (C) *Evidence.*[2]

PRINCIPAL and SURETY. *See* also Guarantee, vol. iv. p. 611.

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(A) *He is Liable in respect of such Acts and Contracts only as are within the terms of his Contract of Indemnity*, p. 238.

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(C) *And where given to a Firm, the Security, unless otherwise expressed, is at an end on a Change of Partners*, p. 240.

(D) *And where it refers to the Duties of an Office, by the Appointment of the person to a Different Office, or a material Change in his Duties*, p. 240.

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agent, to whom a bill of lading is indorsed without consideration by the consignor to enable him to receive the goods, can maintain trover before the receipt of them. See *Cox v. Harden*, 2 East, 211. But it seems at present to be considered that he may, provided the consignment be not countermanded. *Waring v. Cox*, 1 Camp. 369.

If the agent part with the money of his principal under a mistake, or by reason of a fraudulent representation, either principal or agent may recover it back. *Holt v. Ely*, 1 E. & B. 795.

[1] An agreement executed by an agent may, in pleading, be described as a contract by the principal. *Nickleson v. Croft*, 2 Burr. 1188.

In an action by agent against principal, the former may recover for necessary disbursements, either under a special count stating a promise to indemnify, and a breach, or under a count for money paid. *Westropp v. Solomon*, 8 C. B. 369. *Johnston v. Usborne*, 11 Ad. & E. 549.

[2] The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by a power of attorney, it must be proved by the production of the instrument itself, that it may appear whether the authority has been pursued. 1 Esp. Cas. 89. And if the act be such as could only be done under a written authority, it seems requisite to produce it (3 P. Wms. 427); or to account for the non-production. 4 Camp. 88. But in some cases it is sufficient to prove that the agent has acquired credit by acting in that capacity, and has been recognised by the principal in other instances. See *Moody v. Brighton Railway Co.* 1 E. B. & S. 290.

In all actions founded upon the acts of agents, whether upon contracts or for injuries done by them, for which damages are sought against the principal, it is necessary to give such evidence as establishes the relation between employer and employed. 7 T. R. 113. When the general relation does not exist, it must be shown in the particular instance. (Id.)

In all mercantile transactions, except where the authority is specially given by power of attorney, or other express commission in writing, the fact of usual employment, from which the public is justified in giving credit to the person so employed, forms the usual evidence of authority. The circumstances under which that presumption may be made has been already treated of (*see* Master and Servant, vol. v. p. 461); or where no previous authority can be proved, it is often sufficient to prove a subsequent assent by the person for whom an act is done; and his accepting the benefit of the acts amounts, in many instances, to prove such assent.

After the authority is established, the next thing necessary, in order to recover upon a contract made by an agent, is to establish the contract itself by proof; everything which forms a part of the contract, the declarations of the agent at the time of the contract, or upon which it is founded, are equivalent in effect to those of the principal, and of course may be proved by parol evidence, or by the handwriting of the agent. But declarations which do not make any ingredients in the foundation of the contract are not evidence of the facts to which they refer, though those facts may be connected with the transaction.

If the contract arise upon the payment of money, or the delivery of goods, it is sufficient to show that the money was paid, or the goods delivered to the agent of the party to be charged. *Matthews v. Haydon*, 2 Esp. Cas. 509. *Jones v. Perchand*, id. 507.

Notwithstanding the contract has been in writing, the rule that parol evidence cannot be received to vary a written contract does not prevent it being shown whether the parties contracted in the character of principals or agents. *Humfrey v. Dale*, 26 L. J. Q. B. 137; 27 id. 395. *Higgins v. Senior*, 8 Mee. & W. 844. *Beckham v. Drake*, 9 Mee. & W. 91. *Wake v. Harrop*, 30 L. J. Ex. 273.

The fact that a party has agreed to sell goods on commission may be proved by oral

(E) *So in the case of a Surety for the performance of a Contract; if the Contract be altered he will not be liable*, p. 241.

III. Of the Discharge of the Surety, p. 241.

(A) *By Time given to Principal*, p. 241.

(B) „ *Delivering up of Securities held by the Creditor at the time of the Contract of the Surety*, p. 241.

(C) *By other Act or Omission of Creditor injurious to the Surety*, p. 242.

(D) *By Satisfaction or Release of the Original Debt*, p. 242.

(E) „ *Release of Co-Surety*, p. 243.

IV. Rights and Remedies of the Surety, p. 243.

(A) *To be Indemnified by the principal Debtor*, p. 243.

(C) „ *have the benefit of Securities*, p. 243.

(D) „ *Contribution from Co-Surety*, p. 243.

V. Actions against Surety, p. 244.

I. Of the Relation of Principal and Surety, and how it may be Created.[1]

evidence, though the terms as to the payment of such commission have been reduced into writing. *Whitfield v. Brand*, 16 Mee. & W. 282.

[1] *See* Burge on Suretiship; Theobald, Principal and Surety; Fell on Guarantees. A surety is a person who becomes answerable for the payment of a debt, or performance of some other act by another person, who is in the first instance liable to the payment or performance. At common law no particular form is essential to the validity of such an engagement.

The relationship of principal and surety is frequently created by deed, in which case writing, sealing, and delivery are essential to the validity of the instrument. Com. Dig. Fait. A, 123. These being proved, no inquiry can be made as to the consideration (Plowd. 308); nor can any evidence be admitted to contradict or explain anything appearing on the face of the deed, excepting upon the grounds of fraud or illegality; and upon failure in performance of the engagement, the remedy of the obligee is immediate against the obligor or covenantee.

A written promise duly made upon adequate consideration is equally binding with a contract by deed. Every agreement, not under seal, is, in law, regarded as a parol agreement, and will not be binding, unless made upon an adequate consideration, &c. *See* Guarantee, vol. iv. p. 611, as to the operation of sect. 4 of Statute of Frauds.

Prior to the 19 & 20 Vic. c. 97, it was necessary that the consideration (being a material part of the contract) should appear in the writing; but by sect. 3 of this statute the necessity for the consideration being expressed in writing is abolished. *See* vol. iv. p. 613.

If the document is so vague and uncertain that the nature and extent of the undertaking and liability cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise (*Holmes v. Mitchell*, 28 L. J. C. P. 301); as where the name of the principal is omitted or left in blank. *Williams v. Lake*, 29 L. J. Q. B. 1.

Such engagements are frequently entered into by bond, which precludes the necessity of a consideration. Where there is a consideration, as where the undertaking of one party for the fidelity of a clerk or servant is the consequence of a preceding request to the other to take him into his employ, and the inducement of the other so to take him; there, the engagement may be by a simple memorandum in writing. Such memorandum should contain all the requisites for a valid agreement, namely, the parties, the promise, and the signature, and would come within the same rules in every respect as those before stated upon the subject of guarantees.

A memorandum of this description would not fall within the exception in the stamp act, which relates only to contracts respecting the sale of goods, and, therefore, would require an agreement-stamp to give it validity.

A doubt sometimes arises upon the construction of the contract, or the surrounding circumstances, whether the contract is that of a surety coming in aid only of a principal debtor or contractor, or undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal and sole contracting party, stipulating for some benefit or advantage for a third party, who is not bound by the contract, and on whom no liability attaches. See *Spark v. Heslop*, 28 L. J. Q. B. 197. If upon examination of the circumstances, in

II. Of the Nature and Extent of the Obligation of the Surety.

(A) *He is Liable in respect of such Acts and Contracts only as are within the terms of his Contract of Indemnity.*[1]

a case where the contract is equivocal, it should appear that the party to whom the goods have been furnished has been treated as the debtor and principal contracting party, if the credit has been given to him in the tradesman's books, and he has been applied to for payment, then the promisor can only be made liable as a surety after default of such debtor and principal contracting party. If the promisor is himself interested in the subject-matter of the promise, or the transaction to which it relates, he will stand in the position of a principal contracting party. *Fitzgerald v. Dressler*, 5 Jur. N. S. 578. *White v. Corbett*, E. & E. 692.

If, when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the surety with the knowledge of the creditor, such misrepresentation or concealment amounts to a fraud upon the surety, and discharges him from his engagement. *Stone v. Compton*, 6 Scott, 846; 5 Bing. N. S. 142. *Railton v. Mathews*, 10 Clarke & Fin. 942. *Jackson v. Duchaire*, 3 T. R. 552. *Pidcock v. Bishop*, 3 B. & C. 605; 5 D. & R. 605. A creditor, however, is not bound to inquire under what circumstances the consent of the surety has been obtained; but if he abstain from inquiry because he sees the result of inquiry would be to disclose fraud, he cannot say he was innocent of knowledge of the fraud. *Owen v. Homan*, 4 H. L. C. 1035. *Hamilton v. Watson*, 12 Clark & Fin. 119. *Wythes v. Labouchere*, 5 Jur. N. S. 499. *Blest v. Brown*, 8 Jur. 187, 602.

If a man finds that his agent has betrayed his trust; that he owes him a sum of money; or that it is likely he is in his debt, and under such circumstances requires sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he is not so, he cannot afterwards avail himself of a guarantee obtained from a party who was ignorant of what was known to and ought to have been disclosed by the employer. But if a person having doubts as to the circumstances of his agent, and therefore requiring fresh sureties, states his doubts at the time to these sureties, they have then no right to complain that they are called upon to fulfil their engagement. *Smith v. Governor of Bank of Scotland*, 1 Dow, 292. *Wythes v. Labouchere, supra. Pledge v. Bass*, Johns. 663; 6 Jur. 695; *see* 26 L. J. Ch. 201.

[1] The same rules which govern the construction of all contracts, govern the construction of guarantees; but it is said that the courts are always inclined to favour sureties, and will never go beyond the strict letter of the contract. 2 T. R. 370; 1 Stark. 193; 2 Saund. 403. *Blest v. Brown, supra.* The language of the security, the nature of the transaction, and the understanding between the parties at the time of entering into it, must all be taken into consideration. 3 M. & S. 502. An engagement to indemnify and "save harmless" obliges the one to save the other from incurring any expense, &c., and not merely to reimburse him when incurred. 8 East, 593. A bond to indemnify A., B., C., or any of them, for advances made by them as bankers, does not extend to advances by survivors (4 Taunt. 623; 2 Black. 934); and a guarantee to B. does not extend to a new firm created (3 Camp. 53; 3 East, 484. *See* 19 & 20 Vic. *post*, p. 240), or a new credit (3 Camp. 220), given after the guarantee. A guarantee for the payment of goods supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. 2 Stark. 426; 8 Taunt. 208. A party having contracted to guarantee a bill to be drawn for a specific sum, is not liable even to the extent of that sum on a bill which exceeds it (T. Jones, 206; 6 T. R. 200); but a limited guarantee for monies lent to the amount of 200*l.* is not discharged by monies lent above that sum. The recitals in an indemnity bond, or any other guarantee, may be allowed to explain and restrain the extent of a party's liability thereto. 4 Taunt. 593; 2 Saund. 403, 411. A bond reciting that A. had taken a house in the parish for a certain term, and conditioned to indemnify the parish against any charge resulting from A.'s becoming an inhabitant, continues during his inhabitancy, whether in the same house or not, though beyond the term (1 M. & S. 120); and where, from the terms of the condition, a more continual employment seemed to have been meditated, and no specific time was limited, yet, it appearing that the office for which the security was given was an annual office, the court held the security at an end at the expiration of the first year. 2 N. R. 175; 2 M. & S. 363; 5 id. 166. The usages of trade will, in the absence of an express contract, be allowed to explain the meaning and extent of a guarantee; and in a guarantee for goods sold, though no period of credit to the third party is specified in it, yet it will not be for an unlimited period, but is restrained by the usual course of trade; and a guarantee of a debt generally, without saying how much, is valid. 15 East, 272.

The surety may, by the terms of the contract, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come; but the intention to be so bound should be expressed without ambiguity. *Saunders v. Taylor*, 9 B. & C. 35.

If the liability of the surety is not to

(B) *In the case of Annual Appointments he is, in general, Liable only for the current Year.*[1]

attach, except on the happening of a particular event, it must be shown, in order to fix him with liability, that such event has happened. *Moor v. Roberts*, 3 C. B. (N. S.) 841.

Thus, where the defendant signed a deed as surety upon the condition that the money to secure which it was given should not be advanced until the deed was executed by another intended co-surety; the deed not having been executed by the other, the defendant was held entitled to be discharged in equity from every part of the debt. *Evans v. Brembridge*, 25 L. J. Ch. 334.

Where the bond or guarantee is given by a surety to secure the repayment of advances made to or of credit given to the principal, not exceeding in the whole at any one time a certain limited amount, the surety will be liable to that amount, notwithstanding advances are made or credit given to a larger extent (*Seller v. Jones*, 16 Mee. & W. 112), unless it is expressed with great precision in the instrument that the surety should not be responsible at all if the stipulated amount is exceeded. *Gordon v. Rae*, 8 E. & B. 1087. *Parker v. Wise*, 6 M. & S. 246.

The surety cannot be bound beyond the limited time of his engagement. Where a bond, after reciting that the plaintiff (the postmaster-general) had deputed one J. J. to be his deputy-postmaster for six months, was conditioned for the faithful execution of the office by J. J. during all the time he should continue postmaster. J. J. was continued in the office after the expiration of the six months, after which he made default. The court held, that the general words of the undertaking were confined to the time mentioned in the recital, and that the defendant was not liable to answer for any default after that period. *Lord Arlington v. Merrick*, 2 Saund. 403. See *Liverpool Waterworks Co.* 6 East, 507. *Same v. Atkinson*, 6 East, 507. *Hassell v. Long*, 2 M. & S. 363. *Curling v. Chalklen*, 3 M. & S. 502.

A bond had been given as a security for a collector of customs. After the bond given, a new duty was laid upon coals; a deputation given to the same person to collect it; and a new security taken on account of such new duty. It was held that the first bond did not extend to the new duty upon coals. *Bartlett v. Attorney-General*, Parker, 277.

The extent of the condition of an indemnity-bond, we have seen, may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearsall v. Summersett*, 4 Taunt. 593. Or by extrinsic circumstances; as by the nature of the employment and duration of the office to which the indemnity applies. *St. Saviour's, Southwark, v. Bostock*, 2 N. R. 175.

A slight variation from the terms of the indemnity will not vitiate the security. Thus, where the defendant had agreed in writing to purchase a certain quantity of hogs from plaintiff at a certain price, and to be delivered at certain times; an alteration in the times of delivery was afterwards made, at the verbal request of the defendant, and held that the written contract was not thereby vitiated, but that plaintiff might recover against defendant for not fulfilling the residue of the contract after such verbal alteration. *Cuff v. Penn*, 1 M. & S. 21. *Turner v. Phillips*, 1 Roll. Abr. 20. So in *Simmons v. Keating*, 1 M. & S. 21, it was held, that a sale at three months' credit, and payment to be then made by a bill at three months, will satisfy a guarantee given upon a condition of a credit at six months. But if the security be entered into upon the condition of one credit, the surety will not be liable upon transactions at a different credit. *Dickson v. Lord Ellenborough, C. J.*, in the case of *Bacon v. Chesney*, 1 Stark. Rep. 192.

It is not, it seems, sufficient to discharge the surety, that he has written to the obligee cautioning him against giving any further credit to the party for whose payment or integrity he is security. In *Shepherd v. Beecher*, 2 P. Wms. 288, the *Lord Chancellor* said, the father continued bound, and ought not to have satisfied himself with sending the letter, and taking no care of the matter; but should have endeavoured to have made some end of the matter, and got in the bond: wherefore he must continue liable to answer some embezzlements, unless there should appear fraud in the master.

[1] If the recitals of a bond given by a surety set forth the appointment of the party on whose behalf the surety consents to become bound to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment, the liability of the surety will be co-extensive with the duration of the office. If the office is an annual office, the liability will not extend beyond the current year of office. *Mayor, &c. of Cambridge v. Dennis*, 27 L.J.Q.B. 474; 5 Jur. N.S. 265. *See* also p. 238. If it is a fixed and permanent employment, the liability of the surety will continue during the entire time of his employment in the office. *Mayor of Dartmouth v. Silly*, 7 E. & B. 97; 26 L. J. Q. B. 90. If the duration of the office be indefinite and uncertain, or continue *durante bene placito*, and there is nothing in the language of the recital or the condition directly or indirectly limiting the period of liability, the extent and duration of the obligation of the surety are then as indefinite and uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal. *Curling v. Chalklen*, 3 M. & S. 509. *M'Gahey v. Alston*, 1 Mee. & W. 386. But although the recital of a bond setting forth the appointment of the principal to a certain office or employment does

(C) *And where given to a Firm, the Security, unless otherwise expressed, is at an end on a Change of Partners.*[1]

(D) *And where it refers to the Duties of an Office, the Indemnity will not apply if the Person is appointed to a different Office, or there is a material Change in his Duties.*[2]

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not state the nature or duration of the office, or in any way limit the period of the service for the honest and faithful performance of which the surety binds himself; yet, if the office is in point of fact an annual office, and there is a fresh appointment each year, the surety is only answerable for the execution of the duty during the current year. *Cambridge, Mayor, &c. v. Dennis*, 27 L. J. Q. B. 475; 5 Jur. N. S. 266. *Leadley v. Evans*, 9 Moore, 102. *London Assurance Co. v. Bold*, 6 Q. B. 526. *Peppin v. Cooper*, 2 B. & A. 431. But, notwithstanding the office is an annual one, if the surety, by express words, plainly manifests an intention to be bound for the faithful service and good conduct of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will, of course, continue in force as long as the obligee may think fit to continue the employment. *Mayor of Berwick v. Oswald*, 3 E. & B. 563: in error, 5 H. of L. C. 856. And it was held that the words, "during such time as he shall continue in the said office, whether by virtue of his said appointment or of any re-appointment thereto," extended the obligation of the surety beyond the current year of an annual office; and rendered it applicable to future continued re-appointments. *Augero v. Keen*, 1 Mee. & W. 390.

[1] By the 19 & 20 Vic. c. 97, s. 4, it is enacted, "that no promise to answer for the debt, default, or miscarriage of another made to a firm, and no promise to answer for the debt, default, or miscarriage of a firm, shall be binding on the person making the promise in respect of anything done, or omitted to be done, after a change in any one or more of the persons constituting the firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change shall appear, either by express stipulation or by necessary implication. See *Myers v. Edge*, 7 T. R. 254. *Dry v. Davy*, 10 Ad. & E. 30.

Before the above statute the rule was the same. If a bond was given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances to the firm, and any change took place in the constitution of the firm, either by the death or retirement of the existing partners, or the accession of new partners to the firm, the contract of suretiship was at an end, unless it plainly appeared from the terms and language of the contract to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the copartnership. *Chapman v. Beckington*, 3 Q. B. 703. *Mills v. Guardians, &c.* 18 L. J. Ex. 252. *Bellairs v. Ebsworth*, 3 Camp. 52. *Strange v. Lee*, 3 East, 489. *Dance v. Girdler*, 4 B. & P. 34. *Weston v. Barton*, 4 Taunt. 673. *Simson v. Cook*, 8 Moore 605. *University of Cambridge v. Baldwin*, 5 Mee. & W. 580.

[2] A surety who undertakes for the faithful discharge of the duties of another in a particular office or employment, will not be liable if there is such a change in the office or employment as to make it materially a different one, although the salary is the same; neither will be be liable for a continued employment in the same office, if the salary be reduced where he undertook for the discharge of the duties of the office at the higher salary. *North-Western Railway Co. v. Whinray*, 23 L. J. Ex. 261. *Frank v. Edwards*, 22 L. J. Ex. 42. Thus, an undertaking for the performance of the duties of a clerk will not extend to the office of manager, if the principal is afterwards promoted to that position. *Anderson v. Thornton*, 3 Q. B. 276. *Whicher v. Hall*, 5 B. & C. 276. But in order to have this effect, the change in the employment must be substantial. *Guardians of Portsea Island Union v. Whillier*, 29 L. J. Q. B. 151. And upon this ground it was held, where the defendant became surety for a collector of poor-rates of a particular parish under a general appointment, and he was, after the giving of the bond, transferred from the duty of collecting the rates from the owners of small tenements to the duty of collecting poor-rates generally from the ratepayers of the district, that it was not such a change as relieved the defendant from liability. (Id.)

Where there is a bond of suretiship for the faithful execution of the duties of a public officer, and by the act of the parties, or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. And even if the sureties were consenting parties by parol to such a change, it would hardly affect their liability under the bond. *Pybus v. Gibb*, 6 E. & B. 911: *per Lord Campbell, C. J. Mayor of Berwick v. Oswald*, 3 id. 653; 5 H. L. Ca. 856. And in the case of a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that if it be altered the surety is discharged: but if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety cannot complain of a variation to which he has agreed. *Stewart v. M'Kean*, 10 Ex. 689; 24 L. J. Ex. 145.

(E) *So in the case of a Surety for the Performance of a Contract; if the Contract be altered he will not be liable.*[1]

III. Of the Discharge of the Surety.

(A) *By Time given to Principal.*[2]

(B) „ *Delivering up of Securities held by the Creditor at the time of the Contract of the Surety.*[3]

[1] On a like principle, if, in a case where the covenant or contract of indemnity is to secure the faithful observance of the stipulations and obligations of a contract, the contract is afterwards, without the knowledge or consent of the surety, altered in any material particular, or to such an extent as to constitute substantially a different contract, the surety will no longer be bound. *Rees v. Berrington*, 2 Ves. 542. *Gardner v. Walsh*, 24 L. J. Q. B. 285. *General Steam Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550. *Bonar v. Macdonald*, 3 H. L. Ca. 389. *Whitcher v. Hall*, 5 B. & C. 276. *Watts v. Shuttleworth*, 5 H. & N. 235.

[2] The surety will be discharged from his obligation if the creditor, without his knowledge or sanction, extends the time for payment of the debt by a binding agreement with the debtor, or the acceptance of a new security suspending the remedy, for by so doing he prejudices that right which the surety has to pay the debt upon the default of the principal, and then enforces any securities which the creditor may hold. *Moss v. Hall*, 5 Ex. 50. *Coombe v. Woolf*, 8 Bing. 162; 1 M. & Scott, 241. *Eyre v. Bartross*, 3 Mad. 221. *Laxton v. Peat*, 2 Camp. 186. *Nisbet v. Smith*, 2 Bro. C. C. 578. *Strong v. Foster*, 17 C. B. 219. *Defries v. Smith*, 10 W. R. 189.

It is no discharge, however, of the surety that the creditor has forborne to sue the debtor, where he has not placed himself under any obligation to forbear, nor done anything to suspend the remedy. *Orme v. Young*, Holt, 84. *London Assurance Co. v. Buckle*, 4 Moore, 153. *Goring v. Edmonds*, 6 Bing. 94. *Dawson v. Lawes*, 23 L. J. Ch. 434. *Wright v. Simpson*, 16 Ves. 734.

A contract with a stranger to give the debtor time, as it does not prevent the surety paying the debt and pursuing his remedy against the debtor, has not the effect of discharging the surety. *Frazer v. Jordan*, 8 E. & B. 312. Neither has a mere promise not to sue the debtor for a certain time, made without consideration, that effect. *Tucker v. Laing*, 2 De Gex & J. 749. Nor a parol promise to give time, where the principal obligation is under seal; for it is inoperative: nor the acceptance of a collateral security, which does not suspend the remedy upon the original debt. *Twopenny v. Young*, 3 B. & C. 210. *Bell v. Banks*, 3 Scott, N. R. 503.

The application of the above doctrine, that a surety will be discharged where time is given without his consent to the principal debtor, applies to all cases where the relation of principal and surety exists, whether or not that relation appears on the face of the original contract. *Rayner v. Fussey*, 28 L. J. Ex. 132. *Davies v. Stainbank*, 6 De Gex, M. & G. 696. *Posley v. Harradine*, 7 E. & B. 415. But extraneous evidence is not admissible for the purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party. *Hollyer v. Ayre*, 9 Clark & Fin. 45.

Further, if by a contract between the principal debtor and the creditor the latter agree to extend the time for payment, but there is an express reservation of all the rights of the creditor against the surety, such extension of time will not have the effect of discharging the surety: for, first, the reservation of these remedies rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, it prevents the rights of the surety against the principal debtor being impaired, the injury to such rights being the other reason: for the principal debtor cannot complain if the instant afterwards the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is implied by a consent that the surety shall have recourse against him. *Kearsley v. Cole*, 16 Mee. & W. 135. *Price v. Barker*, 4 E. & B. 779; 24 L. J. Q. B. 134. So, if a collateral security is taken from the debtor, it is open to show that it was agreed between the creditor and debtor that it should not suspend the remedy on the original security, and thus keep alive the liability of the surety. *Wyke v. Rogers*, 21 L. J. Ch. 613. *Frazer v. Jordan*, 8 E. & B. 303; 26 L. J. Q. B. 288.

[3] The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and is not allowed in equity to vary in any way the position of the surety with reference to these securities. *Pearl v. Deacon*, 24 Beav. 186; 26 L. J. Ch. 761. *See* 19 & 20 Vic. c. 97; *post*, 243.

Upon entering into the contract, indeed, the creditor is conceived to have made known to the sureties, whether, in fact, he does so or not, every security which he possesses, and the surety is to have the benefit of them; and no act can be done by which he is to be deprived of that benefit, or put in a different position from that which he was in at the time of the contract being entered into. And any such prejudicial dealing with the securities will operate to discharge the surety (*Newton v. Chorlton*, 10 Hare, 650); but this does not apply to securities subsequently obtained. (Id.)

(C) *By other Act or Omission of Creditor injurious to the Surety.*[1]

(D) *By Satisfaction or Release of the Original Debt.*[2]

[1] The surety may be discharged from liability by the neglect of the person indemnified to observe matters incumbent him. For if the person guaranteed does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Eq. Jur. s. 325. *Black v. Ottoman Bank*, 8 Jur. 801. *Dawson v. Laws*, 23 L. J. Ch. 434. Thus, as we have seen, a creditor is bound to give the surety the benefit of every security he holds at the time of the contract: the surety has a complete right to the benefit of it, and if the benefit be lost by the act or default of the creditor, the surety will be discharged. *Newton v. Chorlton*, 10 Hare, 651. Upon this principle it was held, in a case where the defendant had guaranteed advances to a builder under a contract, by which the plaintiff (the employer of the builder) was bound to insure the incompleted works against fire, that the default of the plaintiff in not insuring the works, which were destroyed by fire, was an omission to do an act which his duty towards the defendant required him to do; and that, inasmuch as if he had done it the defendant would have been relieved to the extent of the insurance, and the omission, therefore, was injurious to the defendant, and that he had been thereby discharged from the suretiship. *Watts v. Shuttleworth*, 5 H. & N. 235; 7 id. 353, Ex. Ch. And where the creditor took a warrant of attorney from the principal debtor, with a stipulation for the benefit of the surety, that on notice from the latter the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction of the debt; the creditor having neglected to file the warrant of attorney, and to keep it up as an efficient security, it was held that the surety was discharged. *Watson v. Alcock*, 22 L. J. Ch. 858; 17 Jur. 853. So, in the case of bonds and guarantees given to secure the faithful services of clerks and servants in particular offices and employments, the surety has a right to expect from the principal that he will call upon the clerk or servant, whose fidelity is guaranteed, to account in the ordinary course of business, and that there shall be no negligence in this respect on his part, and that he shall not trust his servant beyond the ordinary bounds of prudence. *Smith v. Bank of Scotland*, 1 Dow, 292. *Mutual Loan Fund v. Sudlow*, 5 C.B. 449; 28 L.J.C.P. 108.

To a declaration on a joint and several promissory note given by defendant and E. to plaintiff, defendant pleaded on equitable grounds that he joined in the note as surety for E., and that at the time the note was made, plaintiff knowing this, agreed with the defendant, in consideration of his making such note as surety, that he (the plaintiff) would call in and demand payment of the said note from the said E. within three years from the date thereof; which the plaintiff wholly omitted to do, whereby the plaintiff lost the means of obtaining payment from the said E., who had since become insolvent: it was held that the plea disclosed a good equitable defence. *Lawrence v. Walmsley*, 31 L. J. C. P. 143.

The rights of a company which has obtained a certificate of complete registration, with limited liability, under 19 & 20 Vic. c. 133, against a surety on a bond entered into with them for the faithful service of a clerk or agent in respect of defalcations since the date of such certificate, remain, by force of sect. 12, unaffected by their change of name. *Grox's Improved Soap Co. (Limited) v. Cooper*, 8 C. B. (N. S.) 899.

[2] If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. *Webb v. Hewitt*, 3 K. & J. 444. *Vorley v. Barrett*, 26 L. J. C. P. 1. *Way v. Hearn*, 11 C. B. 774. If, therefore, a creditor by deed of composition releases the debtor, and precludes himself from suing on the original obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed. *Lewis v. Jones*, 4 B. & C. 513. But if the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor may compound with the principal debtor, receiving a portion only of the debt, and may release him from the payment of the residue, and at the same time reserve all his rights and remedies against the surety. *Ex-parte Glendinning*, Buck, B. C. 520. *Boultbee v. Stubbs*, 12 Ves. 22. A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the parties, and the right of recourse against the surety be preserved. *Thompson v. Lack*, 3 C. B. 552. *Kearsley v. Cole*, 16 Mee. & W. 135. It seems to be the result of the authorities that a covenant not to sue, qualified by a reserve of the remedies against sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant not to sue is to operate only so far as the rights of the surety may not be affected. *Price v. Barker*, 4 E. & B. 779: *per Coleridge, J.* The reserve of remedies against the surety prevents the discharge of the surety, which would otherwise be the result of a composition with, or giving time to a debtor by a binding instrument. *Kearsley v. Cole*, 16 Mee. & W. 128. *Owen v. Homan*, 4 H. L. Ca. 1037. *Wright v. Sandars*, 3 Jur. N. S. 507. *Scholefield v. Temple*,

(E) *By Release of Co-Surety.*[1]
IV. Rights and Remedies of the Surety.
(A) *To be Indemnified by the Principal Debtor.*[2]
(B) „ *have the Benefit of Securities.*[3]
(C) „ *Contribution from Co-Surety.*[4]

28 L. J. Ch. 452.

If the creditor receive payment from the principal debtor in county bank-notes, and after they have been some days in his possession the bank stops payment, the surety will be discharged. *Guardians of Lichfield Union v. Greene*, 1 H. & N. 889. A discharge of the principal under the Insolvent Act (1 & 2 Vic. c. 110), does not exonerate him as to payments subsequently made by the surety (2 C. B. 582); nor does the bankruptcy of the surety discharge him as to an annuity unpaid by the principal since the bankruptcy. 28 L. J. Q. B. 228.

[1] A release by the creditor of one of two or more co-sureties, releases all, notwithstanding a reservation of remedies against the others, if without their consent. *Cheetham v. Ward*, 1 B. & P. 633. *Nicholson v. Revill*, 4 Ad. & E. 683. *Evans v. Bremridge*, 25 L. J. Ch. 104.

[2] Where one person becomes surety for another at his request, the law implies a promise by the latter that he will repay the surety whatever he may be compelled to pay the creditor (*Toussaint v. Martinnant*, 2 T. R. 104. *Warrington v. Furbor*, 8 East, 242. *Willes v. Greenhill*, 30 L. J. Ch. 808); and the surety has a right of action against him the instant he pays, as for so much money paid to his use. *Davies v. Humphreys*, 6 Mee. & W. 153. *Kearsley v. Cole*, 16 id. 128. Thus, a party who accepts or indorses a bill of exchange, or indorses a note without value for the accommodation of another, is entitled, on paying the amount, to recover it from the person for whose benefit he thus became responsible; and in these cases the sum paid by the suretymay be recovered upon the common count for money paid. *See* vol. iii. p. 432. *Bleaden v. Charles*, 7 Bing. 245. *Pitt v. Purssord*, 8 Mee. & W. 528. So bail may recover against the principal any expenses they may have reasonably incurred in taking him into custody for the purpose of surrendering him. *Fisher v. Fallows*, 5 Esp. 171.

It seems that if a surety take a bond of indemnity or other specialty counter-security from his principal, he cannot resort to the count for money paid (*Toussaint v. Martinnant*, 2 T. R. 100. See *Crofts v. Tritton*, 8 Taunt. 365; 2 Moore, 411); but must sue on the specialty. And any costs necessarily incurred by the surety, and which he may be entitled to recover from the principal, can only be recovered under a special count founded on the implied promise of indemnity. Chit. Con. 518. *See post*, p. 244.

[3] The surety is entitled to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor, not only through the medium of the contract, but even by means of securities entered into without the knowledge of the surety, he having a right to have them transferred to him, though there was no stipulation for it; and to avail himself of all these securities against the debtor. See *Craythorne v. Steinburne*, 14 Ves. 162.

By 19 & 20 Vic. c. 97, s. 5, "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, if need be, and upon a proper indemnity to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportions to which, as between those parties themselves, such last-mentioned person shall be justly liable." See *Batchellor v. Lawrence*, 30 L. J. C. P. 42; 9 C. B. 543. *Goddard v. Whate*, 6 Jur. 1364. *Pledge v. Brass*, id. 695. *Brandon v. Brandon*, 28 L. J. Ch. 147. *Pearl v. Deacon*, 24 Beav. 186. *Reynolds v. Wheeler*, 30 L. J. C. P. 350. The court has no power under this sect. to enforce by order the remedy there given. On refusal to assign, the surety may sue by action. *Phillips v. Dickson*, 29 L. J. C. P. 223. *See* 28 id. Ch. 150.

[4] If several persons become sureties for the same debt, either jointly or severally, or by the same or different instruments, and one surety pays more than his proportion of the demand, he may recover against each co-surety an aliquot share of the excess, as money paid to his use. *Davies v. Humphreys*, 6 Mee. & W. 153. *Kemp v. Finden*, 12 id. 421. *Cowell v. Edwards*, 2 B. & P. 268. *Deering v. Winchelsea*, id. 270. *Margrett v. Gregory*, 6 L. T. 543. And at law the calculation of the aliquot share is made with reference to the number of sureties, even although one be insolvent or bankrupt; so that if there be three sureties for a debt of 300*l.*, and one pay the whole, he can

V. Actions against Surety.[1]

PRINTERS.

I. Non-Compliance with Acts relating to, Answer to Action for Work and Labour.[2]

II. Must Complete entire Work before he is Entitled to be Paid.[3]

III. He can Recover nothing for Printing an Immoral or Libellous Matter.[4]

PRINTS, Copyright in.

See Copyright, vol. iii. p. 251.

PRISON.

See Ca. Sa., vol. iii. p. 22; County Gaol, id. p. 438; Escape, vol. iv. p. 263; *post*, Rescue.

I. What is considered as.[5] II. Breach of Prison. *See* vol. iv. p. 266.

recover by action from a co-surety only 100*l.*, although the third surety be unable to contribute. *Kemp v. Finden*, *infra*. *Brown v. Lee*, 6 B. & C. 697; 9 D. & R. 700. But, according to the rule in equity, the surety in the above instance would recover a moiety of the 300*l.* from the solvent co-surety. (Id.) *Peter v. Rich*, 1 Ch. Ca. 19, 34. *Holl v. Harrison*, id. 246. *Layer v. Nelson*. 1 Vern. 456.

The right to contribution subsists, notwithstanding the surety, who has paid the debt, has taken from the principal a collateral security for the repayment of any sum which he might be called upon to pay in discharge of the principal's debt. *Done v. Whalley*, 2 Ex. 198. But one of two co-sureties who has paid the debt with money of the principal debtor, which he had in his hands at the time, and was entitled to apply to that purpose, cannot call upon his co-surety for contribution. *Goepel v. Swinden*, 1 D. & L. 888. And if the surety from whom contribution is claimed become bound at the request of the surety who seeks to recover it, he is not liable, for in such case the implied promise is negatived. *Turner v. Davies*, 2 Esp. 478. See *Thomas v. Cook*, 8 B. & C. 728.

If one of several sureties be called upon after the bankruptcy of a co-surety to pay more than his proportion of the principal's debt, he may still sue the bankrupt co-surety for contribution, inasmuch as one co-surety is not a "person liable for" the debt of another within the meaning of the 12 & 13 Vic. c. 106, s. 178. *Wallis v. Swinburne*, 1 Ex. 203. *See* vol. ii. p. 273.

The right to contribution does not extend to any part of the costs paid or incurred by the surety in attempting to defend, or in settling legal proceedings by the creditor against him to recover the debt. *Knight v. Hughes*, 3 C. & P. 467; M. & M. 247. *Roach v. Thompson*, 4 C. & P. 194. See *Spark v. Heslop*, *infra*. But where the plaintiff and defendant had executed as sureties a warrant of attorney to secure an advance made to the principal, and on default made by the principal, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff; it was held that he was entitled to recover from the defendant a moiety of the costs of such execution. *Kemp v. Finden*, 12 Mee. & W. 421. See *Collinge v. Heywood*, 9 Ad. & E. 633.

[1] A defendant may plead on equitable grounds that he signed the security as surety only. *Taylor v. Burgess*, 29 L. J. Ex. 7. *See* 28 id. C. P. 103. To prove the principal's default, he should be called as a witness (*Middleton v. Melton*, 10 B. & C. 317. *Esp v. Watlington*, 3 M. & Rob. 47. *See* 6 B. & P. 78); his declarations are not admissible for such purpose (5 Esp. 26; 1 Stark. 192); but an account delivered acknowledging receipt of money may be evidence against the surety. 5 Bligh. *Lysaght v. Walker*, N. S. 1.

A contract by a surety with several can only be sued upon by all. *Pugh v. Springfield*, 27 L. J. C. P. 34; id. 225. He may recover not only the costs he is obliged to pay, but those for which he is liable to his own attorney. *Spark v. Heslop*, 28 L. J. Q. B. 197.

[2] A printer cannot recover for labour or materials used in printing a work unless he affix his name to it, pursuant to the statute 39 Geo. 3, c. 79; 2 & 3 Vic. c. 12, s. 2. *Bensley v. Bignold*, 5 B. & A. 335. *Marchant v. Evans*, 8 Taunt. 142. Neither can he recover for printing or assisting to circulate a periodical of which he falsely makes affidavit that he is the sole proprietor. *Stephens v. Robinson*, 2 C. & J. 209. And the proprietor of a newspaper cannot recover for the non-performance of a contract for printing such paper before filing the requisite affidavit. *Houston v. Mills*, 1 M. & Rob. 325. And it is a good defence to an action on a printer's bill that the press at which the work was done was not registered according to the 39 Geo. 3, c. 79, s. 23. *Day v. Hemming*, 9 W. R. 703; 4 L. T. (N. S.) 443.

[3] A printer, by the custom of the trade, is bound to complete and deliver the whole work before being paid for printing it. And therefore, if the impression be destroyed by fire whilst on the premises of the printer, he cannot recover anything, although a part has been actually delivered. *Adlard v. Booth*, 7 C. & P. 108. *Gillett v. Mawman*, 1 Taunt. 137. As to contracts between printer and compositors, &c., see *Hill v. Levey*, 3 H. & N. 702; 28 L. J. Ex. 80. As to contracts between publisher and author, see *Wilson v. Whitehead*, 10 Mee. & W. 503.

[4] A printer cannot recover for printing a libellous or immoral work. *Poplett v. Stockdale*, R. & M. 337; 2 C. & P. 198. *Gale v. Leckie*, 2 Stark. 107. See *Jones v. Johnes*, 4 Esp. 97.

[5] Gaols are of such universal concern to

PRISONERS.

See Arrest, vol. i. p. 519; Bankruptcy, vol. ii. p. 141; Habeas Corpus, vol. iv. p. 619.

I. Proceedings by and against Prisoners, p. 245.
(A) *Holding Prisoner to Bail*, p. 246.
(*a*) *Forms of Writ of Capias and Detainer*, p. 246.
(B) *Declaration*, p. 247.
(C) *Forcing on Trial*, p. 247.
(D) *Charging in Execution*, p. 247.
(E) *Discharge by Supersedeas*, p. 248.
(*a*) *When Prisoner entitled to*, p. 248.
(*b*) *Form of Notice to the Keeper*, p. 249.
(E) *Discharge by Supersedeas (continued.)*
(*c*) *Obtaining Supersedeas*, p. 249.
(*d*) *Form of Supersedeas*, p. 249.
(F) *Discharge under Small Debtors' Act*, p. 249.
(G) *Discharge by Plaintiff's Death or Discontinuance of Action*, p. 250.
(H) *Discharge by Bankruptcy Court*, p. 251.
II. Removal of Prisoners. *See* Habeas Corpus, vol. iv. p. 620.

I. Proceedings by and against Prisoners.[1]

the public, that no prison can be erected by any less authority than an act of parliament. All prisons and gaols belong to the queen, although a subject may have the custody or keeping of them.

By the 14 Edw. 3, s. 1, c. 10, it is enacted, "in the right of the gaols which were wont to be in ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded that they shall be rejoined to the sheriffs, and the sheriffs shall have the custody of the same gaols as before this time they were wont to have, and they shall put in such under-keeper, for which they shall answer."

There is a species of gaol which does not fall under the sheriffs' charge, called a House of Correction, or, in the City of London, a Bridewell, which is governed by a keeper wholly independent of the sheriff. Houses of correction were originally intended for the penal confinement of vagrants (39 Eliz. c. 4); afterwards extended to persons charged with small offences (6 Geo. 1, c. 19, s. 2); and by the 5 & 6 Wm. 4, c. 38, ss. 3, 4, reciting that great inconvenience and expense had been found to result from the practice of committing to the common gaol, where it happens to be remote from the place of trial, it is enacted that a justice of the peace (or coroner) may commit for safe custody to any house of correction situate near the place where the assizes or sessions are to be held; and that offenders who have been sentenced in those courts may be committed in execution of their sentence to any house of correction for the county. And by 14 & 15 Vic. c. 55, ss. 20, 21, it is provided, that after any house of correction for any county has, by order of the justices at quarter sessions (approved by a principal secretary of state), been declared a fit prison for the purpose, it shall be lawful to commit to such gaol or house of correction, for trial at the next assizes for the county, any person charged with an offence triable at such assizes; it being directed, however, that every person so committed shall in due time be removed to the common gaol, in order to take his trial. *See* also 13 & 14 Vic. c. 91.

Every place where one is restrained of his liberty is a prison. See *Attorney-General v. Sir M. Hobert*, Cro. Car. 210.

The Tower is a prison within the Habeas Corpus Act. *Rex v. Kendal*, 1 Ld. Raym. 66.

Prisoners for debt may be kept where the sheriff pleases, but not malefactors. *Sheriff of Essex's case*, id. 136.

All prisons in the kingdom are the queen's prisons, though not under the control of the sheriff. *Ex-parte Evans*, 8 T. R. 172. *Rex v. Edwards*, 7 Mod. 280.

The Court of Queen's Bench has no authority to interfere in the regulation and management of the gaols in the kingdom. *Rex v. Carlisle*, 1 D. & R. 535. But see *Anon.* Lofft. 257.

All felons must be committed to the county gaol. *Anon.* 7 Mod. 31.

[1] By 25 & 26 Vic. c. 104, the Queen's Prison was discontinued. By sect. 2, all persons who before the passing of this act might lawfully have been committed to the keeper of the Queen's Prison may be committed to the keeper of Whitecross Street Prison, subject to this proviso, that no person shall be removed by writ of *habeas corpus* from any other prison to Whitecross Street Prison, and Whitecross Street Prison shall for all purposes of law be deemed and regarded as the Queen's Prison.

Prisoners are subject to the rules and regulations authorised by 5 & 6 Vic. c. 22, and 11 & 12 Vic. c. 7. The removal of a person from one part of a prison to another, in which he is not legally confined, is a trespass. *Cobbett v. Grey*, 4 Ex. 729. *See* also *Stead v. Anderson*, 1 L., M. & P. 109; 9 C. B. 262. *Howard v. Hudson*, 2 E. & B. 2. Prisoners are not entitled to obtain a *habeas corpus* in order to come out of prison to conduct proceedings in court. *Ford v. Graham*, 10 C. B. 369; 1 L., M. & P. 604. *Clark v. Smith*, 3 C. B. 982. But the right might be granted under particular circumstances, as, if the object were to apply for his discharge on the ground of the custody being unlawful. *Re Cobbett*, 27 L. J. Ex. 199. And the wife of a prisoner is not entitled to conduct his case at Nisi Prius as his advo-

(A) *Holding Prisoner to Bail.*[1]

(*a*) *Forms of Writ of* Capias *and Detainer.*[2]

cate. *Cobbett v. Hudson*, 15 Q. B. 988. A prisoner sues as in ordinary cases, and if he be non-suited he may be charged in execution for the costs. *Furnival v. Stringer*, 3 Bing. N. C. 96; 5 Dowl. 195. An action against a prisoner commences with a writ of summons.

[1] Where the defendant is in custody of a sheriff in a civil action a writ of *capias* may be sued out on the usual affidavit and judge's order, and a warrant taken with the former to the sheriff's office. Where he is in Whitecross Street Prison, it seems the only mode is for the bailiff who executes the *capias* to ascertain from the keeper of the prison when the defendant is likely to be discharged, and to take him thereupon under the *capias*. See *Edwards v. Robertson*, 5 Mee. & W. 520; 7 Dowl. 859. Where the defendant has applied for his discharge to the Bankruptcy Court, and has been adjudged to be entitled to his discharge at a future time, the creditor may, if the judge will make an order, issue a *capias*, and detain him up to such time, but no longer. 1 & 2 Vic. c. 110, s. 85. A remanded insolvent was not within this section (*Turnor v. Darnell*, 5 Mee. & W. 28; 1 Dowl. 846); and if a discharged insolvent is arrested by a *capias* under the same section, no judge's order is necessary under s. 3. *Bilton v. Clapperton*, 9 Mee. & W. 473.

If the defendant is in custody of the sheriff on a criminal account, he is detained in the same way (see *Danson v. Le Capelini*, 7 Ex. 667); but if he is in the custody of the keeper of the Queen's (now Whitecross Street) Prison leave must be obtained of the court or a judge to serve the *capias*. See *Grainger v. Moore*, 5 Dowl. 456.

By Reg. Gen. (Pr.) H. T. 1853, r. 123, "every rule or order of a judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith where defendant is in a country gaol.

[2] The act 2 Wm. 4, c. 39, prescribes the two following forms:—

Form of Writ of Capias.

Victoria, &c., to the Sheriff of [*or* to the Constable of Dover Castle, *or* to the Mayor and Bailiffs of Berwick-upon-Tweed, *or as the case may be*] greeting.

We command you [*or*, as before, *or* often we have commanded you] that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law in an action on promises [*or* of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we do hereby require the said C. D. to take notice, that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of to the said action, and that in default of his doing so such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And we do further command you, the said sheriff, that immediately after the execution hereof you do return this writ to our said court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or, that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said court, or any judge thereof.

Witness at Westminster, the day of

Memoranda to be Subscribed to the Writ.

N.B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.—1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution. 2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the stat. 7 & 8 Geo. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution. 3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond. 4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £ by affidavit.

Or,

Bail for £ by order of [*naming the judge making the order*] dated the day of

This writ was issued by E. F. of attorney for the plaintiff [*or* plaintiffs] within named.

Or,

This writ was issued in person by the plaintiff within named, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of plaintiff's residence, if any such there be.*]

(B) *Declaration.*[1] (C) *Forcing on Trial.*[2]
(D) *Charging in Execution.*[3]

Forms of Writ of Detainer.

VICTORIA, &c., to the keepers of our prison called the Queen's Prison.

We command you that you detain C. D., if he shall be found in your custody at the delivery hereof to you, and him safely keep in an action of promises [*or* of debt, &c., *as the case may be*] at the suit of A. B., until he shall be lawfully discharged from your custody. And we do further command you that, on receipt hereof, you do warn the said C. D., by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our Court of to the said action, and that in default of his so doing, the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you, the said keeper, that, immediately after the service hereof, you do return this our writ, or a copy hereof, to our said court, together with the day of the service hereof.

Witness at Westminster the day of

N.B.—This writ is to be indorsed in the same manner as the writ of *capias*, but not to contain the warning on that writ.

[1] If the defendant has appeared in person, the copy of the declaration may be delivered to the keeper or gaoler for the defendant (4 & 5 Wm. 3, c. 21; 1 T. R. 191, R. E. 5 Wm. 3, r. 3, s. 7), in which way all notices and papers in the cause may be served (*Whitehead v. Barber*, 1 Stra. 248); and the defendant need not be brought up by *habeas corpus* to be charged with the declaration. (Id.) *Barnett v. Harris*, 2 Dowl. 186. *Millard v. Millman*, 3 M. & Scott, 63; 2 Dowl. 723. When the defendant has been arrested under a *capias*, it is enough to file the declaration. *Neale v. Snoulton*, 2 C. B. 322. If the defendant has employed an attorney merely to put in bail for him, delivering a copy of the declaration to such attorney is insufficient. *Dent v. Halifax*, 1 Taunt. 493. *Spencer v. Newton*, 6 Ad. & E. 630; 1 Nev. & P. 827. If the defendant is in criminal custody, and the action is in the Queen's Bench, leave of the court or a judge must be obtained to charge him with the declaration (*Crackall v. Thomson*, 1 Salk. 354. *Ramsden v. Macdonald*, 1 Wils. 217; 1 W. Black. 30. *Coppin v. Gunner*, 2 Ld. Raym. 1572; 2 Stra. 873. *Altroffe v. Lunn*, 9 B. & C. 395. *Ess v. Smith*, 3 Tyr. 363; 1 Dowl. 703), otherwise it is an irregularity. *Williams v. Scudamore*, 1 Chit. Rep. 386. But this leave is not granted if the defendant is in any other criminal custody than that of the sheriff or keeper of the Queen's Prison. *Guthrie v. Ford*, 4 D. & R. 271. *Jones v. Danvers*, 5 Mee. & W. 284; 7 Dowl. 394. The leave is generally given as a matter of course (*Foxworthy's case*, 7 Mod. 153; 2 Ld. Raym. 848); and the judge's signature to the writ of *habeas* is sufficient evidence of it. *Gibb v. King*, 1 C. B. 1; 2 D. & L. 806. A *habeas corpus ad respondendum* is then sued out of the Crown side of the court, and he is brought up and charged with the declaration. If the action is in the Common Pleas or Exchequer, this leave cannot be obtained from those courts, and the only course is to wait till the criminal custody expire. (Id.) *Walsh v. Davies*, 2 N. R. 245. *Freeman v. Weston*, 1 Bing. 221; 8 Moore, 81.

[2] By Reg. Gen. (Pr.) H. T. 1853, r. 124, the plaintiff shall proceed to trial or final judgment (see *Wriglesworth v. Wright*, 13 East, 167) against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment. The plaintiff is only bound by this rule where the prisoner is detained at his suit. *Hall v. Wetherall*, 2 Scott, N. R. 196.

By r. 128, "after notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any act for the relief of insolvent debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the court from the time of such notice given, until some rule or order shall be made in the cause in that behalf." The prisoner will not obtain the benefit of this rule if the delay is that of the court or his own. *Huggins v. Bainbridge*, Barnes, 383. *Myers v. Cooper*, 2 Dowl. 423. *Grimes v. Joseph*, 2 B. & B. 35.

[3] The plaintiff may sue out a *fi. fa.* against the prisoner's goods, without this operating as a discharge (*Jones v. Tye*, 1 Dowl. 181); and if only part is levied, he may charge the prisoner in execution for the residue. *Green v. Foster*, 2 Dowl. 191. He must be so charged within the term next after the trial or final judgment. Reg. Gen. (Pr.) H. T. 1853, r. 124. This time is calculated from the signing of judgment (*Colbron v. Hall*, 5 Dowl. 534); and if the judgment is signed in term or vacation, the defendant must be charged in the following term. *Thorn v. Leslie*, 8 Ad. & E. 125. *Baxter v. Bailey*, 3 Mee. & W. 415. The rule applies only where the defendant is imprisoned at the plaintiff's suit. *Hall v. Wetherall*, *supra*. Delay on the plaintiff's part is excused by delay of the defendant, as where defendant proceeds in error, or for an injunction (*Garrett v. Mantell*, 2 Wils. 380. *Stonehurst v. Ramsden*, 1 B. & A. 676. *Maitland v. Mazaredo*, 6 M. & S. 139. *Laroche v. Wasbrough*, 2 T. R. 737), or pleads to a *scire facias* (*Ribbins v. Mantell*, 2 Wils. 378), or is put in criminal custody (*Freeman v. Weston*, 1 Bing. 221), or commences a negotiation for a settlement. *Walter v. Stewart*, 3 Wils.

(E) *Discharge by* Supersedeas.

(*a*) *When Prisoner Entitled to.*[1]

455. *Pitt v. Yalden*, 4 Burr. 2060. *Hewitt v. Melton*, 1 C. & M. 579; 2 Dowl. 71. An action on the judgment is not equivalent to charging in execution. *Childs v. Prows*, Barnes, 390. *Maud v. Braithwaite*, 2 Stra. 943.

Where the defendant is in custody for contempt of court, he may be charged in execution in the usual way. *Wade v. Wood*, 1 C. B. 462. Before charging in execution, it is unnecessary to enter the proceedings on any roll. C. L. P. Act, 1852, s. 206; Reg. Gen. (Pr.) H. T. 1853, r. 70.

By r. 127, "it shall not be necessary in any case to sue out a writ of *habeas corpus ad satisfaciendum* to charge in execution a person already in the prison of the court, but such person may be so charged in execution by a judge's order, made upon affidavit that judgment has been signed and is not satisfied, and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer.

Form of Affidavit.

[*Title of court and cause.*]

I, P. A. of the attorney of the plaintiff in this action, make oath and say—

1. That C. D., the abovenamed defendant, is now a prisoner in Whitecross Street Prison [*or* prison of this court].

2. That final judgment was signed in this action for the plaintiff on for £ and that the said judgment is not satisfied, but that the sum of £ and interest thereon is still due and owing to the plaintiff.

3. That the said plaintiff is desirous of having the said C. D. charged in execution for the said £ and interest thereon, at four per cent, from the said day of 18

If the defendant is in Whitecross Street Prison at the plaintiff's suit (*Furnival v. Stringer*, 5 Nev. & M. 60), the mode of charging him in execution is as follows:—A sidebar rule to acknowledge the custody is obtained at the master's office and taken to the keeper, who writes an acknowledgment thereon, which must be dated in the same term as the defendant is charged in execution. A *committitur* piece is then made out on plain parchment, and filed with the clerk of the judgments. If the *committitur* is wrong, it may be abandoned on notice given to the defendant. *Cunningham v. Cogan*, 10 East, 46.

Form of Committitur Piece.

(Venue) } C. D. is committed to the custody
to wit. } of the keeper of Whitecross Street Prison, in an action at the suit of A.B., there to remain until, &c.

Judgment of the day of 18
Roll

P. A., Attorney.

If the defendant is in the sheriff's custody, a *ca. sa.* is sued out in the usual manner and lodged with the sheriff (*Owen v. Owen*, 2 B. & Adol. 805; 1 Dowl. 335), or his town agent (*Williams v. Waring*, 4 Dowl. 200; 2 C., M. & R. 354. It seems a warrant directed to the gaoler or officer is also required. *Poole v. Cook*, Barnes, 389. *Astley v. Goodjer*, 2 Dowl. 619. It is unnecessary for this purpose to remove the prisoner into Whitecross Street Prison. *Owen v. Owen*, *supra*. *Deemer v. Brooker*, 3 Dowl. 576. If the sheriff is the plaintiff, the *ca. sa.* may be directed to the coroner, who may hand it to the gaoler. *Barston v. Trutch*, 3 Ad. & E. 451; 5 Nev. & M. 109; 4 Dowl. 6.

[1] A prisoner is entitled to a *supersedeas* if the plaintiff neglect to proceed to trial and final judgment, and to charge him in execution within the times specified. But where the prisoner's estate has been vested in a provisional assignee, under 1 & 2 Vic. c. 110, s. 41, he is not entitled to a *supersedeas* for any neglect of the plaintiff in not proceeding in any action as to which that act would protect him. Yet a prisoner who, at the time of a vesting order made on the petition of a creditor, was held entitled to his discharge on the ground of the lapse of a year without the plaintiff's declaring, notwithstanding this section. *Hallett v. Creswell*, 3 D. & L. 561.

By Reg. Gen. (Pr.), H. T. 1853, r. 126, "if, by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the keeper of the Queen's Prison be not entitled to a *supersedeas* or discharge for want of proceeding to trial or judgment, or charging in execution, within the times prescribed, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be detained in custody shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter to the keeper, upon pain of losing the right to detain such prisoner in custody by reason of such special matter, and the keeper shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedable."

If the prisoner is once supersedable he is always supersedable (*Melton v. Hewitt*, 2 Dowl. 71. *Colbron v. Hall*, 5 id. 534. *Hallett v. Cresswell*, 3 D. & L. 561), unless he has expressly waived his option. *Pearson v. Rawlings*, 1 East, 77. *Williams v. Scudamore*, 1 Chit. R. 386. Hence, he cannot be charged in execution after the time has ex-

(*b*) *Form of Notice to the Keeper.*[1]
(*c*) *Obtaining* Supersedeas.[2]
(*d*) *Form of* Supersedeas.[3]
(F) *Discharge under Small Debtors' Act.*[4]

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pired, except he has been already charged in execution, and neglected an opportunity to apply for a *supersedeas*. *Rose v. Christfield*, 1 T. R. 591. *Morris v. Magrath*, 3 B. & B. 301; 7 Moore, 154. *Robinson v. Cresswell*, 2 Mee. & W. 410. He may, however, be sued on the judgment, and again taken on a *ca. sa.* thereon. *Toppling v. Ryan*, 1 T. R. 275. *Blandford v. Foot*, Cowp. 72. *Ismay v. Dewin*, 2 W. Black. 982.

By Reg. Gen. (Pr.) H. T. 1853, r. 126, "the keeper of the Queen's Prison shall present to the judges of the courts, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedable, showing as to what actions, and on what account, they are so, and as to what actions (if any) they still remain not supersedable." And by rule 127, "all prisoners who have been, or shall be, in the custody of the keeper for the space of one calendar month after they are supersedable, although not superseded, shall be forthwith discharged out of the Queen's Prison as to all such actions in which they have been, or shall be, supersedable."

[1] *Notice to the Keeper.*

In the Q. B. [C. P. *or* Ex. of Pleas].
Between A. B., plaintiff,
and
C. D. (a prisoner), deft.

Take notice, that [*here state the special matter*], and that on account of the premises, the plaintiff has not proceeded to trial [*or as the case may be*] within the time prescribed by the rules and practice of the court in that behalf.

Dated, &c. P. A.

To the Keeper, &c.

[2] In order to obtain a *supersedeas* in Whitecross Street Prison, the course is to obtain from the clerk at the prison a copy of the causes the defendant is charged with. A summons is then taken out at chambers and served, calling on the plaintiff or his attorney to show cause why the defendant should not be discharged. The plaintiff's attorney may then consent to an order being made, which consent is indorsed on the summons, and the order is made in the usual way. If the attorney do not attend, the judge, on an affidavit of service, will make the order. A copy of the order is served, and the order is taken to the keeper, who will thereupon discharge the prisoner.

If the prisoner is in the custody of the sheriff, the gaoler is applied to for a certificate of the cause, and an affidavit is made of his signature. A summons is then taken out and served as above. When the order is made, the *supersedeas*, written on plain parchment, and a *præcipe* thereof, are taken to the master, who signs the *supersedeas*, and this being left with the sheriff, the prisoner will be discharged.

[3] *Form of Writ of Supersedeas for not Declaring.*

Victoria, &c., to the Keeper of Whitecross Street Prison [*or* to the Sheriff of], greeting:

Whereas C. D. was on arrested by the then sheriff of the county of under and by virtue of our writ of *capias* to the said sheriff directed, and which issued out of our Court of against the said C. D. in an action at the suit of A. B.; and the said C. D. is now detained in our prison in your custody by virtue of the said writ: And whereas the writ of summons by which the said action was commenced issued out of the said court on and the defendant was duly served with a copy thereof on : And because the said A. B. hath not declared against the said C. D. in the said action within one year after the day and year last aforesaid, Therefore we command you, that if the said C. D. be detained in our prison under your custody by virtue of the said first-mentioned writ, and for no other cause, then do you immediately discharge the said C. D. out of your custody, and permit him to go at large, as you will answer the contrary at your peril.

Witness [*name of chief of the court*], at Westminster the day of in the year of our Lord

[4] The Small Debtors' Act, 48 Geo. 3, c. 123, was passed to relieve from prison after twelve months persons whose debts were under 20*l.*; but since the act was passed a *ca. sa.* can seldom be issued for so small an amount. 7 & 8 Vic. c. 96, s. 57. By the 48 Geo. 3, c. 123, s. 1, "all persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as hereinafter mentioned, shall and may, upon his, her, or their application for that purpose, in term time, made to one of her majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution, by the rule or order of such court." This statute applies to plaintiffs as well as defendants. *Roylance v. Hewling*, 3 M. & S. 282. *Bradley v. Webb*, 7 Dowl. 588. It ex-

(G) *Discharge by Plaintiff's Death or Discontinuance of Action.*[1]

tends only to civil actions (*R. v. Hubbard*, 10 East, 408. *Lewis v. Morland*, 2 B. & A. 61), and not to *quasi* criminal proceedings, as attachments (Id. *Pitts v. Evans*, 3 Dowl. 649. *R. v. Clifford*, 8 D. & R. 58), or a writ *de contumace capiendo*. *Ex-parte Kaye*, 1 B. & Ad. 652. It applies to actions for damages, as trover (*Smith v. Preston*, 1 Har. & W. 93), for assaults (*Winter v. Elliot*, 1 Ad. & E. 24; 3 Nev. & M. 315), and ejectments (*Doe d. Symons v. Price*, 2 D. & L. 752), or to executions under rules of court. *Doe d. Smith v. Roe*, 6 id. 544. The debt must be less than 20*l.* at the time of action brought; and hence, though the original debt may have been less, yet, if with interest accruing after action it exceed that amount, the prisoner is not entitled to his discharge. *Cooper v. Bliss*, 2 Dowl. 749; 3 M. & Scott, 797. See *Rathbone v. Fowler*, 6 Dowl. 81; 3 Mee. & W. 137. The imprisonment must have been continuous up to the application. *Eiffe v. Jacob*, 9 Dowl. 345. *Stubbing v. M'Grath*, 7 id. 328. It is reckoned inclusive of the day when the prisoner was charged in execution. *Porkers v. Wilkins*, id. 152. The statute does not interfere with execution against the property of the prisoner. (*Ex-parte Kaye*, 1 B. & Ad. 653), nor does it affect, or is it affected by, the Insolvent Debtors' Act, 1 & 2 Vic. 110, ss. 36, 41. *Chew v. Lye*, 7 Dowl. 465. *Fuge v. Rogers*, 1 D. & L. 713. *Clapperton v. Monteith*, id. 909. *Hopkins v. Pledger*, id. 119. *Kitching v. Croft*, 12 Ad. & E. 586.

The prisoner must himself apply, and not a third party (*Wood v. Heath*, 4 Man. & G. 918; 2 Dowl. N. S. 651); though if he be a lunatic his wife may do so. *Clay v. Bowler*, 6 Nev. & M. 814. He must apply to the court, and not at chambers. *Kelly v. Dickinson*, 1 Dowl. 546. *Jones v. Fitzadam*, 1 C. & M. 855. Where the judgment is that of an inferior court, the application may be to any of the superior courts. *Short v. Williams*, 4 Dowl. 357. "A rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." Reg. Gen. (Pr.) H. T. 1853, r. 129. Where the notice was served on the 3d, stating that the motion would be made on the 12th, or as soon as counsel could be heard, and counsel was not heard till the 14th, the notice was held insufficient. *Burley v. Worrall*, 1 D. & L. 145.

The notice must correctly state the name of the cause. *Kelly v. Dickinson*, 1 Dowl. 546. It must in general be served on the plaintiff, unless he cannot be found, or his attorney continues to act in the matter. *George v. Fry*, 4 Dowl. 273. *Johnson v. Rutledge*, 5 id. 579. *Percival v. Russell*, 7 Man. & G. 448. 526. Service on one of the plaintiffs suffices. *Harris v. Turtle*, 8 Mee. & W. 258. If the plaintiff is dead, service on his representatives, if there are any, or his wife, is necessary. *Ex-parte Richer*, 4 Dowl. 275; 1 Har. & W. 518.

Where the residence of the plaintiff and his attorney were both unknown, it was held sufficient to serve the notice on the attorney's successors in business, who stated they were concerned in other matters for the plaintiff, and would oppose the discharge. *Jones v. Boddington*, 2 D. & L. 30. A copy of the affidavits to be used on the application is generally served with the notice. *Wilcox v. Lemon*, 8 Dowl. 144.

The gaoler or keeper's certificate of the commitment and causes must be obtained before the application, and an affidavit made of the signature. There must also be an affidavit of the prisoner's signature to the notice (*Randall v. Sweet*, 10 L. J. C. P. 132), and he must make an affidavit properly entitled in the cause as to the amount of the debt and the length of the imprisonment. *Clapperton v. Monteith*, 6 Man. & G. 909; 1 D. & L. 908.

If no previous notice of the application be given the rule is a rule *nisi* only (*Ex-parte Neilson*, 7 Taunt. 37, 467. *Moore v. Clay*, 4 Dowl. 5), which is served in the same manner as the ten-days' notice. *Bolton v. Allen*, 1 Dowl. N. S. 309. The court cannot make the rule returnable at chambers. *Jones v. Fitzadams*, 1 C. & M. 855.

Where the ten-days' notice has been improperly served, the prisoner may still apply for a rule *nisi*. *Johnson v. Rutledge*, 5 Dowl. 579. The plaintiff may, notwithstanding the discharge of the prisoner under this act, proceed with execution against the lands or goods (except his wearing apparel, tools, &c.) to the value of 10*l.* (*O'Hare v. Reeves*, 13 Q. B. 659) of the prisoner, in the same manner as if the prisoner had never been taken or charged in execution, and he cannot be a second time taken in execution on the same judgment, unless the discharge was unduly or fraudulently obtained. 48 Geo. 3, c. 123, s. 1. In the latter case the plaintiff may apply to the court for leave to sue out a new *ca. sa.*

[1] Where a plaintiff, at whose suit a defendant is in prison, dies and leaves no personal representative, or none who will administer, the prisoner may apply for a rule *nisi* for his discharge, which rule may be served on the plaintiff's next of kin. *Gore v. Wright*, 1 Dowl. N. S. 864. *Taylor v. Burgess*, 16 Mee. & W. 781. The court may, under suspicious circumstances, refer to the master to inquire for the next of kin. *Ridsdale v. Latour*, 2 L., M. & P. 318. An attorney's lien for costs will not be allowed to stand in the way of the discharge (*Camp v. Pote*, 8 C. B. 375), unless the attorney has a lien on grounds independent of the action, as where he advanced money to the plaintiff, who authorised the attorney to pay himself out of

(H) *Discharge by Bankruptcy Court.*[1]

PRIVATE Acts. *See post*, Statutes.

PRIVATORUM Conventio juri publico non derogat. 9 Rep. 141. *A Contract cannot be in derogation of the Law.* See *Butt's case*, 7 Rep. 23, b.

PRIVILEGE. *See* Ambassador, vol. i. p 315; Arrest, id. p. 519; Attorney, vol. ii. p. 16; Parliament, *ante*, p. 48; Prerogative, *ante*, p. 213.

PRIVILEGED Communications. *See* Libel, vol. v. p. 368; *post*, Slander.

PRIVY Council.[2]

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the money recovered in the action, and where such attorney states his intention to take out administration. *Cox v. Richard*, 2 L., M. & P. 298. Where a personal representative, however, exists, his consent is required before the court will discharge the defendant, even though eighteen months had elapsed from the plaintiff's death. *Fothergill v. Walton*, 4 Bing. 711; 1 M. & P. 743. *Dunsford v. Gouldsmith*, 8 Moore, 145. See *Pyne v. Earl*, 8 T. R. 407. The defendant will also be discharged where the action is discontinued or abated, or where the defendant compromises or settles the debt (see *Butt v. Conant*, 3 B. & B. 3; 6 Moore, 65), or where any third party pays it for him (*Rimmer v. Turner*, 3 Dowl. 601), and the plaintiff is bound to grant a discharge, otherwise an action on the case may lie against him. *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26. Where, however, the plaintiff sues for the benefit of other parties, he cannot release the defendant collusively, otherwise an attachment will lie against him. *M'Gregor v. Barrett*, 6 C. B. 262. Where a plaintiff was in execution for costs, and defendant absconded, and his attorney consented to the discharge, the court held they had no power to discharge the plaintiff. *Pearce v. Skaif*, id. 200.

Where a party was imprisoned for a libel, and afterwards reversed the judgment on error, he was held entitled to his discharge. *Holt v. Reginam*, 2 D. & L. 771.

[1] By 12 & 13 Vic. c. 106, s. 112, the Bankruptcy Court has power, under certain circumstances, to order a bankrupt in custody to be discharged, either absolutely or conditionally: "Provided, also, that such release shall in nowise affect any rights of the creditor at whose suit the bankrupt may be in prison or in custody against the bankrupt, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the Bankruptcy Court." See *Larkin v. Marshall*, 1 L., M. & P. 186. *Allcard v. Wesson*, 7 Ex. 753. *Clark v. Smith*, 3 C. B. 982. *Wearing v. Smith*, 9 Q. B. 1024. As to discharge under 24 & 25 Vic. c. 134, ss. 161, 162, *see* Bankruptcy, vol. iii. p. 277. So, before that statute, the prisoner might have obtained his discharge by means of the Insolvent Debtors' Acts, 1 & 2 Vic. c. 110, s. 75, *et seq.*; 7 & 8 Vic. c. 96; and 8 & 9 Vic. c. 127. *Harvey v. Hudson*, 5 Ex. 845. *Ex parte Violet*, 10 C. B. 891. *Howard v. Hudson*, 2 E. & B. 1. *Thomas v. Hudson*, 14 Mee. & W. 353; 16 id. 885. *Hookpayton v. Bussell*, 9 Ex. 279.

[2] The Privy Council is the most effective and important council of the king. It consists of a body of such peers or private subjects as the king particularly selects and honours with his peculiar confidence. Their number depends on the royal pleasure; they may be appointed merely by the royal nomination, without any particular ceremony or instrument, on taking the oaths for the security of the government and the test for the security of the church; and their qualifications have not been made the subject of legal definition, except by the stat. 12 & 13 Wm. 3, c. 2, by which persons born out of the dominions of the Crown of England, unless born of English parents, even though naturalised by parliament, are rendered unable to be of the privy council. Their official existence depends also entirely on the king's will; the whole or one of the members may be immediately removed; though, to obviate the common-law inconvenience of the demise of the Crown operating as a dissolution of this assembly, the stat. 6 Anne, c. 7, s. 8, prolongs its continuance for six months after the royal demise, unless sooner determined by the successor. The duty of a privy councillor appears, says Sir Wm. Blackstone (1 Com. 230; 4 Burr. 2422), from the oath of office, which consists of seven articles — 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public without partiality, through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what should be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general — 7. To observe, keep, and do all that a good and true councillor ought to do to his sovereign lord. The privy council have also, in certain cases, a judicial appellate jurisdiction, and the power of magistrates. The original and exclusive

PRIVY Seal.[1]

PRIZE[2] **and Prize-Money.**[3] *See* Admiralty, vol. i. p. 183; Capture, vol. iii. p. 28.

PROBABLE Cause. *See* False Imprisonment, vol. iv. p. 428; Malicious Prosecution, vol. v. p. 419.

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jurisdiction in cases relating to boundaries between provinces in the plantations, the dominion or proprietary government therein, is vested in the king in council. They possess judicial power through the king in all cases in which an appeal in the *dernier ressort* lies to the king. So, in Admiralty causes (3 Price, R. 110), being matters which arise out of the jurisdiction of the realm. 1 Bl. Com. 231. And they have also jurisdiction in matters of idiotcy and lunacy. The judicial authority of the council is usually exercised in a committee of the whole privy council, who hear the allegations and proofs, and make their report to the king in council, and the decision rests with his majesty. But the king in council cannot decree in person, even in England. 1 Ves. sen. 447. And it is expressly declared and enacted by the stat. 16 Car. 1. c. 10, s. 5, that neither the king nor privy council have any jurisdiction or power to take cognisance of any matter of property, real or personal, belonging to subjects of this kingdom. The privy councillors have, whilst in council, the power by warrant to commit offenders to safe custody, to take their trial for high offences against the government. 1 Bl. Com. 251; 7 T. R. 748. And secretaries of state also may (but not by general warrants) cause a party accused of high treason to be arrested. 2 Wils. 288. But none of these officers can punish, they can only inquire; and the stat. 16 Car. 1, c. 10, gives a *habeas corpus*, as if the party were committed by an ordinary justice of the peace. Privy councillors have also precedence and rank as such. 1 Bl. Com. 405. And the stats. 3 Hen. 8, c. 14, and 9 Anne, c. 16, were passed to protect them against conspiracies of the king's menial servants to kill them, which are felonies; and any attempt to kill them in the execution of their office, which is a capital offence.

The Council exercises judicial functions in colonial causes which arise out of the jurisdiction of this kingdom (*see* 3 & 4 Wm. 4, c. 41), in appeals from the Lord Chancellor in matters of lunacy or idiotcy (*Sheldon v. Fortescue*, 3 P. Wms. 108); in appeals from the ecclesiastical and maritime courts (2 & 3 Wm. 4, c. 92; 3 & 4 Wm. 4, c. 41, ss. 2, 31; 6 & 7 Vic. c. 38); in applications to prolong the term of patents for new inventions (5 & 6 Wm. 4, c. 83; 2 & 3 Vic. c. 67; 7 & 8 Vic. c. 69, s. 2); and in making orders in certain cases relative to copyright, pursuant to the provisions of the Copyright Acts. 5 & 6 Vic. c. 45, s. 5; 7 & 8 Vic. c. 12.

Practically, all the judicial authority of the privy council is exercised by a committee of privy councillors called the "Judicial Committee of the Privy Council," who hear the allegations and proofs, and make their report to her Majesty in council, by whom the judgment is finally given. *See* 3 & 4 Wm. 4, c. 41; 6 & 7 Vic. c. 38; 7 & 8 Vic. c. 69; 8 & 9 Vic. c. 30; 14 & 15 Vic. c. 83; 22 & 23 Vic. c. 1. *Ex-parte Smyth*, 1 Tyr. & Gr. 222. *Penn v. Baltimore*, 1 Ves. sen. 444. *Chesterton v. Farlar*, 7 Ad. & E. 713. *Hutchinson v. Gillespie*, 11 Ex. 798; 4 Steph. Com. 479, 5th ed.

There are also other committees of the privy council, which exercise important administrative functions; namely, the committee called the "Board of Trade." *See* 6 & 7 Wm. 4, c. 71, s. 56, as to tithe commutations; 14 & 15 Vic. c. 64, as to railways; 16 & 17 Vic. c. 129; 17 & 18 Vic. c. 104; and 25 & 26 Vic. c. 63, as to merchant ships and seamen; 24 & 25 Vic. c. 45; 25 & 26 Vic. c. 19, s. 69, as to the formation of piers and harbours; 25 & 26 Vic. c. 89, as to joint-stock companies; and 13 & 14 Vic. c. 104, as to copyright of designs. And a committee called the "Education Committee" receives applications for assistance out of the parliamentary grants made for the purpose of education. *See* 7 & 8 Vic. c. 37; 18 & 19 Vic. c. 131; 19 & 20 Vic. c. 116. *See* Rules and Regulations, 13th June, 1853.

[1] All persons must take notice of the queen's privy seal. *East India Co. v. Sandys*, Skin. 225.

[2] In international law a captured vessel, or vessel and cargo captured by a public or private armed vessel of a belligerent exercising the right of war. The sentence of a prize court is necessary to invest a capture with the character of prize.

[3] Under a prize proclamation of 1797 it was held that the officer was entitled to the flag eighth who was the commander on the station, and not he who was returning home. *Lord Nelson v. Tucker*, 4 East, 238. *Lord Keith v. Pringle*, id. 261. See *Johnstone v. Margetson*, 1 H. Black. 262. *Donelly v. Topham*, 1 Taunt. 1.

Where a captain, under the command of a flag-officer, quitted his station in disobedience of orders, but for which he afterwards received the approbation of the Admiralty, he was held entitled to the flag eighth, and not the commanding flag-officer (*Harvey v. Cook*, 6 East, 220; 2 Smith, 341), unless by special terms of his commission a ship detached by one commanding officer, within the limits of another's command, ceases whilst within them to be under the command of the former, who, therefore, is not entitled to the flag eighth upon a capture made therein. *Holmes v. Rainier*, 8 East, 502.

Even admitting that the commander upon one station may annex to his command a cruiser put by the Admiralty under the command of an admiral upon another station, still he cannot entitle himself to share in the

PROBATE.[1] *See* also Administration, vol. i. p. 162; Executors and Administrators, vol. iv. p. 360; *post*, Wills.

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prizes she may take whilst cruising under the orders he may have given to her, unless taken during such time as she cruises within the limits of his station. *Lady Gardner v. Lyne*, 13 East, 574. See *Drury v. Lord Gardner*, 2 M. & S. 150. *Lord Duncan v. Mitchell*, 4 id. 105.

The Commander is the person who stands on the ship's books as captain, though under arrest, and another officer has been put on board to command. *Lumley v. Sutton*, 8 T. R. 224.

The mate of a revenue cutter, acting as commander under a temporary appointment made by the comptroller and collector of the customs at the port to which she belongs, was held entitled to share as commander under the warrant of 26th November, 1803, without deducting the share of a deputed mariner, who, at the time of the capture, was on board acting as mate by like authority; and this, notwithstanding the former commander, whose commission as such had before been withdrawn and cancelled by order of the commissioners, was afterwards restored, and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. *Pill v. Taylor*, 11 East, 414.

A second captain appointed by the Admiralty on board, and commanding at the time of the capture, is entitled to the captain's share. *Waterhouse v. King*, 2 East, 507.

An officer on board, but not belonging to the ship, is only entitled to a passenger's share. *Wennys v. Linsee*, Dougl. 324.

No right vests under the Prize Acts in the captain until ultimate adjudication by the prize courts. *Home v. Lord Camden*, 2 H. Black. 533. The title to prize-money must be decided by the king's proclamation for its distribution. *Sutton v. Johnstone*, 1 T. R. 508. It can be assigned only in the form prescribed by 26 Geo. 3, c. 63. *Turtle v. Hartwell*, 6 T. R. 426.

By stat. 33 Geo. 3, c. 32, the parties shall not be liable, in case of the reversal of a sentence of condemnation, beyond the net value of the proceeds at the time of the sale of the prize. The meaning is, that the captors shall not be charged with the value of the prize beyond the amount of what it then produced; therefore, they are chargeable with any interest made with those proceeds. *Willis v. Causes*, 5 East, 22; 1 Smith, 339.

Trespass does not lie for an imprisonment consequent on the capture of a ship as prize, although the ship shall have been acquitted (*Le Caux v. Eden*, Dougl. 596). Nor for goods taken on shore as prize by the joint operation of a fleet and army. *Lindo v. Rodney*, id. 613, n. And where a ship is *bonâ fide* seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she be released without any suit being instituted against her: his remedy, if any, being in the Court of Admiralty. *Faith v. Pearson*, 2 Marsh. 133; 6 Taunt. 439. See *Dobrie v. Napier*, 2 Bing. N. C. 782. *Bullen v. Reg.* 11 Moore, P. C. C. 271.

[1] In its widest sense, all the proceedings in proving a will, including the proof itself, the copy of the will, and certificate of proof.

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I. Of the Court of Probate and its Officers.

(A) *Of the Judge.*[1] (B) *Registrars and District Registrars.*[2] (C) *Practitioners.*[3]

[1] The judge ordinary may exercise all the powers formerly vested in the full court (23 & 24 Vic. c. 144, s. 1), and he may call in the assistance of one of the other judges (Id.), or direct any matter to be heard by the full court. (Sect. 2.) This power will not be acted upon, except for some sufficient reason. *Bevan v. Bevan*, 30 L. J. P. & M. C. 23.

The judge of the Probate Court may sit for the judge of the Admiralty Court, and *vice versâ*. 21 & 22 Vic. c. 95, s. 1.

The judge of the court, if a privy councillor, is a member of the Judicial Committee of the Privy Council. 20 & 21 Vic. c. 77, s. 113.

[2] Provision is made in the statute for the appointment of principal and district registrars. 20 & 21 Vic. c. 77, ss. 13, 14, 15. They are appointed by the judge (sect. 18), and hold their offices during good behaviour, subject to be removed by order of the Lord Chancellor for some reasonable cause, to be in such order expressed. (Sect. 19.) The registrars of the principal registry are prohibited from practising as advocate, barrister, proctor, solicitor, or attorney. (Sect. 20.) They have power to administer oaths. (Sect. 27.) Forging their signature is felony. (Sect. 28.)

There are four principal registrars, who are paid by salary. 21 & 22 Vic. c. 95, s. 67. In general they are promoted by seniority. (Sect. 7.) Clerks having served five years in the principal registry are eligible to be appointed registrars or district registrars. (Sect. 8.)

The registrars of the principal registry are invested with, and shall and may exercise, with reference to proceedings in the Court of Probate, the same power and authority which surrogates of the judge of the Prerogative Court of Canterbury could or might, before the passing of the Court of Probate Act, have exercised in chambers with reference to proceedings in the said Prerogative Court. 21 & 22 Vic. c. 95, s. 24.

The judge may appoint a deputy for any officer incapacitated by ill-health or other infirmity, for a period not exceeding six months. 21 & 22 Vic. c. 95, s. 35.

The district registrar pays the salaries of his clerks out of the fees, and retains the residue to his own use: he must, however, render an account of the fees annually to the Commissioners of the Treasury, who may order that he should be paid by salary. 20 & 21 Vic. c. 77, s. 111.

[3] All serjeants and barristers-at-law are entitled to practise in all causes and matters in the Probate Court. 21 & 22 Vic. c. 95, s. 2.

(D) *Sittings of the Court.*[1]
(E) *Declarations, Affidavits, or Affirmations; before whom Sworn.*[2]
(F) *Of the Fees of Court.*[3]

II. Of the Jurisdiction of Probate Court.[4]

Advocates of any ecclesiastical court, when the act was passed, are entitled to practise in the court, and they, and serjeants and barristers, are to have the same precedence there as they have before the Judicial Committee of the Privy Council. 20 & 21 Vic. c. 77, s. 40. Proctors, solicitors, and attorneys, are qualified to practise. Sects. 42–45.

The 53 Geo. 3, c. 127, imposes penalties on proctors allowing their names to be used by unqualified persons. Nothing in that act prevents any proctor of the Court of Probate from acting as agent of any attorney or solicitor in relation to any matter testamentary, or from allowing him to participate in the profits of and incident thereto. 20 & 21 Vic. c. 77, s. 94.

The judge of the Court of Probate has and exercises over proctors, solicitors, and attornies, practising in the court, the like authority and control as is exercised by the judges of any court of equity or common law over persons practising therein as solicitors or attornies. 21 & 22 Vic. c. 95, s. 36.

[1] The judge may sit in chambers for the despatch of business; but no question may be heard in chambers which either party require to be heard in open court. 21 & 22 Vic. c. 95, s. 3. When so sitting in chambers, the judge has the same power and jurisdiction in respect of the business brought before him as if sitting in open court. (Sect. 5.)

[2] The judge may appoint commissioners for taking oaths in the Isle of Man or the Channel Islands. 21 & 22 Vic. c. 95, s. 30. And affidavits, declarations, or affirmations, may be declared, sworn, and affirmed abroad, before the persons empowered to administer oaths under the 6 Geo. 4, c. 87; or 18 & 19 Vic. c. 42: "Provided that in places where there are no such persons as are mentioned in the said acts, such affidavits, declarations, or affirmations, may be made, declared, and affirmed before any foreign local magistrate, or other person having authority to administer an oath." 21 & 22 Vic. c. 95, s. 31. In Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plantation, or place out of England, under the dominion of her majesty, they may be sworn and taken before any court, judge, notary public, or person lawfully authorised to administer oaths therein, or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge, or surrogate, who at the time of the passing of the Court of Probate Act was authorised to administer oaths in the Isle of Man or in the Channel Islands respectively; and all registrars and other officers of the Court of Probate are required to take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, or person, which shall be attached, suspended, or subscribed to any such affidavit, declaration, or affirmation, or to any other document. (Sect. 32.) As to forgery of such seal, *see* s. 33. The wilfully giving false evidence in any such affidavit, &c. is perjury. (Sect. 34.)

An affidavit sworn before a notary abroad, will not be admitted unless it appears by affidavit that there was not at the place where it was sworn a British consul or other officer empowered to take affidavits by the 18 & 19 Vic. c. 42, and that a notary had by the law of such place authority to take affidavits. *In the Goods of Bernard*, 31 L. J. Prob. 89.

[3] Tables of fees have been issued under the act, which are subject to alteration as may seem expedient. *See* 20 & 21 Vic. c. 77, s. 95. None of the fees payable to the officers of the Court of Probate, or of any county court in respect of business under this act, except the fees of the district registrars (which are to be taken as their remuneration, and for their own use), the fees of proctors, solicitors, and attornies, and such fees as may be authorised to be taken for their own use by surrogates and commissioners for administering oaths, shall be received in money, but every such fee shall be collected and received by a stamp denoting the amount of the fee which otherwise would be payable. 20 & 21 Vic. c. 77, ss. 97, 98. Documents which ought to be so stamped, will not be received or filed until it is affixed. In case the omission has been through mistake or inadvertence, the judge may order the affixation of a stamp, and thereupon the document, and all proceedings in reference to it, will be as valid as if the stamp had been originally upon it. (Sect. 99.) Officers conniving at a fraudulent evasion of the stamp-duty are subject to dismissal. (Sect. 100.)

[4] By the 20 & 21 Vic. c. 77, the ecclesiastical jurisdictions by which probate and administration were previously granted, and testamentary causes decided, were abolished, and a new court erected for these purposes. By the 23d sect. of this act it is enacted, that "the Court of Probate shall be a court of record; and such court shall have the same powers, and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury, and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which by statute or otherwise are imposed on or should be performed by ordinaries generally, or on or by the said prerogative courts in respect of probates, administrations, or matters or causes testamentary, within their respective jurisdic-

III. Of what Testamentary Instruments Probate will be Granted.

See also *post*, Will.

(A) *In General.*[1]

tions, shall be performed by the Court of Probate: Provided that no suits for legacies or suits for the distribution of residues shall be entertained by the court, or by any court or person whose jurisdiction as to matters and causes testamentary is hereby abolished."

The court has power to summon witnesses, and require the production of documentary evidence (20 & 21 Vic. c. 77, s. 24), and to punish for contempt; and generally it has the same power for enforcing all orders, decrees, and judgments as are by law vested in the Court of Chancery for such purposes. (Sect. 25.)

As personal property, wherever situate, follows the person, the court will grant probate of a document, though it purports to deal only with property out of its jurisdiction. *In the Goods of Winter*, 30 L. J. Prob. 56.

Indian government notes, on which interest is payable in London, and certain Indian government promissory notes, are deemed personal estate of such deceased person in England, and probate or letters of administration in England, or confirmation granted in Scotland, and sealed with the seal of the principal Court of Probate in England, in pursuance of the provisions of the Confirmation and Probate Act, 1858, shall be valid and sufficient to constitute the persons therein named the legal personal representatives of the deceased with respect to such notes and monies as aforesaid. 23 Vic. c. 5, s. 1. And by 24 & 25 Vic. c. 114, wills made out of the kingdom are to be admitted to probate, if made according to law of place where made; and to wills in the kingdom, if according to local usage, change of domicile is not to invalidate. As to domicile, *see* 24 & 25 Vic. c. 121.

In applying for administration of the estate of a person who died abroad, it should be stated in the affidavit that he left effects in this country. *Evans v. Burrell*, 28 L. J. Prob. 82.

As to probates and administrations in Ireland, *see* 20 & 21 Vic. c. 79; 21 & 22 Vic. c. 56; 22 & 23 Vic. c. 31.

[1] The court will hold a paper to be testamentary which is in due form and duly executed without regard to its contents, notwithstanding they are manifestly nugatory. *Roberts v. Roberts*, 2 S. & T. 387; 8 Jur. N. S. 220.

Where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the court that it was executed *animo testandi*. *Thorncroft v. Lashmar*, 31 L. J. Prob. 150; 8 Jur. N. S. 595. See *In the Goods of Stoddart*, 2 S. & T. 356.

A codicil conditioned to take effect only upon an event which does not happen, republishes the will, and is on that ground entitled to probate. *In the Goods of De Silva*, 30 L. J. Prob. 171.

Where the name of one of the attesting witnesses was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the name of the attesting witness had been erased by the testator, and afterwards rewritten by the attesting witness at the testator's request, the court granted probate to the widow, on affidavit that notice had been given to the persons entitled in distribution. *In the Goods of Colman*, 30 L. J. Prob. 170.

A will was written on different sheets of note paper, stitched together. At the foot of one of the pages were the following words: — "I leave the whole of my property to the following religious societies; namely, to be divided in equal shares among them." At the top of the opposite page, which was otherwise blank, were the names of certain societies. The surviving attesting witness could not say that the names were there when the will was executed. It was held that the names so written must be considered as interlineations; and as there was not evidence that they were inserted before execution, probate should issue without them. *In the Goods of White*, 6 Jur. N. S. 808.

Where alterations were made in a will after execution, and the testator and attesting witnesses traced the former signatures with a dry pen, and the attesting witnesses wrote their initials in the margin opposite each alteration, this was held no evidence of a due execution of the alterations, and the court refused to admit them to probate. *In the Goods of Cunningham*, 29 L. J. Prob. 71.

Where the testator made a testamentary disposition on the first page of a sheet of note paper, signed and attested by one witness only; and afterwards, on the third page of the same sheet, made another testamentary disposition duly executed, and which contained no reference to the first, it was held not incorporated with it. *In the Goods of Drummond*, 8 W. R. 476.

Due execution was inferred where the will appeared on its face to have been duly executed, and the attesting witnesses were unable to say whether or not the testator had signed it when they subscribed their names. *Gwillim v. Gwillim*, 29 L. J. Prob. 31.

Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in accordance with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him. *In the Goods of Owston*, 10 W. R. 410; 6 L. T. (N. S.) 368.

(B) *In the case of Wills of Married Women.*[1]

IV. To whom Probate may be Granted.[2] *See* also Executors, vol. iv. p. 362.

Where the testatrix, by her will, bequeathed all her jewels, furniture, &c., to such of her children, in such portions as she should by any list, signed by herself, direct; a list annexed to a codicil, but unsigned by the testatrix, was not admitted to probate. *In the Goods of Warner*, 10 W. R. 566.

The court refused to grant probate on motion, where the attestation clause and signatures of the deceased and attesting witnesses were written on a separate piece of paper, which had previously been attached by wafers to the bottom of the will. *In the Goods of Lambert*, 31 L. J. Prob. 118; 8 Jur. N. S. 158. But where the attestation clause and signature were written on a piece of paper bearing a bill stamp, and pasted at the foot of the parchment on which the will was written, it was admitted to probate. *In the Goods of Gausden*, 2 S. & T. 362; 31 L. J. Prob. 53.

Where a paper writing, purporting to be a will, appears clearly from the affidavits of the attesting witnesses to have been not duly executed, and a person appointed by an executor is desirous of obtaining the decision of the court that it is inoperative as a will, he may do so by moving the court to decree probate. *In the Goods of Jackson*, 28 L. J. Prob. 32.

The deceased duly executed in the presence of two witnesses, the day before his death, two papers, in which he requested that any money he might have in certain banks should be paid to his wife, at any time she might apply for the same; and there being evidence that he meant they should operate after his death, they were admitted to probate. *In the Goods of Marsden*, 6 Jur. N. S. 405; 36 L. T. 87.

B., on his death-bed, dictated a writing in the form of a letter, but attested by two witnesses, requesting the devisee of certain estates under his will to consent to charge them with 10,000*l.*, to be raised as soon as possible after his death, adding that he knew the request was not legal. The court decreed probate of the paper, on motion, in order that the question of construction might be brought before a court of equity. *In the Goods of Mundy*, 30 L. J. Prob. 85; 7 Jur. N. S. 52.

A will drawn by a person who was a stranger in blood to the testatrix, and attested by two witnesses (both since dead) with their respective marks, no one else being present except the drawer, was admitted to probate on the consent of the next of kin being formally executed. *In the Goods of L. Edwards*, 1 S. & T. 10.

If a testator, when he executes a testamentary paper, is ignorant that it contains a clause which has been inserted without his knowledge and by mistake, such clause will be excluded from the probate. *In the Goods of Duane*, 31 L. J. Prob. 173; 8 Jur. N. S. 752.

The wills of soldiers and sailors in actual service abroad are admissible to probate, although not executed with the same solemnities as are required in the case of other wills. *See post*, Wills.

A letter of a sailor containing some testamentary sentences written at a foreign port before sailing on a voyage, in the course of which he was drowned, was admitted to probate. *In the Goods of Paker*, 5 Jur. N. S. 553.

Probate of a will made by a soldier in actual military service, signed but not attested, will not be granted, unless the signature be proved by two disinterested persons. *In the Goods of Neville*, 28 L. J. Prob. 52. *See post*, Wills.

Probate may be granted of a copy where the original cannot be produced. See *In the Goods of Pechell*, 6 Jur. N. S. 405. *In the Goods of Gardner*, 27 L. J. Prob. 55.

[1] The testamentary law of the domicile at the time of death does not govern the will of a married woman made in execution of a power. *In the Goods of Alexander*, 29 L. J. Prob. 93; 6 Jur. N. S. 354. *See* 24 & 25 Vic. c. 114, *ante*, p. 257.

Where a testamentary paper is made in pursuance of a power, the court is bound to grant probate of the paper, provided it is valid as a testamentary instrument, without examining into the due execution of the power; leaving it to the competent court of construction to decide whether the testamentary paper is a due execution, or operative under the power. *Barnes v. Vincent*, 5 Moore, P. C. 201. *De Chatelain v. Pouhgny*, 5 Jur. N. S. 579; 7 W. R. 497.

A married woman made a will appointing executors, and died in the lifetime of her husband, who by deed confirmed the will, and consented to the same being proved. The court granted administration, with the will annexed, to the executors. *In the Goods of Isaacs*, 31 L. J. Prob. 158.

Where a married woman, in execution of a power, devises real estate only, and names executors "of this my will," if she survives her husband she will be intestate as to any property not specifically mentioned therein; and such executors will take nothing *jure representationis*. *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; 29 L. J. Prob. 47.

[2] The persons appointed executors in the will are entitled to probate. If the effect of the disposition of the estate shows an intent that a person named should act as executor, he may be entitled to probate, although not formally named in the will as executor. Thus, where the testator by will disposed of the whole of his personal and of certain real property, and appointed executors; he subsequently executed another

V. Practice in Non-Contentious Business.[1]

(A) *In the Principal Registry.*

(*a*) *Application for Probate.*[2]

testamentary paper, containing this clause—"If my wife survives me, in two years after my wife's death, my cousin B., and next of kin, to take possession of all my real and personal property, and to pay all my just debts according to my will. I give B. this written document, as I am afraid my executors will not put my will into court." The executors died in the lifetime of the testator. It was held, that as the paper was testamentary, and duly executed (although it did not operate until some time after the death of the testator) it was entitled to probate; and that B. was executor according to the tenor thereof, and that he must take probate of the will as well as of the paper. *In the Goods of Newns*, 7 Jur. N. S. 688.

In a codicil, the testator ordered certain personal ornaments to be transmitted to the executor B. in England, to whom the proceeds of the sale of property of the testator abroad were to be also remitted, and with the amount he was directed to pay a debt, and divide the residue between the deceased's sisters. It was held that B. was executor according to the tenor of the codicil. *In the Goods of Cooper*, 8 Jur. N. S. 394.

Where the will (duly executed) was in the form of a letter, directing the person to whom it was addressed to dispose of the property of the deceased according to directions therein given, it was held that such person was executor according to the tenor. *In the Goods of Manby*, 8 Jur. N. S. 493.

A universal legatee is not entitled to probate according to the tenor of the will. *In the Goods of Oliphant*, 6 Jur. N. S. 256.

Where the whole personal property is given to a trustee in trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor. *In the Goods of Jones*, 4 L. T. (N. S.) 477. And where the will contained the following clause—"I give and bequeath to A. B. and C. D., administrators and assigns, and to be disposed of by them as trustees, all funeral expenses and others to be paid, and afterwards the residue of my personal estate to be paid to," &c., it was held that they were not executors according to the tenor. *In the Goods of Heaton*, 7 Jur. N. S. 832.

If the name of the executor has been erased, and another name substituted by the testator, but the alteration is not executed, probate will be granted to the person originally named, if he can be ascertained. *In the Goods of Harris*, 29 L. J. Prob. 79. *In the Goods of Parr*, id. 70.

A testator by his will disposed of all his real and personal estate, and appointed B., C., and D. executors. By a subsequent testamentary paper, which contained no clause of revocation, he disposed of his personal estate only, and appointed B. & E. executors. It was held that the appointment of executors in the first testamentary paper was not revoked, and that the executors named in the second will were entitled to probate of both, leave being reserved to the executors named in the first to come in and take probate. *In the Goods of Leese*, 31 L. J. Prob. 169.

B. made her will in the presence of C. and D., who subscribed the same; subsequently E., an executor and legatee in the will, at the request of the testatrix, signed his name, to signify, as suggested, his acceptance of the executorship. The court rejected a motion to omit E.'s name in the probate. *In the Goods of Forest*, 2 S. & T. 333.

Where the testator appointed "A. as my executor with any two of my sons," and died leaving three sons, the court declined to grant probate to A. and two of the sons. *In the Goods of Baylis*, 31 L. J. Prob. 119; 8 Jur. N. S. 546.

Where the person designated executor could not be found, and it appeared that neither the testator nor any of his family knew any person answering to the name or description given in the will, the court granted administration, with the will annexed, to one of the residuary legatees. *In the Goods of Sawtell*, 31 L. J. Prob. 65; 10 W. R. 782.

The executors of a person found *felo-de-se* by the verdict of the jury upon a coroner's inquest are entitled to probate, notwithstanding there may have been a forfeiture of the personal estate to the Crown. *In the Goods of Bailey*, 4 L. T. (N. S.) 477.

An executor is not disentitled by a conviction of felony after the death of the testator from maintaining a suit in the Probate Court, with a view to establish the validity of the will by which he was appointed executor. *Smethurst v. Tomlin*, 7 Jur. N. S. 295.

On the death of an executor who has neither renounced nor taken probate, the executor of the survivor of the acting executors becomes the personal representative of the original deceased. *In the Goods of Lorimer*, 10 W. R. 809; 6 L. T. (N. S.) 612.

[1] Non-contentious business shall include all common-form business, as defined by the act and the warning of caveats. Rules and orders, 27 L. J. Prob. 1; *see* also rules, 30th July, 1862, 31 id. 9.

[2] Application for probate or letters of administration may be made at the principal registry in all cases. (R. 1.)—Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent. (R. 2.)—The registrars are not to allow probate or letters of administration to issue until all the inquiries which they may see fit to institute have been answered to their satisfaction. The

(*b*) *Probate of Wills dated after* 31*st December*, 1837.[1]
(*c*) „ „ *before* 1*st January*, 1838.[2]
(*d*) *Grant of Letters of Administration.*[3] *See* vol. i. p. 165.

registrars are, notwithstanding, to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud. (R. 3.)

[1] As to probate of wills, and codicils, and letters of administration with the will (or will and codicils) annexed, where the wills and codicils are dated after 31st December, 1837, it is directed by rule 4, "if there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if either of them be living, to prove that the provisions of 1 Vic. c. 26, s. 9, and 15 & 16 Vic. c. 24, in reference to the execution of the will, were, in fact, complied with, and such affidavit must be engrossed and form part of the probate.—By r. 5, if on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the registrars must refuse probate.—By r. 6, if on perusing the affidavit or affidavits setting forth the facts of the case it appear doubtful whether the will has been duly executed, the registrars may require the parties to bring the matter before the judge on motion.—By r. 7, if both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact, and of the handwriting of the deceased and the subscribing witnesses; and also of any circumstances which may raise a presumption in favour of the due execution.—By r. 8, interlineations and alterations are invalid, unless they existed in the will at the time of its execution, or if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.—By r. 9, when interlineations or alterations appear in the will (unless duly executed or recited in, or otherwise identified by the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are but of small importance, and are evidenced by the initials of the attesting witnesses.—By r. 10, erasures and obliterations are not to prevail, unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can, upon inspection of the paper, be ascertained, they must form part of the probate.—By r. 11, in every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.—By r. 12, if a will contain a reference to any deed, paper, memorandum, or other document, so as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document, must be required, with a view to ascertain whether it be entitled to probate, and, if not produced, its non-production must be accounted for.—By r. 13, no deed, paper, memorandum, or other document can form part of a will, unless it was in existence at the time when the will was executed.—By r. 14, if there are any vestiges of sealing-wax or wafers, or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document, must be required, and if not produced its non-production must be accounted for.—By r. 15, rules apply equally to codicils.—By r. 16, in case of probate of a married woman's will, or of administration with the will of a married woman annexed, made by virtue of a power, the power under which the will purports to have been made must be specified in the grant.

[2] As to probate of wills, codicils, and testamentary papers relating to personalty, and dated before the 1st of January, 1838, directions are contained in rules 17 to 27.

[3] *As to Letters of Administration.*—By the rules of 1862 (r. 28), where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit, or statutory declaration, that notice of such application has been given to such other next of kin.—By r. 29, limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge.—By r. 30, no person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge.—By r. 31, whenever the court, under sect. 73, appoints an adminis-

(*e*) *General Rules and Orders for the Principal Registrars.*

(1) *Of the Swearing of the Will and Grant of Letters of Administration.*[1]

(2) *Testamentary Papers to be Marked.*[2]

(3) *Renunciations.*[3]

(4) *Of Affidavits.*[4]

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trator other than the person who, prior to the Court of Probate Act, would have been entitled, it must be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.—By r. 32, in the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney acting under a power of attorney.—By r. 33, grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.—By r. 34, in cases of infants (*i.e.* under the age of seven years) not having a testamentary guardian or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or of one of the registrars: the registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that the next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.—By r. 35, where there are both minors and infants the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar.—By r. 36, in all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of 20*l.*, or when the administrators are the guardians appointed by the High Court of Chancery or other competent court, or are the testamentary guardians of the minors or infants.—By r. 37, the oath of administrators and of administrators with the will annexed, is to be so worded as to clear off all persons having a prior right to the grant; and the grant is to show on the face of it how the prior interests have been cleared off; and the oath is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

[1] By the rules of 1862, the following general rules and orders for the principal registrars were promulgated:—

By r. 43, no probate or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.—By r. 44, no letters of administration shall issue until after the lapse of fourteen clear days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.—By r. 45, in every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars.—By r. 46, all probates or letters of administration issued from the principal registry are to be filled up there.—By r. 47, the usual oath of administrators, as well as that of executors and administrators, with the will annexed, is to be subscribed and sworn by them as an affidavit, and then filed in the registry.

[2] By r. 49, every will, copy of a will, or other testamentary paper to which an executor or administrator with the will is sworn, must be marked by such executor or administrator, and by the person before whom he is sworn.

[3] By r. 50, no person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

[4] By r. 51, every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.—By r. 52, in every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.—By r. 53, no affidavit will be admitted in any matter depending in the Court of Probate, of which any material part is written on an erasure; or in the jurat, of which there is any interlineation or erasure.—By r. 54, where an affidavit is made by any person who is blind, or who from his or her signature or otherwise appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature in the presence of the registrar, commissioner,

(5) *Caveats.*[1]
(6) *Citations.*[2]
(7) *Blind or Illiterate Testators.*[3]
(8) *Alteration in Grants, &c.*[4]
(9) *Affixation of Seal to Irish Grant.*[5]
(10) *Grants for Property in the United Kingdom.*[6]

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or other authority before whom the affidavit was made.—By rr. 55, 56, no affidavit to be sworn before the party on whose behalf the same is offered, or before his proctor, &c.—By r. 57, in every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.—By r. 58, the registrars are not to allow any affidavit to be filed (unless by leave of the judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time the affidavit was sworn is not clearly shown by the initials of the commissioner or other person before whom it was sworn.

[1] By r. 59, any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district registry; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat-book.—By r. 60, a caveat shall remain in force for the space of six months only, but may be renewed.—By r. 61, the registrars shall immediately, upon a caveat being lodged, send notice thereof to the registrars of any district in which it is alleged the deceased resided, or in which he is known to have had a fixed place of abode at the time of his death.—By r. 62, no caveat shall affect any grant made on the day on which the caveat is entered, unless notice previously received.—By r. 63, a caveat shall be warned at the place mentioned in it as the address.—By rr. 64, 65, the warning of a caveat may be sent by post.—By r. 66, before any citation is signed by a registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the district registrar of any district in which the deceased appears to have resided at the time of his death.—By r. 67, in order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning stating the manner of service, and an affidavit of search for appearance and of non-appearance, must be filed.

[2] By r. 68, no citation is to issue under the seal of the court until an affidavit in verification of the averments it contains has been filed in the registry.—By r. 69, citations are to be served personally, when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do.—By r. 70, citations and other instruments which cannot be personally served are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars, as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals, as the judge or one of the registrars may direct.

[3] By r. 71, the registrars are not to allow probate or administration, with the will annexed, of any blind person, or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time a knowledge of its contents. This rule applies to the will of a soldier, made in actual military service, and executed by mark. *In the Goods of Hackett*, 28 L. J. Prob. 42.

[4] By r. 72, whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant, or a grant is revoked, and the volume of the printed calendar containing the entry of such grant has been forwarded to the district registrars; notice of such re-swearing, alteration, or revocation is without delay to be forwarded by the registrars of the principal registry to all the district registrars.

[5] By r. 73, the seal is not to be affixed to any probate or administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officers, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect to letters of administration, the provisions of stat. 21 & 22 Vic. c. 95, s. 29, must also be complied with.

[6] By r. 74, whenever a grant of probate or of letters of administration is made under stat. 21 & 22 Vic. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavits made for the Inland Revenue Office that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland other than that excluded by 22 & 23 Vic. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland,

(11) *Notices to the Queen's Proctor.*[1]
(12) *Transmission of Papers.*[2]
(13) *Probate Copies of Wills.*[3]
(14) *Office Copies.*[4]
(15) *Attendances with Documents.*[5]
(16) *Subpœna to bring in Testamentary Papers.*[6]
(17) *Time for Appearing, &c.*[7]
(18) *Taxation of Costs.*[8]

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a separate affidavit and schedule must also be filed upon all such grants; a note or memorandum must also be written and signed by one of the registrars, to the effect that the testator or intestate died domiciled in England.

[1] By r. 75, in all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bachelor or a spinster, or a widower or a widow without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator-General (or, in case the deceased died domiciled within the duchy of Lancaster, to the solicitor for the duchy in London), in order that he may determine whether he will interfere on the part of the Crown; and no grant is to be issued until the officer of the Crown has signified the course which he thinks proper to take.—By r. 76, in the case of persons dying intestate without any known relation, a citation must be issued against the next of kin of any and all persons having, or pretending to have, any interest in the personal estate of the deceased, and the service thereof upon them shall be effected as required by rule 70. Such citation must also be served on the Queen's proctor, or upon the solicitor for the duchy of Lancaster, as the case may require.

[2] By rr. 77, 78, the registrars are to take care that the copies of wills to be annexed to the probate are fairly written in an engrossing hand. A will may be delivered out to the executor for the purpose of his being sworn thereto before a commissioner, upon an exemplified copy being left in the registry. *In the Goods of Gibbs*, 28 L. J. Prob. 90.

[3] By r. 79, the registrars are required to take care that the copies of wills and affidavits to be annexed to the probate or letters of administration are fairly and properly written in the engrossing hand heretofore in use in the Prerogative Court, and are to reject those which are otherwise.

[4] By rr. 80, 81, office copies furnished in the principal registry are not to be collated unless required. The seal of the court can only be affixed to copies certified to be examined.

[5] By r. 82, if a will or other document filed in the registry is required to be produced at any place within three miles of the principal registry, application must be made for that purpose not later than the day previously to that named for its production; if beyond that distance, at least twenty-four hours' notice must be given. *See* r. 83.

[6] By 21 & 22 Vic. c. 95, s. 23, "it shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said court, to issue a subpœna requiring any person to bring into the principal or any district registry, or otherwise, as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing."—By r. 84, any person bringing in a will or testamentary paper, in obedience to a subpœna, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the registrar, to whom the will or paper brought in is to be delivered, and the registrar will sign the minute recording the delivery thereof. *See* r. 85.—By r. 86, any person served with a subpœna to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.

[7] By r. 87, the time fixed by a warning or citation for entering an appearance, or by a subpœna to bring in a testamentary paper, shall in all cases be exclusive of Sundays, Christmas-day, and Good Friday.

[8] By r. 88, any bill of costs may be referred to the registrars of the principal registry for taxation, and no special order shall hereafter be required for the purpose. The bill of costs of any proctor, solicitor, or attorney, will be taxed on his application, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner, and the registrar shall decide in each case what may be a sufficient notice. (R. 89.) Where an appointment has been made by a registrar to tax a bill, the registrar may proceed to tax the same after the expiration of a quarter of an hour, notwithstanding the absence of either party or his agent, provided he be satisfied that the absent party has had due notice of the ap-

(B) *Proceedings in District Registries.*

(*a*) *What is Non-Contentious Business.*[1]

(*b*) *Grant of Probate in District Registry.*[2]

(*c*) *Probate of Wills dated after 31st December*, 1837.

(1) *Execution and Attestation of.*[3]

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pointment for taxation. (R. 90.) If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill. (R. 91.)

[1] In district registries, non-contentious business shall include all common-form business, as defined by the Court of Probate Act, 1857, and the warning of caveats. (Reg. Gen. 1863.)

[2] By 20 & 21 Vic. c. 77, s. 46, "probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by the affidavit of the person, or some or one of the persons applying for the same, that the testator or intestate, as the case may be, at the time of his death, had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit; and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly."

By sect. 46, such affidavit shall be conclusive for the purpose of authorising the grant by the district registrar of probate or administration, and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached, by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit as is hereby required. The district registrar, however, is not to grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it would otherwise appear to him that probate or administration ought not to be granted in common form. (Sect. 48.) The district registrar must transmit notice to the registrars of the principal registry of the application, containing certain particulars required by the act; and he cannot grant the probate or administration until he has received from them a certificate that no other application appears to have been made. (Sect. 49.) Further, in every case where it appears to a district registrar to be doubtful whether the probate or letters of administration that may be applied for should or should not be granted, or where any question arises in relation to the grant, or application for the grant, of any probate or administration, the district registrar is required to transmit a statement of the matters in question to the registrars of the Court of Probate, who shall obtain the directions of the judge in relation thereto; and the judge may require the district registrar to proceed in the matter according to such instructions as to the judge may seem necessary, or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate, through its principal registry, or, if the case be within its jurisdiction, to a county court. (Sect. 50.)

Wills of which probate has been granted must be filed by the district registrar in the registry of the district. (Sect. 52.)

Application for probate or letters of administration may be made at the principal registry in all cases. Application may also be made at a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which the application is made, and not otherwise. (Reg. Gen. 1863, r. 1.) Such applications may be made through a proctor, solicitor, or attorney; or in person, by executors and persons entitled to grants of administration. (R. 2.)—The district registrar, before he entertains any application for probate or letters of administration, must ascertain that the deceased had, at his death, a fixed place of abode within his district. (R. 3.)—The district registrar is not to allow probate or letters of administration to issue until all the inquiries which he may see fit to institute have been answered to his satisfaction, and this refers more particularly to applications made in person by executors and others. (R. 4.)—No district registrar, or clerk in a district registry, shall directly or indirectly transact business for himself, or as the proctor or solicitor of any other person, in the district registry to which he has been appointed. (R. 5.)

[3] As to probate of will and codicils, and letters of administration with the will (or will and codicils) annexed, where the wills and codicils, or the codicils only, are dated after 31st Dec. 1837. Upon receiving an application for probate or letters of administration with the will annexed, the district registrar must examine the will and each codicil, and see whether, by the terms of the attestation clause (if any), it is shown that the

(2) *Interlineations and Alterations.*[1]
(3) *Erasures and Obliterations.*[2]
(4) *Deeds, &c. referred to in Will.*[3]
(5) *Appearance of the Paper.*[4]
(6) *Married Woman's Will.*[5]
(7) *Codicils.*[6]
(8) *Doubtful Cases.*[7]
(9) *Letters of Administration, with Will annexed.*[8]

(*d*) *Probate of Wills dated before the* 1*st of January*, 1838.
(1) *Execution and Attestation.*[9]

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same have been executed in accordance with the provisions of statutes 1 Vic. c. 26, and 15 Vic. c. 24. (R. 6.)—If there be no attestation clause, or if the attestation clause thereto be insufficient, the district registrars must require an affidavit from at least one of the subscribing witnesses, that the provisions of 1 Vic. c. 26, s. 9, and 15 & 16 Vic. c. 24, have been complied with. (R. 7.)—If, on perusing the affidavits of both the subscribing witnesses, it appear that the requirements of the statute were not complied with, the district registrar must refuse probate. (R. 8.)—If it appear doubtful whether the will or codicil has been duly executed, the district registrar must transmit a statement of the matter to the registrars of the principal registry, who may require the parties to bring the matter before the judge on motion. (R. 9.)—If both the subscribing witnesses are dead, or if, from other circumstances, no affidavits can be obtained, resort must be made to other persons, or affidavits must be procured of the handwriting of the subscribing witnesses. (R. 10.)

[1] Interlineations and alterations are invalid, unless they existed in the will at the time of its execution, or if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. (Reg. Gen. 1863, r. 11.)

[2] Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless they have been rendered valid by the re-execution of the will. (R. 13.)

[3] If a will contain a reference to any document, such as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such document must be required. (R. 15.)

No document can form part of a will or codicil unless it was in existence at the time when the will or codicil was executed. (R. 16.)

[4] If there are any vestiges of sealing-wax or wafers, or other marks upon the testamentary papers, the same must be satisfactorily accounted for. (R. 17.)

[5] In granting probate of a married woman's will, made by virtue of a power, or administration with such will annexed, the power under which such will purports to be made must be specified in the grant. (R. 18.)

[6] The above rules and orders respecting wills apply equally to codicils. (R. 19.)

[7] If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arise in consequence of the appearance of the paper, or on any other point, the district registrar must communicate with the registrars of the principal registry. (Reg. Gen. 1863, r. 20.)

[8] The right of parties to letters of administration with the will annexed, and letters of administration *de bonis non*, depend so entirely upon the circumstances of each particular case taken in connexion with the wording of the will, that no general rules other than those which have obtained a judicial sanction can be laid down for the guidance of the district registrars. Whenever the right of the party applying is at all questionable, a statement of the case, accompanied by a copy of the will, must be transmitted to the registrars of the principal registry, who will advise thereon. (Reg. Gen. 1863, r. 21.)

[9] As to probate of wills, codicils, and testamentary papers relating to personalty, and dated before the 1st of January, 1838, it is not necessary that a will, codicil, or testamentary paper, dated before the 1st of January, 1838, should be attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator, nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will or codicil must be proved by circumstances. (R. 22.)—A will or codicil, signed at the end of it by the testator, and attested by two disinterested witnesses (although there be no clause of attestation), is *primâ facie* entitled to probate. (R. 23.)—In cases where a will or codicil is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name, or made his mark in the presence of, or produced it with his name already written, &c. to, one attesting witness, and afterwards to the other, and

(2) *Appearance of Paper.*[1]
(3) *Alterations and Interlineations.*[2]
(4) *Deeds, &c. referred to in a Will, or annexed to a Will.*[3]
(5) *Republication by Codicil.*[4]

(*e*) *Grant of Letters of Administration.*

(1) *District Registrar must ascertain fact of Death and Value of Property.*[5]
(2) *And that Notice has been given to the Next of Kin.*[6]
(3) *Limited Administration.*[7]
(4) *Administrations under sect.* 73.[8]
(5) *Grants to an Attorney.*[9]
(6) „ *of Administration to Guardians.*[10]

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he declared it to be his will and codicil, or otherwise notified his intention that it should operate as such. (R. 24.)—If the will or codicil is signed at the end of it, but is unattested, and there is nothing to show an intention that it should be attested, the affidavit of two disinterested persons to prove the signature will be sufficient for probate. (R. 25.)—If the will or codicil is signed at the end of it, and attested by one witness, and nothing to show the testator's intention that it should be attested by a second, the affidavit of one disinterested person to prove the handwriting of the testator will be sufficient for probate. (R. 26.)—A person being named as an executor in the will or codicil, or being interested as a legatee, is incompetent to become an attesting witness, and the same, so far as regards the attestation, must be considered as unattested, and the party's evidence will be inadmissible, unless he shall first release his interest thereunder. (R. 27.)—The will, codicil, or testamentary paper should appear on the face of it to be a complete document. (R. 28.)

[1] Any appearance of an attempted cancellation, and any circumstance leading to a presumption of abandonment or revocation of the testamentary paper, and the evidence taken in support of it, should be transmitted to the registrars of the principal registry. (R. 29.)

[2] Alterations, &c. if unattested, are to be proved by the affidavits of two persons to his handwriting. Alterations and interlineations made since the 31st of December, 1837, are subject to the provisions of 1 Vic. c. 26. (R. 30.)

[3] With respect to documents mentioned in a testamentary paper, or appearing to have been annexed thereto, the foregoing rules as to wills bearing date since the 31st of December, 1837, will apply. (R. 31.)

[4] A will made before the 1st of January, 1838, is confirmed by a codicil duly executed, bearing date on or after that day. (R. 32.)

[5] The duties of the district registrar, in granting letters of administration, are in many respects the same as in cases of probate. In both cases he must ascertain the time and place of deceased's death, and the value of the property to be covered by the grant, and see that the applicant has been sworn as required by stat. 55 Geo. 3, c. 184. (R. 33.)

[6] Where administration is applied for by one of the next of kin, there being another equally entitled thereto, the district registrars may require proof by affidavit or statutory declaration that notice has been given to such other. (R. 34.)

[7] These are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited. (R. 35.)—No person entitled to a general grant of administration of the personal estate and effect of the deceased will be permitted to take a limited grant, except under the direction of the judge. (R. 36.)

[8] Whenever the court, under sect. 73, appoints an administrator other than the person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to appear in the oath of the administrator, in the letters, and in the administration bond. (R. 37.)

[9] In the case of a person residing out of England administration, or administration with the will annexed, may be granted to his attorney acting under a power of attorney (R. 38.)

[10] Grants of administration may be made to guardians of minors and infants, for their use and benefit, and elections by minors of their next of kin, or next friend, as the case may be, will be required; but proxies accepting such guardianships, and assignments of guardians to minors, will be dispensed with. (R. 39.)—In all cases of infants (*i. e.* under the age of seven years), a guardian must be assigned by order of the judge, or of one of the registrars of the principal registry. The registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship. (R. 40.)—Where there are both minors and infants, the guardians elected by the minors may act for the infants, without being specially assigned to them by order of the

(7) *Administrator's Oath.*[1]

(8) *Administration Bonds.*[2]

(*f*) *General Rules and Orders for the District Registrars.*

(1) *Last Wills.*[3]

(2) *Time of Issuing Grant.*[4]

(3) *Filling up Grant.*[5]

(4) *Notices of Applications.*[6]

(5) *Oath of Executors and Administrators.*[7]

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judge or a registrar of the principal registry, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge, or of a registrar of the principal registry. (R. 41.) —Where grants of administration are to be made for the use of minors, the administrators are to exhibit a declaration on oath of the personal estate, except when sworn under 20*l.*, or when the administrators are the guardians duly appointed. (R. 42.)

[1] In all administrations of a special character, the recitals in the oath, and in the letters of administration, must be framed in accordance with the facts. (R. 43.)

[2] Administration bonds are to be attested by an officer of the principal registry, by the district registrar, or his chief clerk, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vic. c. 77, and 21 & 22 Vic. c. 95; but in no case are they to be attested by the proctor, solicitor, or attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bond, if not taken in the principal or district registry, must be attested by the same person who administers the oath to such administrator or administratrix. (R. 44.)—In ordinary cases, two sureties are to be required, but when the property is *bonâ fide* under the value of 50*l.* one surety only may be taken to the administration bond. (R. 45.)—In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband to the deceased, or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grants. The alleged value of such property is to be verified by affidavit if required. (R. 46.)—The administration bond is, in all cases of limited or special administration, to be prepared in the district registry. (R. 47.) —The district registrars are to take care (as far as possible) that the sureties to the administration bonds are responsible persons. (R. 48.)

[3] The district registrar is not, in any case in which a will, apparently duly executed, has been produced to him for probate or administration with any former will annexed, to grant probate of any former will or administration with any former will annexed, or administration to the deceased, as having died intestate, without an order of the judge or one of the registrars of the principal registry, showing that the last will is not entitled to probate. In the absence of such order the district registrar is to communicate with the registrars of the principal registry. (R. 50.)

[4] No probate, &c. with the will annexed, shall issue until after the lapse of seven days from the death, unless under the direction of the judge, or by order of one of the registrars. (R. 51.)—Same as to administrations. (R. 52.)—In every case where probate, &c. is applied for after three years from the death, the reason of the delay is to be certified. (R. 53.)

[5] Every grant of probate or of letters of administration issued from a district registry is to be filled up therein, and any former grant which has been revoked, or has ceased, is to be cleared off therein. (R. 54.)

[6] Notices of applications for grants of probate or administration with the will annexed, transmitted by the district registrar to the registrars of the principal registry, are to contain (in addition to the particulars specified in sect. 49 of the Court of Probate Act, 1857) an extract of the words of the will or codicil, by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration. (Reg. Gen. 1863, r. 55.)—Notices of application are to set forth the names and interests of all persons who, according to the practice of the court, would have a prior right to the applicant, and to show how such prior rights are cleared off. In case the persons, or any of them, have renounced, the date of his or her renunciation must be stated. If the applicant claims as the representative of another person, the date and particulars of the grant to him must appear. (R. 56.)

These certificates need not be made under the hand of a registrar of the principal registry, as required by the 20 & 21 Vic. c. 77, s. 49, but may be issued under a stamp provided for that purpose, and approved of by the judge. 21 & 22 Vic. c. 95, s. 26.

[7] The usual oath is to be reduced into writing, and to be subscribed and sworn by the executors or administrators, and filed in the registry. (R. 57.)—The draft oaths to lead grants of special or limited probate or administration, with or without the will annexed, are to be transmitted by the district registrar to the registrars of the prin-

(6) *Identity of Parties.*[1]
(7) *Testamentary Papers must be Marked.*[2]
(8) *Renunciations.*[3]
(9) *Revocation and Alteration of Grants.*[4]
(10) *Affidavits.*[5]
(11) *Caveats.*[6]
(12) *Citations and Subpœnas.*[7]
(13) *Blind and Illiterate Testators.*[8]

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cipal registry in order to their being settled, and no special or limited grant is to issue until the draft oath to lead the same has been settled by a registrar of the principal registry. (R. 58.)

[1] The district registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant. (R. 59.)

[2] Every will or copy of a will must be marked by such executor or administrator, and by the person before whom he is sworn. (R. 60.)

[3] No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character, is to be allowed to take a representation to the deceased in another character. (R. 61.)

[4] Grants of probate or letters of administration can only be revoked by order of the judge, or of one of the registrars of the principal registry. (R. 62.) No grant of probate or letters of administration is to be altered by a district registrar without an order of a registrar of the principal registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of the application must be renewed, and the alteration ordered is not to be made by the district registrar until the usual certificate on such notice has been received from the principal registry. (R. 63.)

[5] The following regulations with respect to affidavits are contained in the rules of January, 1863:—Every affidavit is to be drawn in the first person, and in addition the true place of abode of every deponent is to be inserted. (R. 64.)—In every affidavit made by two or more persons the names of all are to be written in the jurat. (R. 65.)—No affidavit must be written on an erasure or in the jurat. (R. 66.)—Where made by a person who is blind or illiterate, the district registrar is to state in the jurat that the affidavit was read in the presence of the party making the same, and that he perfectly understood the same, and also made his mark or wrote his signature in the presence of the district registrar, &c. (R. 67.)—No affidavit is sufficient if sworn before the party on whose behalf the same is offered, or before his proctor, &c., or before a partner or clerk of his proctor, &c. (R. 68.)—Proctors, &c. and their clerks, if acting for any other proctor, &c., shall be subject to the rules applicable to those in whose stead they are acting. (R. 69.)—Where an affidavit is required from a subscribing witness he shall depose as to the mode in which the said will, &c. was executed and attested. (R. 70.) The district registrars are not to allow any affidavit to be filed (unless with the concurrence of the registrars of the principal registry) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time the affidavit was made is not clearly shown by the initials of the commissioner or other person before whom it was sworn. (R. 71.)

[6] Any person intending to oppose the issuing of a grant of probate or administration must, personally or by proctor, &c., enter a caveat in the principal registry, or in the district registry. (Reg. Gen. 1863, r. 72.)—It shall bear date on the day it is issued, and remain in force for six months, and then expire; but it may be renewed. (R. 73.)—The district registrar shall, upon a caveat being lodged, send notice thereof to the registrars of the principal registry, and also to the registrar of any other district in which it is alleged the deceased resided. (R. 74.)—Nor shall affect any grant made on the day on which it is entered, or on the day on which notice is received. (R. 75.)—Caveats shall be warned from the principal registry only. (R. 76.)—After a caveat has been entered, the district registrar is not to proceed with the grant or probate of administration to which it relates until it has expired or been subducted, or until he has received notice from the principal registry that the caveat has been warned, and no appearance given, or that the contentious proceedings consequent on the caveat have terminated. (R. 77.)—The further rules with respect to caveats will be found in the Rules, Orders, and Instructions for the Registrars of the Principal Registry. (R. 78).

[7] Citations and subpœnas can be issued from the principal registry only, and the rules applicable to them will be found in the Rules, Orders, and Instructions for the Registrars of the Principal Registry. (Reg. Gen. 1863, r. 79.)—No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge, or of one of the registrars of the principal registry, authorising the same. (R. 80.)

[8] The district registrars are not to allow

(14) *Alteration in Grants.*[1]
(15) *Transmission of Papers.*[2]
(16) *Lists of Grants.*[3]
(17) *Grants of Property in the United Kingdom, &c.*[4]
(18) *Notice to Queen's Proctor.*[5]
(19) *Transmission of Papers.*[6]
(20) *Probate Copies of Wills.*[7]

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probate, &c., with the will annexed, of any blind person, or of any obviously illiterate person, unless they have satisfied themselves that the will was read over to the deceased, or that he at such time had knowledge of its contents. (R. 81.)

[1] Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant or a renunciation is filed, notice of such re-swearing, alteration, or renunciation, is to be forwarded by registrars of the principal registry to district registrars. (R. 82.)

[2] When motions are made in court as to applications for probate, &c., the registrars, unless otherwise directed, are to return to the district registrars the original papers, &c., with directions of the judge thereon. (R. 43.)—Papers, &c. may be transmitted by the registrars of the principal registry to the district registrars through the office; they may be superscribed with the words, "On Her Majesty's Service." (R. 44.)

As to the transmission of records, probates, &c. from one registry to another where required for the purpose of reference, *see* 20 & 21 Vic. c. 77, ss. 89, 90; 21 & 22 Vic. c. 95, s. 27; id. s. 37.

The copies of wills may be certified and transmitted, as directed by sect. 51 of the Court of Probate Act, under a stamp provided by the district registrar for that purpose. 21 & 22 Vic. c. 95, s. 25.

[3] The lists of grants of probate and administration required to be furnished by the district registrars under sect. 51 of the Court of Probate Act, 1857, are to be furnished on the first, and every other Thursday in the month, and are to contain the name of the registry in which each grant was made, and the Christian and surname of each testator and intestate. (R. 83.)—It must be accompanied by a copy of the record of each grant mentioned in it. (R. 84.) The district registrar must also transmit a monthly return, in alphabetical arrangement, of grants of probate and letters of administration during the preceding month. (R. 85.) 20 & 21 Vic. c. 77, s. 51.

[4] Whenever a grant of probate or of letters of administration is made under stat. 21 & 22 Vic. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the Inland Revenue Office that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland other than that excluded by 22 & 23 Vic. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed. Upon all such grants a note or memorandum must also be written and signed by the district registrar, to the effect that the testator or intestate died domiciled in England. (R. 86.)—Grants of probate and administration made in Ireland, and confirmations granted in Scotland, must be taken to the principal registry, and not to a district registry, to be sealed with the seal of the Court of Probate, in order to the same having force and effect in England. (R. 87.)

[5] Where application is made for administration (with or without a will annexed) of a bastard dying single, without issue, notice is to be given to her majesty's procurator-general; and no grant is to be issued until that officer has signified the course to be taken. (R. 88.)—In the case of persons dying intestate without any known relation, a citation must be issued from the principal registry against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased. *See* the Rules, Orders, and Instructions for the Registrars of the principal Registry. (R. 89.)

[6] When motions are to be made before the judge in court with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the court have been taken, will, on the application of the parties, be returned to the district registry, together with an office copy of the decree of the judge. (Reg. Gen. 1863, r. 90.)—Original papers are also to be forwarded to the principal registry whenever an inspection of them is necessary, in order to enable the registrars to answer the questions submitted to them by the district registrar. (R. 91.)—Original papers and documents may be transmitted by the district registrar to the registrars of the principal registry through the post-office. Such letters or packets are to be superscribed by the words, "On Her Majesty's Service," and may be registered if thought necessary. (R. 92.)

[7] The district registrar is to take care that the copies of wills or affidavits to be annexed to the probate or letters of ad-

(21) *Office Copies.*[1]

(22) *Attendances, with Documents.*[2]

(23) *Doubtful and Difficult Cases.*[3]

(24) *Taxing Bills of Costs.*[4]

VI. Obtaining Probate or Grant of Administration on Personal Application.[5]

ministration are fairly and properly written, and is to reject those which are otherwise. (R. 93.)

[1] Office copies of wills and other documents furnished in a district registry will not be collated with the will or other document, unless specially required. Every copy so examined shall be certified under the hand of the district registrar to be an examined copy. (R. 94.)—The seal of the court is not to be affixed to any office copy of a will or other document unless the same has been certified to be an examined copy. (R. 94.)

[2] If a will or other document filed at a district registry is required to be produced at any place within three miles of that registry, application must be made for that purpose not later than the day previously to that named for its production. (R. 96.)—If a will or other document filed in a district registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place. (R. 97.)

[3] The district registrars are in every case of doubt or difficulty to communicate with the registrars of the principal registry. (R. 98.)

[4] The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements, in respect of any business transacted in the Court of Probate, whether contentious or otherwise, or any matters connected therewith, shall, as well between proctor or attorney, or solicitor and client, as between party and party, be subject to taxation by any one of the registrars of the said court, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under this act, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said court. 20 & 21 Vic. c. 77, s. 96.

All bills of costs are to be referred to the registrars of the principal registry for taxation, and no special order shall be required for the purpose. (R. 99.)—The rules in respect to taxing bills of costs will be found in the Rules, Orders, and Instructions for the Registrars of the principal Registry. (R. 100.)

When an appointment has been made for taxing bills of costs, and one party only attends, the registrar may proceed to tax after a quarter of an hour, being satisfied by affidavit that the other party had due notice of the time. (Reg. Gen. 1862, r. 90.) If more than one-sixth is deducted from costs taxed between party and party, or as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of the bill. (R. 91.)—The costs of proceeding taken in the abolished jurisdictions are subject to the same taxation. 21 & 22 Vic. c. 95, s. 28.

[5] The following rules, orders, and instructions, came into operation on the 9th of April, 1862:—1. Persons wishing to obtain grants of probate, &c., without a proctor, &c., must apply *in person* at the department for personal applications. — 2. No such application will be received through an agent. — 3. Nor of parties who are attended by a person acting, or appearing to act, as their adviser. — 4. Fees are to be paid in advance in probate court stamps. — 5. Applications made in the first instance through a proctor, &c., cannot be transferred. — 6. Nor for grants of probate, &c., in cases which have already been before the court (on motion or otherwise), but must be made by the proctor, &c.—7. Whenever it becomes necessary, in the course of proceeding with an application which has been entertained at this department, to obtain the directions of the court, it must be placed in the hands of a proctor, &c. — 8. The papers necessary for the grant will be prepared in this department. An applicant is at liberty to bring such papers filled up, *but not sworn to.* If correct, may be received, the usual fee for perusal being charged.—9. The party taking an oath shall be sworn before the principal registrar, or a district registrar, unless otherwise permitted by registrar. — 10. Every applicant for a first grant of probate, &c. must produce a certificate of the death or burial, or give a reason, to the satisfaction of one of the registrars, for the non-production. — 11. And must be prepared with a reference to some person of position or character to establish his identity. — 12. Engrossments of wills, &c., will be made in the registry.— 13. Every applicant for a grant of probate, &c., shall give under his hand a schedule of the property in the form annexed, marked A. The forms will be provided in the registry.— 14. Legal advice is not to be given to applicants, but the clerks will, as far as practicable, assist applicants by giving them information and directions as to the course which they must pursue. — 15. A receipt or acknowledgment of each application will be handed to the applicant. — 16. No officer is to become surety to any administration bond. — 17. All administration bonds, in cases of personal

VII. Of the Practice, Pleadings, and Procedure in Contentious Business and Testamentary Causes.[1]

(A) *What is Contentious Business.*[2]

(B) *Proving Will in Solemn Form.*[3]

(C) *Caveats.*[4]

(D) *Citation.*[5]

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applications, are to be executed in this department, or in a district registry, and attested by the chief clerk or senior clerk.

[1] By the 20 & 21 Vic. c. 77, s. 29, the practice of the Court of Probate shall, except where otherwise provided by this act, or by the rules and orders to be from time to time issued under this act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court. And power is given to the judges to frame rules of practice. (Sect. 30.)

[2] All proceedings in the court, or in the registries thereof, of business not included in the act itself, under the expression, "common-form business," except the warning of caveats, shall be deemed to be contentious business. (R. G. 1862, r. 3.)

[3] Executors who might prove wills in solemn form shall be at liberty to prove them under similar circumstances, and with the same effect as heretofore. (R. 4.)—Next of kin and others who, previous to the passing of the act, had a right to put executors, &c., entitled to administration with the will annexed, upon proof of the will in solemn form of law, shall continue to possess the same rights, &c. (R. 5.)—Parties who, previously to the act, had a right to intervene, shall continue to possess the same right, subject to the same limitations as heretofore. (R. 6.)

[4] By 20 & 21 Vic. c. 77, s. 53, it is enacted, that "caveats against grants of probate or administration may be lodged in the principal registry, or in any district registry, and (subject to any rules or orders under this act) the practice and procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury; and immediately upon a caveat being lodged in any district registry, the district registrar shall send a copy thereof to the registrars, to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the district registrar of the district (if any) in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may appear to the registrar of the principal registry expedient to transmit the same."

A caveat shall remain in force for the space of six months, and then expire, but may be renewed as heretofore. (R. 8.)—A caveat shall be warned at the place mentioned in it as the address of the person who entered it. (Rules 9, 10, 11.)—Upon a party appearing in answer to the warning, the matter shall be entered in the court books, and the contentious business shall be held to commence. (R. 12.)—Where a party proposes to prove a will, &c. in solemn form, and no caveat has been entered, or has been entered and no appearance given to the warning, contentious business shall be held to commence with the extracting of a citation in the forms Nos. 1 and 2. (R. 14.)—When a caveat has been entered, and subsequently warned, expenses of the entry of such caveat, and the warning thereof, shall be considered as costs in the cause. (R. 12.)—The warning to a caveat is to state the name and interest of the party on whose behalf it is issued, and if such person claims under a will, &c. to state the date. A form is supplied in the registry. (R. 11.)—Upon the issuing of a citation, a caveat shall be entered in the court books against any grant as to the effects of the deceased, and notice shall be sent to the registrar of any district in which the deceased resided. (R. 15.)

Before a person is allowed to contest a will, he may be called upon by the propounder to show his interest; but when two contest a will, neither can call upon the other to show his interest. *Hingeston v. Tucker*, 31 L. J. Prob. 91.

[5] By 20 & 21 Vic. c. 77, s. 61, "where proceedings are taken under this act for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this act, the validity of a will is disputed, unless, in the several cases aforesaid, the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, subject to the provisions of this act, and the rules and orders under this act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others, having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests, in such real estate, subject to such rules and orders, and to the discretion of the court."

By sect. 63, "nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the court, and the court is satisfied that the deceased was, at the time of his death, seised of or entitled to, or had power to appoint by will, some real estate beneficially, or, in any case where the

(E) *Suits* in Formâ Pauperis.[1]

will propounded, or of which the validity is in question, would not, in the opinion of the court, though established as to personalty, affect the real estate, but in every such case, and in any other case in which the court may, with reference to the circumstances of the property of the deceased, or otherwise think fit, the court may proceed without citing the heir or other persons interested in real estate."

Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorising him to cite the heir or heirs at-law, or other person or persons having or pretending interest in such real estate, to see proceedings; and the judge or registrar, on being satisfied by affidavit that the will in question does affect, or purports to affect the real estate, will make an order authorising the person applying to cite the heir or heirs-at-law, or other such person or persons as aforesaid: Provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires. (R. 78.)

Citations to see proceedings may be extracted from the registry on the application of any party to the cause. (R. 16.) — Every citation must be on parchment, and the party taking out the same, or his proctor, &c., shall take it with a præcipe, and get the citation signed and sealed. The address given must be within three miles of the General Post-office. Personal service of any citation shall be effected by leaving a copy of the citation with the party cited, and showing him the original, if required by him so to do. (Rules 17, 18.) — Service may be effected on persons abroad by advertisement in the newspapers, as directed by the judge or registrar. (R. 19.) — Before proceeding after the service of a citation an appearance must have been entered, or an affidavit of personal service filed in the registry, or the order of the judge or a registrar giving leave to proceed without personal service must have been obtained. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause. (R. 22.)

A certificate of the service of the citation should be indorsed upon it. *Goodburn v. Bainbridge*, 8 W. R. 504; 29 L. T. 163.

The court has no power to dispense with service of citations. Leave to proceed to prove a will in solemn form will not be granted unless citations have been served on the persons entitled to see proceedings; or, if personal service is impracticable, have been duly advertised. *Potts v. Potts*, 30 L.J. Prob. 112.

Where an executor, to whom power has been reserved, survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will, and the executors of any of the acting executors will be representatives of the original testator. *In the Goods of Noddings*, 2 S. & T. 15.

B., the surviving executor of A., died in Australia, and his executors proved his will in that country, in which alone he had any property. The court refused to allow administration with the will annexed of the unadministered property of A., until the executors of B. had been cited. *In the Goods of Fleming*, 6 Jur. N. S. 486.

Where an executor propounds a later will the court will, on the motion of the executor, direct a citation to issue against the devisees of a former will. *Lister v. Smith*, 10 W. R. 429.

The court refused a motion for leave to cite the legatees under a codicil, which the executors had treated as invalid, to propound the codicil, or show cause why probate of the will only should not be granted. *In the Goods of Benbow*, 31 L. J. Prob. 171.

Service on a minor must in general be effected in the presence of his natural or legal guardian, or of some person upon whom the care or custody of the minor has for the time being devolved. *Brown v. Wildman*, 28 L. J. Prob. 54.

An affidavit that a minor was served with a citation "in the presence of A., his guardian," is not sufficient, unless it also show how A. became his guardian. *Johnson v. Weldy*, 30 L. J. Prob. 170.

Where a person of the age of seventeen was living in service at a distance from her mother (her natural guardian), the court dispensed with the ordinary rule which requires service of citation upon a minor to be effected in the presence of the natural or legal guardian, or upon some person upon whom the custody of the minor for the time being properly devolves. *Lainson v. Naylor*, 29 L. J. Prob. 126.

Service on the committee of a lunatic is sufficient. *In the Goods of Surtees*, 28 L. J. Prob. 89.

A next of kin who has been cognisant of, and privy to, a suit between the executors and another next of kin, is bound by the decision in that suit, although he has not been cited to see proceedings, and did not intervene. *Ratcliffe v. Barnes*, 31 L. J. Prob. 61; 8 Jur. N. S. 313.

The court will give leave to cite the queen's proctor, in case the will of a bastard dying without issue affects real estate. *Wyman v. Ashwell*, 29 L. J. Prob. 94.

[1] Any person desirous of prosecuting a suit *in formâ pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding. (R. 23.)—No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the judge, and to obtain such order the case laid before counsel, and his opinion thereon, with an affidavit of the

(F) *Appearance.*[1]

(G) *Default in Appearance.*[2]

(H) *Affidavit of Scripts.*[3]

(I) *Of the Pleadings, &c. in the Suit.*

(*a*) *Service of Pleadings.*[4]

(*b*) *Of the Declaration.*[5]

(*c*) „ *Pleas, &c.*[6]

party, or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts to the best of his or her knowledge and belief, and an affidavit of the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made. (R. 24.)—Where a pauper omits to proceed to trial pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid. (R. 25.)

[1] The entry of an appearance shall be in the book of the principal registry, and be accompanied by an address within three miles of the General Post-Office. It must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased. (Rules 26, 27.)

[2] In case the party cited does not appear within the time limited, the cause may proceed. (R. 12.)

[3] In testamentary causes the parties, within eight days of the entry of an appearance on the part of the defendant, are to file their affidavits as to scripts. (Rules 30, 31.)—No party shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavits as to scripts or exhibits annexed thereto, filed by any other party, until his own affidavit as to scripts shall have been filed. (R. 32.)

[4] It is sufficient to leave all pleadings, &c., not requiring personal service, at the address furnished. (R. 28.)

[5] In ordinary cases it belongs to the plaintiff to deliver the declaration, and to the defendant to deliver the plea; but the party propounding the alleged last will and testament of the deceased shall in all cases, even if defendant in the suit, deliver the declaration, and the party opposing the same deliver the plea. (R. 33.)—The declaration is to be delivered to the opposite party, and a copy thereof filed in the registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts. (R. 34.)—In case of proving a will in solemn form of law, the party whose duty it is shall declare in form No. 6, or as near thereto as the circumstances of the case admit. (R. 35.)—In case of proceedings in default, the plaintiff shall file his declaration in the registry within eight days from the last day allowed in the citation for the appearance of the defendant. (R. 36.)—In a testamentary cause, after delivery of the declaration, the interest of the party to whom it has been delivered cannot be disputed by the party declaring, except by leave of the judge. (R. 37.)

The declaration ought to aver, if the will which it propounds was made abroad, that it was valid according to the law of the foreign country. *Isherwood v. Cheetham*, 31 L. J. Prob. 99.

Where the executors of a later will, having called in the probate of a will of prior date, propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and void. *Rosbotham v. Rosbotham*, 30 L. J. Prob. 38.

[6] In a queen's proctor's suit, the plea in answer to the allegation of bastardy ought to set out the pedigree of parties claiming to be related to the intestate. It is a sufficient allegation that B. was the legitimate child of A., and his lawful wife, without stating the time or place of the marriage, the name of the wife, or the date of the birth. *Dyke v. Wallis*, 31 L. J. Prob. 97; 8 Jur. N. S. 417. *Same v. Williams*, 2 S. & T. 353; 31 L. J. Prob. 90.

The defendant must deliver his plea within eight days after the service of the declaration, and file a copy thereof in the registry the same day, otherwise he can only plead with the permission of the judge, or a registrar in his absence. A form of plea is given in No. 9. (R. 38.)—If the plaintiff propound a will, and the defendant allege the existence of a will of later date, the parties, subject to the permission of the judge, may adduce proof on the trial of the validity of the will upon which they rely. (R. 40.)

Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication, rejoinder, surrejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea is presumed to be a sufficient guide as to the form of any further pleadings. (R. 39.)—If a party in any cause fail to deliver or file a copy of the declaration plea, or other pleading, within the time

(*d*) *Demurrer.*[1]

(*e*) *Notice that Defendant insists only on Solemn Proof.*[2]

(*f*) *Amending and Adding Pleadings.*[3]

(*g*) *Issue.*[4]

(K) *Of the Trial or Hearing.*

(*a*) *Mode of Trial.*[5]

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specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea, or other pleading ought to have been delivered, shall not be bound to receive it, and the copy of such declaration, plea, or other pleading shall not be filed, unless by direction of the judge, or by order of the registrars of the principal registry obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the judge or registrars shall otherwise direct. (R. 44.)—When in any cause a conditional order is made, the party entitled to proceed in default must, before he can take the next step, obtain an order of the registrars, or, if required, an order of the judge upon summons, or on motion in court. (R. 45.)

Pleas of undue influence, intimidation, duress, and improper control, are bad, unless the persons by whom the same was exercised are named in the plea. *Harris v. Bradbury*, 30 L. J. Prob. 168.

To a declaration propounding the will of A., a plea that it was, after the execution thereof, revoked by another will duly executed by the said A., was held bad for want of circumstantiality, as it ought to have alleged the time of making, and the fact of its due execution, in like manner as in propounding a will. But it is not necessary that such a plea should set out the will. *Leake v. Hurst*, 30 L. J. Prob. 39; 7 Jur. N. S. 410.

A plea of undue influence is insufficient to let in a charge of fraud. *White v. White*, 2 S. & T. 504.

The following pleas to a declaration propounding a will were held bad: 1st, That at the time of the pretended execution of the will the deceased was incapable of executing it; 2d, That the will was prepared and made by A., and that the deceased had not given A. directions to prepare or make it. *Middlehurst v. Johnson*, 30 L. J. Prob. 14.

It is a bad plea to a declaration propounding a codicil that it was not prepared in conformity with the intention of the deceased, and that, at the time of its execution, he was ignorant of its contents. *Cunliffe v. Cross*, 32 L. J. Prob. 68.

[1] Where a party has been ordered to join in demurrer within a certain time, and has not complied with the order, the court will, upon motion, give judgment for the party demurring, with costs. *Wells v. Wells*, 31 L. J. Prob. 112.

[2] In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Prerogative Court. (R. 41.)

The court allowed a pleading of undue influence to be added at the trial, subject to the postponement of the hearing, and the payment by the defendants of the costs of the postponement. *Todd v. Simpsion*, 1 S. & T. 269.

[3] Either party desiring to alter or amend a pleading must apply to the court upon motion; but if the alteration or amendment required be merely verbal, or in the nature of a clerical error, it may be made by order upon summons. (R. 42.)—When a pleading has been ordered to be altered or amended, the time for filing the next pleading shall commence from the time of the order having been complied with. (R. 43.)

[4] Within fourteen days of the delivery of the last pleading in the cause, the party who brought in the declaration is to deliver to the other parties in the cause the issue, in the form No. 11, or in a form as near thereto as the circumstances of the case will admit, but the issue is not to be filed. (R. 46.)

[5] The party who delivers the issue shall therewith give notice to the other parties to the cause, that after the expiration of eight days he intends, on a day to be specified in the notice, to apply to the court to try the questions at issue before itself, either with or without a jury, or to direct an issue to be tried before a judge of assize, as the case may be; and if he do not give such notice with the issue, or within sixteen days from the day on which the issue was delivered, the other party may give a similar notice to him. A form of notice is given, No. 12, subjoined to the rules. (R. 47.)—A copy of every such notice shall be filed in the registry, with the case for motion as to mode of trial. (R. 48.)—In each case the judge shall, after hearing the parties on motion in court, direct in what mode the cause shall be tried or heard. (R. 49.)

By 20 & 21 Vic. c. 77, s. 35, "it shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this act to be tried by a special or common jury before the court itself, or by means of an issue to be directed to any of the superior courts of common law, in the same manner as an issue may now be directed by the Court of Chancery; and such question shall be so tried by a jury in any

(*b*) *Record.*[1]

(*c*) *Trial by Jury.*[2]

(*d*) *Setting down Cause, &c. for Trial or Hearing.*[3]

(*e*) *Subpœnas.*[4]

(*f*) *Notice to Admit.*[5]

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case where an heir-at-law, cited or otherwise made party to the suit or proceeding, makes application to the Court of Probate for that purpose; and in any other case where all the parties to the suit or proceeding concur in such an application, and where any party or parties other than such heir-at-law make a like application (the other party or parties not concurring therein), and the court shall refuse to cause such question to be tried by a jury, such refusal of the court shall be subject to appeal as herein provided." The attendance of the jury is enforced in like manner, and the qualification of jurymen is the same, as in the superior courts of common law. (Sect. 36.)

The court has power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of pleadings in the same suit to be tried by itself alone. *Crispin v. Daglioni*, 10 W. R. 810; 6 L. T. (N. S.) 694.

The court will make it part of the order for the trial of a cause by a special jury, that if the applicant does not take the necessary steps for striking the special jury, the other party may have it tried by a common jury. *Morris v. Owen*, 30 L. J. Prob. 213.

The application for the trial of an issue at the assizes must be supported by affidavit. *Brandreth v. Brandreth*, 31 L. J. Prob. 153; 6 L. T. (N. S.) 335. The *postea* should be signed by the associate. *West v. Goodrick*, 31 L. J. Prob. 39.

[1] When a question of fact is ordered to be tried by a jury before the court itself, "such question shall be reduced into writing, in such form as the court shall direct; and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of Probate shall have the same powers, jurisdiction, and authority as belong to any judge of any of the superior courts of common law, sitting at Nisi Prius." 20 & 21 Vic. c. 77, sect. 37. "The court may direct the issue to be tried either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is done by the Court of Chancery." (Sect. 38.)

After the direction of the judge has been obtained as to the mode in which the cause is to be heard, the plaintiff shall, within four clear days, deposit the record in the registry. It is to conclude with a statement of the mode in which the judge has directed the cause to be tried. (R. 50.)—In default of the appearance of the party cited, a record in form No. 14 shall be filed in the registry. (R. 51.)

[2] If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by one of the registrars of the principal registry. A form is given (No. 15), and a copy of such questions so settled is to be served on all the other parties to the cause. (R. 52.)—After the questions have been so settled, any party in the cause shall be at liberty to apply to the judge on summons to alter or amend the same, and his decision shall be final and binding on the parties. (R. 53.)

[3] The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the registry, and the cause, unless the judge shall otherwise direct, shall come on in its turn. (R. 54.)—No cause is to be called on for trial or hearing until after the expiration of ten days from the day on which the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit previously filed in the registry. (R. 55.)—All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the judge without a jury. (R. 56.)

[4] Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party shall take it, together with a præcipe (forms of which are given, marked 16, 17, 18, and 19), to the registry, and there get it signed and sealed, and there deposit the præcipe. (R. 71.)

[5] Either party may call upon the other party, by notice in writing in the form annexed (No. 20), to admit any document saving any just exceptions, and on refusal or neglect to admit the same, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause, unless at the trial or hearing the judge shall certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed

(*g*) *Enforcing Production of Testamentary Papers.*[1]
(*h*) *Hearing.*[2]
(*i*) *Decree.*[3]

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as costs in the cause except in cases where the omission to give the notice was, in the opinion of the registrar, a saving of expense. (R. 30.)

[1] The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce or bring into the principal or any district registry or otherwise, as the court may direct, any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person: and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the court may direct such person to attend, for the purpose of being examined in open court, or upon interrogatories respecting the same, and such person shall be bound to answer such question or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or in not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court, and had made such default: and the costs of any such motion, petition, or other proceeding, shall be in the discretion of the court." (20 & 21 Vic. c. 77, s. 26.)

Applications for the production of testamentary papers, and shown to be under the control of any person, as mentioned in sect. 26 of the act, may be made to the judge on motion or petition, or by summons. (R. 73.)

[2] The hearing of the case shall be conducted in court, and the counsel shall address the court, subject to the same rules and regulations as now obtain in the courts of common law. (R. 57.)

By 20 & 21 Vic. c. 77, s. 31, it is enacted that, subject to the regulations established by the rules and orders, the witnesses, and, where necessary, the parties in all contentious matters, where their attendance can be had, shall be examined orally by or before the judge in open court: Provided always, that subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party orally in open court as aforesaid, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed. Where a witness is out of the jurisdiction, or in case of illness, the court has power to order a commission to issue for his examination upon interrogatories, or otherwise. (Id. s. 32.) The rules of evidence observed in the superior courts of common law at Westminster are applicable to and to be observed in the trial of all questions of fact in the Court of Probate. (Id. s. 33.)

After the trial the registrar shall enter on record the finding of the jury, or the decision of the judge, in form Nos. 25 and 26, and shall sign the same. (R. 58.)

Where an executor propounds a will in solemn form, and there be several defendants whose cases are substantially the same, the court will hear counsel for one defendant only. *Palmer v. Maclear*, 1 S. & T. 149.

It is not necessary, in order to prove a will in solemn form, that both the attesting witnesses should be examined. *Belbin v. Sheats*, 1 S. & T. 148.

Where on the trial of the testamentary cause a verdict is taken by consent, the agreement will not be made a rule of court, unless it was part of it that it should be so. *Evans v. Saunders*, 30 L.J. Prob. 184.

[3] By 20 & 21 Vic. c. 77, s. 62, "where probate of such will is granted in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matters as aforesaid, the probate decree or orders respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof, respectively stamped with the seal of her Majesty's Court of Probate, shall in all courts and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the will is otherwise declared by decree or order under this act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding relating to real estate, save in any proceeding by way of appeal from such decrees or orders." The probate decree or order of the court does not affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or

(*k*) *New Trial or Rehearing.*[1] (*l*) *Appeals.*[2]

(L) *Affidavits.*[3] (M) *Summonses.*[4]

made party to the proceedings, or derives title under or through a person so cited or made party. (Id. s. 63.)

By the 86th sect. of 20 & 21 Vic. c. 77, "all grants of probates and administration made before the commencement of the act, which might be void or voidable by reason only that the courts from which the same were obtained had not jurisdiction to make such grants, are declared to be as valid as if the same had been obtained from courts entitled to make such grants, unless the same has already been revoked or determined to be void." *See* also ss. 87, 88.

The court refused to enforce a writ of sequestration by an attachment against the tenants who held under the person whose estate had been sequestered, and who refused to give up possession, but ordered a writ of assistance to the sheriff to be issued. *Bayley v. Bayley*, 29 L. J. Prob. 72.

[1] An application for a new trial may be made within fourteen days from the day on which the cause was tried, or on the first sitting of the court after the cause has been tried. (R. 59.)—And for a rehearing of any case tried before the judge without a jury, and in which evidence is given *viva voce*, within fourteen days from the day on which the same was heard, or at the first sitting of the court after the cause has been heard. (R. 60.)

[2] "Any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate may appeal therefrom to the House of Lords: Provided always, that no appeal from any interlocutory order of the Court of Probate shall be made without leave of the Court of Probate first obtained; but on the hearing of an appeal from any final decree, all interlocutory orders complained of shall be considered as under appeal as well as the final decree." (20 & 21 Vic. c. 77, s. 39.)

Application for leave to appeal against any interlocutory decree or order of the Court of Probate must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favour such order or decree has been made and filed in the registry. A form of notice is given, No. 29. (R. 87.)—Parties may proceed to carry into effect the decision of the court, notwithstanding such notice of appeal, unless the judge otherwise order; and the judge may order the execution of his decree to be suspended upon such terms as he sees fit. (R. 88.)

[3] Every affidavit is to be drawn in the first person, and the addition and true place of abode of every person making an affidavit is to be inserted therein. (R. 80.)—In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat. (R. 81.)—No affidavit will be admitted in any matter depending in the Court of Probate, any material part of which is written on an erasure, or in the jurat, of which there is any interlineation or erasure. (R. 82.)—When an affidavit is made by any person who is blind, or who, from his or her signature or otherwise appears to be illiterate, the registrar, commissioner, or other person before whom such affidavit is made, is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his mark, &c. in his presence. (R. 83.)—It must not be sworn before the party or his proctor, &c. (Rules 84, 85.)—Where a special time is limited for filing affidavits, no affidavit filed after shall be used, unless by leave of the judge. (R. 86.)

[4] A summons may be taken out in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding. (R. 98.)—A printed form must be filled up with the object of the summons, and a proper fee-stamp affixed. It must be taken to the clerk of the papers, who will fill in the time when the summons is to be made returnable, and get the summons signed by a registrar. (R. 99.)—The clerk of the papers is then to enter the name of the cause, and the agent taking out the summons, and return the summons (with the stamp obliterated) signed to the applicant, who is to serve a copy on the opposite party, one clear day at least before the summons is returnable, and before seven, p. m. On Saturdays the copy of the summons is to be served before two, p. m. (R. 100.)—At the hour named in the summons, the party issuing the same is to present himself with the original at the judge's chamber. (R. 101.)—Both parties will be heard by the judge, who will make such order as he may think fit. (R. 102.)—If the party summoned do not appear after the lapse of half an hour from the time named, the other party shall be at liberty to go before the judge, who will make such order as he may think fit. (R. 103.)—An attendance on behalf of the party summoned for half an hour, if the other party do not appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion. (R. 104.)—If a formal order is desired, the same may be had by either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will be drawn up and delivered to the person filing such summons or copy. (R. 105.)—If a summons is brought with a consent, signed by the party summoned, or his proctor, &c. indorsed thereon, an order will be drawn up without the necessity of going before the

(N) *Inventories.*[1]

(O) *Notices.*[2]

(P) *Interest Causes.*[3]

(Q) *Proceedings by Petition.*[4]

(R) *Power of Judge to Extend Time.*[5]

(S) „ *Amend Grants of Probate or Administration.*[6]

(U) *Appointment of Receiver* pendente lite.[7]

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judge, provided the order sought is in the opinion of the registrar one which the judge would make. (R. 106.)

[1] In contentious business, inventories of the personal effects are to be filed, unless by order of the judge or a registrar. The form is given, No. 27. (R. 76.)

[2] All notices required by these rules, or by the practice of the court, are to be in writing. (R. 77.)

[3] In interest causes each party shall be at liberty to deny the interest of the other, and in such cases both parties may, subject to the permission of the judge, adduce proof on the same trial of their interest respectively. (R. 61.)—The pleading of each party must show on the face of it that no other person exists having interest prior to that of the claimant. (R. 62.)—Forms of the declaration and plea are given, Nos. 7 and 9. (R. 63.)

[4] Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the court by declaration and plea, may be brought before the court by petition. (R. 64.)—The party desiring to proceed by petition is to give notice thereof to all the other parties in the cause, and such notice is to set forth the question intended to be raised for the decision of the court, and a copy of such notice is to be filed in the registry. (R. 65.)—In proceedings by petition, the plaintiff shall, within eight days after he has given notice, deliver his petition to the defendant, and file a copy thereof in the registry upon one and the same day. (R. 66.)—The defendant shall, within eight days after the delivery of the petition, deliver his answer to the plaintiff, and file a copy thereof in the registry upon one and the same day, and the same course shall be pursued with respect to the reply, rejoinder, &c. until the petition is concluded. (R. 67.)—When the defendant raises the question to be heard by petition, and gives notice thereof to the plaintiff, the plaintiff shall, within eight days from the receipt of such notice, file a petition; otherwise the defendant shall be at liberty to do so. (R. 68.)—Both plaintiff and defendant shall, within eight days from the day upon which the petition is concluded, file in the registry such affidavits and other proofs as may be necessary in support of their several averments therein. A form of petition is given, No. 28. (R. 69.)—After the time for filing the affidavits and other proofs has expired, petitioner is to set down the petition for hearing, in the same manner as a cause. (R. 70.)

[5] The judge shall, in every case in which a time is fixed for the performance of any act, have power to extend it to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit. (R. 89.)—To prevent the time fixed for the performance of any act from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day when the judge shall next sit in chambers or in court to hear motions. (R. 90.)—The time fixed in these rules for bringing in pleadings, and for other proceedings, shall in all cases be exclusive of Sundays, Christmas-day, and Good Friday. (R. 91.)

[6] The judge of the Probate Court has the same power of altering and amending grants of probate and letters of administration made before the 11th of January, 1858, as any ecclesiastical court had and exercised in respect of such grants. (21 & 22 Vic. c. 95, s. 17; *see* s. 18.)

[7] By 20 & 21 Vic. c. 77, s. 71, the Court of Probate is empowered to appoint any administrator *pendente lite*, or any other person, to be receiver of the real estate of any deceased person, pending any suit in the court touching the validity of any will of such deceased person, by which his real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the court may direct.

The court may require security by bond, with or without sureties, from the receiver, and may, on application made on motion, or in a summary way, order one of the registrars of the court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both in law or in equity, as if the same had been originally given to him instead of the judge of the said court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof. (21 & 22 Vic. c. 95, s. 21.)

A receiver of real estate pending suit is to give bond in the form annexed to the rules, with two sureties, and in a penalty of such an amount as may be directed by the judge. (R. 80.)

(V) *Of the Costs of Contentious Proceedings.*[1]

(W) *Taxation of Costs.*[2]

[1] A next of kin may generally put an executor on the proof of a will, without making himself liable for costs; but if he pleads, or takes any further step, he does so at his own risk. *Farlar v. Farlar*, 1 S. & T. 124. *Tyson v. Westrop and another*, id. 279.

An executor of a former will has the same right as a next of kin to put an executor of a subsequent will upon proof in solemn form, and to interrogate his witnesses without being liable for costs. *Boston v. Fox*, 29 L. J. Prob. 68.

Where a legal question fairly arises upon the papers of a deceased person, the court will order the costs of the losing party to be paid out of the estate. *Clark v. Lashmar*, 31 L. J. Prob. 150; 8 Jur. N. S. 595. See *Ferrey v. King*, 31 L. J. Prob. 120.

When the opposition is groundless, the unsuccessful opponent of a will who has pleaded the incapacity of the testator will be condemned in costs, although he may have acted *bonâ fide*. *West v. Goodrick*, 31 L. J. Prob. 39.

Where, in opposition to a will, the defendant relies upon difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate. *Robins v. Dolphin*, 1 S. & T. 517.

Notwithstanding the will was made under remarkable circumstances, and such as would have justified the next of kin in calling upon the executors to prove it in solemn form, yet the next of kin was held not entitled to costs out of the estate, on the ground that he had put the executors to a very expensive trial, after having received from them full and complete information respecting the execution of the will. *Nichols v. Burns*, 1 S. & T. 239. So, if the suit be brought for a collateral purpose, and where the circumstances were such that the heir-at-law would have been entitled to his costs out of the estate if the suit had been brought in the Prerogative Court, with the simple object of taking the opinion of the court on the will, yet, as it appeared that the suit was brought for the purpose of eliciting facts to be used as evidence on the trial of an issue *devisavit vel non* then pending, the court refused to allow him the costs out of the estate. *Swinfen v. Swinfen*, 1 S. & T. 282.

Where A. obtained probate in common form of a paper professing to be the will of B., which was afterwards revoked on the ground that it was not the will of the deceased, and that A. was guilty of fraud in obtaining probate of it, and in contesting the point; A., though suing *in formâ pauperis*, was condemned in costs. *Carless v. Thompson*, 1 S. & T. 21.

In a case where A., B., and C., three legatees named in a codicil, sought probate of it in solemn form against the legatees named in the will, and subsequently to their having propounded the codicil, D., another legatee, intervened; the executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.; it was held that D. was not entitled to have his costs out of the estate. *Shaw & Dickens v. Marshall*, 1 S. & T. 129. But if, in addition to a question of law, which would have entitled the next of kin to costs, he raises also another question, upon which he has no such right, there being no reasonable ground for so doing, he will not be allowed costs out of the estate. *Onslow v. Cannon*, 30 L. J. Prob. 165.

The application for a certificate for the costs of a special jury ought to be made immediately after the verdict is given. *Skipper v. Bodkin*, 8 W. R. 589; 36 L. T. 636. *See* vol. v. p. 281.

The court will not order the plaintiff to find security for costs when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country; his affidavit in opposition to such an application need not state an intention of permanent residence. *Crispin v. Daglione*, 1 S. & T. 522.

Where a foreigner came to reside in this country, merely for the purpose of a probate suit, and of certain proceedings in Chancery, the court refused to require him to give security. *Crispin v. Bell*, 6 Jur. N. S. 303.

When the costs of the unsuccessful party are ordered to be paid out of the estate, they are not taxed on so liberal a scale as between proctor and client. *Jeffrey v. Jeffrey*, 27 L. J. Prob. 73.

On taxing the costs in a case where each is liable for his own, the costs of proceedings, which cannot be assigned to one party more than the other, will be taxed equally between them. *Tyson v. Westrop, supra.*

A married woman is liable to be condemned in costs. *Clarkson v. Waterhouse*, 6 Jur. N. S. 326. The court refused an attachment for non-payment of costs against a married woman without separate property. *Harris v. Bradbury*, 31 L. J. Prob. 86. But an attachment was granted against a married woman for non-compliance with a citation calling upon her to file an inventory in the registry of an estate of which she was administratrix. *Baker v. Baker*, 2 S. & T. 380.

[2] All bills of costs in contentious proceedings are referred to the registrars of the principal registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of the judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill. (R. 92.)—The party who has obtained an appointment to tax the bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of

(X) *Accounts of Receiver* pendente lite.[1]

(Y) *Paying Money Out of Court.*[2]

VIII. Jurisdiction of County Court in Contentious Causes.[3]

such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed. (R. 93.)—When an appointment has been made by a registrar of the principal registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may, nevertheless, proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed. (R. 94.) If more than one-sixth is deducted from any bill of costs taxed, as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill. (R. 95.)

[1] Every administrator *pendente lite* and receiver of real estate shall exhibit the inventory, and render an account of the property of the deceased which comes to his hands, and the account of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report before the same are allowed by the court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination. (R. 96.)

[2] Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and is to set forth the day on which the money applied for was paid into the registry; the minute entered on receiving the same; the date and particulars of the order for payment to the applicant; and if the same be in payment of costs, the date of filing the bill for taxation, and of the registrar's certificate. During the summer vacation money can only be paid out on certain days, to be fixed by the registrars, notice whereof will be given in the registry. (R. 97.)

[3] By 21 & 22 Vic. c. 95, s. 10, "where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate, in respect of whose estate a grant, or revocation of a grant of probate, or letters of administration, is applied for, had, at the time of his death, his fixed place of abode in one of the districts specified in schedule A. [*i. e.* 'Districts and places of district registries throughout England and Wales'] to the said Court of Probate Act, and that the personal estate in respect of which such probate or letters of administration are to be, or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was, at the time of his death, under 200*l.*, and that the deceased, at the time of his death, was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards, the judge of the county court, having jurisdiction in the place in which the deceased had, at the time of his or her death, a fixed place of abode, shall have the contentious jurisdiction of the Court of Probate in respect of questions as to the grant and revocation of probate of the will and letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

By 20 & 21 Vic. c. 77, s. 55, on a decree being made by the judge of a county court for the grant or revocation of probate or letters of administration in any such cause, the registrar of the county court shall transmit to the district registrar of the district in which it shall be sworn that the deceased had his fixed place of abode at the time of his decease, a certificate under the seal of the county court of such decree having been made, and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar, according to the effect of such decree. By sect. 56, the county-court judge is to have all the jurisdiction, power, and authority, to decide the disputed question, and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the county court.

The affidavit to give the county court jurisdiction is conclusive for that purpose, and the decree cannot be impeached, either on the ground of the district not having been the fixed place of abode of the deceased, or as to the amount of the property; but where it is shown to the county-court judge before whom the matter is pending that the place of the abode, or the state of the property of the testator or intestate, in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration, has not been correctly stated in the affidavit, and, if correctly stated, would not have authorised him to exercise such contentious jurisdiction, he is required to stay all further proceedings in his court in the matter, leaving any party to apply to the Court of Probate for such grant of probate or revocation, making such order as to the costs of the proceedings before him as he may think just. (Sect. 57.)

IX. Of the Renunciation of Probate.[1]

Any party who is dissatisfied with the determination of the judge of the county court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this act, may appeal to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this act, and the decision of the Court of Probate upon such appeal shall be final. (Sect. 58.)

It is not obligatory to proceed in the district registry or the county court in cases thus within their jurisdiction; but the judge of the Probate Court may send any cause to the county court which might have been brought there originally. (Sect. 59.) 21 & 22 Vic. c. 95, s. 12.

Rules for regulating the exercise of the jurisdiction in probate cases are framed and allowed in the same manner, and by the authority, as other county-court rules. (Sect. 60.)

The following rules have been promulgated for regulating the practice in the county courts in probate cases. (4th February, 1858):—1. Any person desirous of taking proceedings in any county court under the stat. 20 & 21 Vic. c. 77, for amending the law relating to probates and letters of administration in England, shall lodge with the registrar of the court having jurisdiction in the matter an application in writing, according to form A. annexed, duly stamped with the proper duty thereon, and at the same time lodge with the registrar an office copy of the minute of the Court of Probate authorising such application.—2. Where any person shall have lodged a caveat against the grant of probate or letters of administration, and proceedings are proposed to be taken in a county court, the person who shall have applied for the probate or letters of administration shall be deemed the plaintiff in the proceedings, and the person who shall have lodged the caveat shall be deemed the defendant.—3. The party making application to a county court for the revocation of probate or letters of administration shall be deemed the plaintiff in the proceedings, and the party against whom the application is made shall be deemed the defendant.—4. Where an application shall be made to a county court for the grant or revocation of probate or letters of administration, the registrar shall issue a notice to the defendant according to form B. annexed, and deliver a notice according to such form then and there to the plaintiff or his agent.—5. The above-mentioned notices shall be issued ten clear days before the day on which the judge shall proceed to make a decree in the matter.—6. Notices shall be served by a bailiff of the court, by his delivering the same to some person at the respective places of residence of the parties, as mentioned in the application for proceedings to be taken.—7. The registrar of the county court at the time that he issues the notices in proceedings for the revocation of the grant of probate or letters of administration, shall give notice by post, according to form C. annexed, to the district registrar, by whom the probate or letters of administration has been granted, to produce the original will or other necessary documents at the county court at which the matter of the application will be considered.—8. The certificate to be given by the registrar of a county court, under sect. 55 of 20 & 21 Vic. c. 77, shall be according to form D. annexed; and on or before the day mentioned in the notice the plaintiff shall deliver to the registrar such form, stamped with the proper duty thereon, and the cause shall not proceed until such form, duly stamped, is so delivered: provided that the defendant may procure and deliver such form, duly stamped, if the plaintiff shall have neglected to deliver such form so stamped.—9. Upon the day mentioned in the notice the judge, whether both parties are then before him or not, may proceed to consider the matter of the application, and to make a decree thereon, or he may adjourn the proceedings from time to time, as he may think fit.—10. The decree shall be according to form E. annexed, and a copy of such decree shall be sent by post to the plaintiff and defendant.—11. Where application for probate or letters of administration has been made at the principal registry, and any contentious matter shall arise out of such application, and the judge of the Court of Probate shall send the cause to a county court; the registrar, upon the receipt of such cause, shall forthwith issue a notice, according to form B. in the schedule, both to the plaintiff and the defendant, without any application being made to the court by the plaintiff.—12. In proceedings for which rules and orders are not hereby provided, the rules and practice of the Court of Probate shall be followed as far as they are applicable.—13. The enactments, practice, and forms in force, and used in the county court, shall, subject to the foregoing rules and orders, be adopted with reference to proceedings in the county court in matters of probate or letters of administration, so far as the same are applicable, *mutatis mutandis*.

Where the issue raised in a suit for proving a will in solemn form have been directed to be tried by a judge of a county court, and are found by him against the will, upon a certified copy of his decree being filed in the principal registry the judge of the Court of Probate will pronounce against the will, and decide any question as to the costs. *Thomas v. Crowther*, 10 W. R. 861.

[1] Where any person renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall

X. Revocation of Grants.[1]

(A) *In case of Revocation, Payments, &c. to Executor are Protected.*[2]

XI. Second or subsequent Grant of Probate or Administration.[3]

XII. Sealing of Confirmation of Scottish Probate Court where Deceased died possessed of Personalty in England.[4] *See* Administration, vol. i. p. 182.

XIII. Inspection of Calendars, Office Copies of Wills, &c.[5]

XIV. Of Probate Duty.[6]

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wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed, in like manner as if such person had not been appointed executor. (20 & 21 Vic. c. 77, s. 79.)

By the 21 & 22 Vic. c. 95, s. 16, whenever the executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed, in like manner as if such person had not been appointed executor.

The court has a discretion to allow the next of kin to retract a renunciation before letters of administration have issued to another party. *In the Goods of Park*, 6 Jur. N. S. 660.

On a proxy of renunciation and consent being filed by the widow, which omitted the usual declaration that she had not intermeddled in the estate of the deceased (and the fact was, that she had unintentionally intermeddled), the court granted administration to the father of the deceased. *In the Goods of Fell*, 9 W. R. 252; 3 L. J. (N. S.) 756.

[1] Grants of probate or letters of administration can only be revoked by order of the judge, or of one of the registrars of the principal registry.

[2] Where any probate or letters of administration are revoked, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration, may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or administration shall be afterwards granted might have lawfully made. (20 & 21 Vic. c. 77, s. 77.) And all persons or corporations making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstances whatsoever affecting the validity of such probate or letters of administration. (Sect. 78.)

[3] By 21 & 22 Vic. c. 95, s. 20, all second and subsequent grants of probate or letters of administration shall be made in the principal registry, or in the district registry where the original will is registered, or the original grant of letters of administration has been made, or in the district registry to which the original will or a registered copy thereof, or the record of the original grant of administration, have been transmitted, by virtue of a requisition issued in pursuance of sect. 89 of the Court of Probate Act, and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made.

[4] The executors of a Scotch will having sent the original confirmation of the Commissary Court to Victoria, obtained a duplicate confirmation, and applied to have the seal of the Probate Court affixed: the court ordered it to be affixed. *In the Goods of Webster*, 29 L. J. Prob. 66. But the court refused to affix a seal to an additional confirmation, granted after the passing of the act, of a confirmation obtained previously to the act. *In the Goods of Gordon*, id. 67.

It is no ground for a stay of proceedings in a testamentary suit commenced by the next of kin, that the defendant, the executor, has filed a petition in the Commissary Court in Scotland, to obtain confirmation of the same instrument. *Hawarden v. Dunlop*, 4 L. T. (N. S.) 339.

[5] Provision is made by the act for the printing of calendars of grants of probates and administration, and their deposit in the various registries, where they are open to inspection, one shilling being demandable for each search. (20 & 21 Vic. c. 77, ss. 67, 68.) An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved, or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this act. (Id. sect. 69.)

[6] The stamp-duties payable on probates

PROCEDENDO.[1]

PROCESS. *See* Action, vol. i. p. 132; Arrest, id. p. 519; Execution, vol. iv. p. 344; Limitations, vol. v. p. 392.

are those contained in the schedule to statute 55 Geo. 3, c. 184. They are imposed according to a graduated scale, commencing with estates exceeding 20*l.* and under 100*l.*, in which case the stamp is 10*s.* above 100*l.* and under 200*l.* the stamp is 2*l.*, and so on.

The graduated scale under the 55 Geo. 3, c. 184, ceases where the value amounted to 1,000,000*l.*; but by the 22 & 23 Vic. c. 36, where such is the case, there is payable "for every 100,000*l.* of the whole value of such estate and effects, and any fractional part of 100,000*l.*, 1500*l.* in case there is a will; and 2250*l.* in cases of intestacy.

The Court of Probate Act, 1857, does not affect the duties payable on probates and administration. (20 & 21 Vic. c. 77, s. 92.) The registrars must deliver particulars of every grant to the Commissioners of Inland Revenue. (Id. sect. 93.) *See* 21 & 22 Vic. c. 56, s. 16.

A penalty is imposed in case "any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months of his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there be any such, which shall not be ended within four calendar months of the death of the deceased." (55 Geo. 3, c. 184, s. 37.) Probate or administration cannot be granted without an affidavit that "the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estate for years of the deceased, whether absolute or determinable upon lives, if any, and without deducting anything on account of the debts due and owing from the deceased, are under the value of a certain sum, to be therein specified to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp-duty may be paid on such probate or letters of administration. (Id. ss. 38, 39.) If too high a duty has been paid, it will be returned (s. 40); and if too little, the difference must be afterwards paid. (Id. ss. 41, 43.) Credit may in certain cases be given for the stamp-duty where the executor or administrator is unable to pay it. *See* ss. 45–49. *Doe v. Wood*, 2 B. & A. 724. And a return in respect of debts of the deceased paid afterwards may be obtained if claimed within three years. (Id. s. 51; 5 & 6 Vic. c. 79, s. 23.) The probate or letters of administration cannot be given in evidence unless properly stamped (*see* 55 Geo. 3, c. 184, s. 8. *Hunt v. Stevens*, 3 Taunt. 113. *Carr v. Roberts*, 2 B. & Adol. 905. *Jones v. Howells*, 2 Hare, 342. *Christian v. Devereux*, 12 Sim. 264); but the grant is not thereby void, and the defect may be remedied by the proper stamp being afterwards affixed. *Rogers v. James*, 7 Taunt. 147; 2 Marsh. 425. As to being evidence of assets, *see* vol. iv. p. 404. The grant should be taken out to the extent of the sum the executor or administrator expects to receive. *Butler v. Butler*, 2 Phil. 39. In the case of doubtful or desperate debts he may exercise a discretion. *Moses v. Crafter*, 4 C. & P. 524. As to the exemption of trust property, see *Carr v. Roberts*, 2 B. & Adol. 905. The duty is not payable in respect of effects in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country by the executor. *Att.-Gen. v. Diamond*, 1 C. & J. 356; 1 Tyr. 243. *Att.-Gen. v. Hope*, 1 C., M. & R. 530; 8 Bligh, 44; 2 Clark & Fin. 84. French *rentes* and American stock, which are part of the national debt of France and America respectively, and are transferable there only, and debts due from persons in America, are not assets locally situated here. (Id.) But it has been held that probate duty was payable upon the value of Russian, Danish, and Dutch government bonds, which were the property of the testatrix, and were at the time of her death in the province of Canterbury, these being saleable chattels. *Att.-Gen. v. Bouwens*, 4 Mee. & W. 171. Probate-duty is not payable in respect of land directed to be converted into money (*Matson v. Swift*, 8 Beav. 368), nor on partnership real property. *Custance v. Bradshaw*, 4 Hare, 315. Where a party has a general power under a settlement over a trust-fund of personalty, which he may exercise either by deed or will, and he elects to exercise it by a testamentary instrument, probate-duty is not, it seems, payable in respect of the fund. *Platt v. Routh*, 6 Mee. & W. 756; 3 Beav. 257. *Drake v. Att.-Gen.* 10 Clark & Fin. 257; *contra*, *Palmer v. Whitmore*, 5 Sim. 138. *Att.-Gen. v. Staff*, 2 C. & M. 124; 4 Tyr. 14. *Nail v. Punter*, 5 Sim. 563. *Vandrest v. Fynmore*, 6 id. 170.

[1] Where an action is removed from an inferior to a superior jurisdiction, by *habeas corpus*, *certiorari*, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause was removed is sufficiently proved, there issues a *procedendo*, whereby the cause is remitted, or sent down to the court from whence removed, to be proceeded on there. *See* Certiorari, vol. iii. p. 58.

PROCHEIN Amy. *See* Infant, vol. v. p. 145.

PROFERT and Oyer Abolished.[1]

PROFIT à Prendre.[2] *See* Common, vol. iii. p. 143; Custom, id. 532; Easements, vol. iv. p. 149.

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II. To Inferior Courts not being County Courts.

(A) *The Nature of the Writ, and to what Court it Lies in General.*[3]

[1] By the C. L. P. Act, 1852, s. 55, "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading, and if profert shall be made it shall not entitle the opposite party to crave oyer, or set out upon oyer such deed or other document." *See ante*, p. 41.

[2] A *profit à prendre* is a right vested in one man of entering upon the land of another, and taking therefrom a profit of the soil. It is an incorporeal right, and can be claimed only by grant, or by prescription, which presumes a grant, and not by custom, however ancient. *Blewett v. Tregoning*, 3 Ad. & E. 575. *Gateward's case*, 6 Co. 60, a. *Grimstead v. Marlowe*, 4 T. R. 717. And it differs from an easement, that in the one instance there is a participation in the profits of the soil, and in the other there is none. Gale on Easements, p. 1, 7. Thus, a right of pasture or of digging sand, or of killing and taking away the game or fish, is a *profit à prendre*, and not an easement. See *Manning v. Wasdale*, 5 Ad. & E. 764. *Blewett v. Tregoning*, 3 id. 554. *Bailey v. Appleyard*, 8 id. 161. But the right to receive light or water passing across or through a neighbour's land may be claimed as an easement, because the property in them remains common. Gale, Eas. 8, 3d ed. Water, as it issues from a well or spring, is not considered as produce of the soil, so as to make the right to take it *in alieno solo* for domestic purposes a *profit à prendre*; such a right is therefore an easement only, and may be claimed by custom. *Race v. Ward*, 4 E. & B. 702.

[3] As all temporal jurisdictions, whether ecclesiastical or civil, are derived from the sovereign, and the administration of justice is committed to a great variety of courts, hence it has been the care of the Crown that these tribunals keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. For this purpose the writ of prohibition was framed, which issues out of the superior courts of common law, to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that the cognisance of the matter belongs not to such courts. Where they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts punishable, sometimes at the suit of the queen, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

The reason of prohibitions in general is that they preserve the right of the queen's

(B) *When it Lies in General.*[1]

crown and courts, and the ease and quiet of the subject. It is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court; that by the same reason that one court might be allowed to encroach another might, which could produce nothing but confusion and disorder in the administration of justice. So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are *alia* than the queen's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all prohibitions, be the court ecclesiastical or temporal to which it is awarded, that the cause is drawn *ad aliud examen, contra coronam et dignitatem regiam.*

A prohibition quousque is only proper when the objection is merely to the manner and form of proceeding in the inferior court, and not on the merits; as, for denying a copy of the libel, for in the absence of the libel there can be no prohibition for a defect or abuse of jurisdiction, and the subordinate court has not yet given any decision upon the merits. There may be other cases in which such a special writ may be proper; for instance, there is authority for saying that in matters of purely ecclesiastical cognisance, where evidence is refused which, according to the rules of common law ought to have been admitted, a matter which affects the manner and form of their proceeding only, the prohibition is *quousque.* But it is inappropriate where a defence upon the merits has been rejected below, and must be established in the superior jurisdiction in law and fact, in order to sustain the prohibition; in such a case the court will peremptorily prohibit any further proceeding. *White v. Steel*, 31 L. J. C. P. 269: *per Willes, J.*

The effect of a prohibition in general is to stay all proceedings in the particular action in the courts below, and to keep the plaintiff and defendant in the same state that they are in when the writ is obtained. Where it issues after execution a clause directing restitution may be inserted in the writ. *Jones v. Owen*, 18 L. J. Q. B. 8.

[1] To found a prohibition the matter must be material. *Butterworth v. Walker*, 3 Burr. 1689. There must be an entire want of jurisdiction, and not merely an irregular (*Smart v. Wolf*, 3 T. R. 347. *Smith v. Lord Mayor*, 6 Mod. 78), or inconvenient exercise of it. *Rex v. Justices of Dorset*, 15 East, 594. And a prohibition will not issue on a mere suggestion that a subject beyond the jurisdiction of the inferior court has been introduced into the suit, unless it appear that the court is proceeding to adjudicate upon such matter. *Dutens v. Robson*, 1 H. Black. 100. *Lord Camden v. Homne*, 4 T. R. 397. But if it appear the court has no jurisdiction the prohibition will go (*Velthasen v. Ormsby*, 3 id. 315), as to entitle a party to a prohibition to restrain commissioners acting under a local act from proceeding to enforce a penalty for an offence against the act, he must distinctly show that they are acting without jurisdiction. It is not enough to show that it is doubtful upon the act whether the jurisdiction extends to the place where the alleged offence was committed. *In re Birch*, 15 C. B. 743.

By the special act of a court of local jurisdiction it was enacted that "no defendant shall be permitted to object to the jurisdiction of the court, in or by any proceeding whatsoever, except by plea." A prohibition was denied before plea upon this ground. *Ex-parte Farquharson*, 30 L. J. Q. B. 22.

If the defendant in a suit in a spiritual court do not reside within the jurisdiction of the court a prohibition lies. Say. 158. *Vaughan v. Evans*, 8 Mod. 374. But on a libel in the spiritual court for cohabitation with a woman, who for a considerable time, and up to the day of the citation, lived within the diocese, a motion for prohibition, on a suggestion that she lived out of the diocese, was refused. *Fenwick v. Lady Grosvenor*, 12 Mod. 610.

A prohibition was denied, because the party who prayed it had often before in the course of the suit admitted the jurisdiction of the ecclesiastical courts. *Smith v. Executors of Powdreill*, Cro. Car. 97. A prohibition lies if the spiritual court refuse a plea to the jurisdiction, or proceed in a libel for a legacy to be paid out of lands. *Bastard v. Stockwell*, 2 Show. 50; *contrà, Anon.* 11 Mod. 412.

There must be a surmise that the inferior court refuses the plea. *Wright v. Wright*, Cro. Eliz. 511. When *assumpsit* was brought in an inferior court, and the defendant tendered a plea there, that a contract upon which the action was brought was made out of the jurisdiction, the court having refused to allow it, on affidavit of the tender and refusal, a prohibition was granted. *Michee v. Berby*, T. Raym. 189.

A prohibition lies to the spiritual court in any suit for denying a copy of the libel. Salk. 553. If a copy of the articles be denied by the Court of Arches, a prohibition lies as well as when the copy of a libel is denied (*Mangling v. Smith*, 2 Show. 132; 1 Vent. 5; T. Raym. 170); and if the party be excommunicated, a prohibition lies with a *mandamus* to absolve him. 1 Vent. 525. No prohibition lies to the Admiralty for denying a copy of the libel. *Anon.* 1 Ld. Raym. 442; Salk. 553. Prohibition does not lie for refusing a copy of the libel where the proceeding is *ex-officio.* Mo. 756; but *see* T. Raym. 170. But if the spiritual court refuse a copy of the articles they shall be prohibited *quousque*, although the proceedings are *ex-officio. Bennayer's case*, 6 Mod. 87.

A prohibition lies if the spiritual court

(C) *Out of what Court it may Issue.*[1]

(D) *To what Court it Lies.*[2]

(*a*) *To Admiralty Court.* *See* vol. i. p. 194.

(*b*) „ *Ecclesiastical Courts.*[3]

(*c*) „ *Courts Martial.*[4]

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will not allow proof by one witness to be sufficient, where one is sufficient by common law (2 Ro. 414; Cro. Eliz. 666; 1 Low. 158, 172; Mo. 413; Carth. 142. *Shotter v. Friend*, 3 Mod. 284; Salk. 547; 1 Ld. Raym. 220; Hob. 183), or if they refuse any other competent proof. *Watt v. Corresby*, Hob. 247.

A prohibition to restrain waste in a bishopric does not lie in the Court of Queen's Bench, at least at the suit of an uninterested person. *Jefferson v. The Bishop of Durham*, 1 B. & P. 105.

[1] The superior courts at Westminster, having a superintendency over all inferior courts, may in all cases of innovation, &c., award a prohibition. In this the power of the Court of Queen's Bench has never been doubted, being the superior common-law court in the kingdom. Also, the Court of Chancery may award a prohibition, which may issue as well in vacation as in term time, but such writ is returnable into the Court of Queen's Bench or Common Pleas.

[2] Prohibitions are grantable to almost every description of court which differ from the common law in their proceedings, as to the Courts Spiritual, to the Admiralty, or to the delegates, and even to the steward and marshal, upon the Statute of *Articuli super Chartas*, or courts exercising criminal jurisdiction (*R. v. Hertford*, 29 L. J. Q. B. 246), or the Mayor's Court of London, id. 378.

[3] If it appears that an ecclesiastical judge has either no jurisdiction, or has exceeded his jurisdiction, the Court of Queen's Bench will grant a prohibition. But if the spiritual court has jurisdiction, though it is proceeding erroneously, or, as it is termed, *inverso ordine*, the court will not interpose. *Ackerley v. Parkinson*, 3 M. & S. 411. *Bulwer v. Hase*, 3 East, 217.

A prohibition will lie to the Consistory Court to stay a suit by libel in an indictable matter (*Anon.* Comb. 71. *Palmer v. Thorpe*, 4 Co. 23, a; Salk. 552. *Jones v. Clegg*, 7 Mod. 375); or in a temporal matter, as a suit against a clergyman for non-residence. 7 Mod. 375. If in a suit in the spiritual court for ecclesiastical matter the queen's patent, an act of parliament, or any temporal subject comes in question, a prohibition shall go. *Bousey v. Ley*, 3 Lev. 72. But if the ecclesiastical court proceed on acts of parliament or other temporal matters, they shall not be prohibited so long as they proceed according to the common law. *Juxen v. Lord Byron*, 2 id. 64. An appeal from the Consistory Court of Arches is no bar to an application for prohibition. *White v. Steele*, 12 C. B. 383; 32 L. J. C. P. 1.

If an ecclesiastical court give a wrong sentence on the merits, in a matter within its jurisdiction, the error can only be rectified by appeal, not by prohibition; but where it proceeds without jurisdiction, a prohibition lies: as where, though at the commencement of the suit it had jurisdiction, yet that has been taken away by the parties being at issue on a fact, which, since it cannot proceed by the rules of the common law, it has no power to try. *Leman v. Goulty*, 3 T. R. 3. See *Sir D. Massingberd's case*, 2 Raym. 219.

The plaintiff was libelled in the spiritual court for the subtraction of tithes. The defendant put in his personal answer, in which he stated a claim by a third party as lessee of the plaintiff; and afterwards his plea or responsive allegation, in which there was no mention of any such claim. The court refused to grant a prohibition, on the ground that the personal answer of the defendant was not a part of the proceedings on which issue could be raised. *Earl of Beauchamp v. Turner*, 2 Per. & D. 497.

A suit in the Ecclesiastical Court was promoted against a clergyman, and there was a variety of articles, some alleging matters which were of ecclesiastical cognisance, and others of cognisance in the temporal court; and the Ecclesiastical Court, after the appearance of the defendant, proceeded to sentence of suspension, reciting, that the articles were, for the most part, sufficiently and in truth fully proved. The court held, it was incumbent on the party applying for a prohibition after sentence, to show that the court below proceeded on those articles which allege matters of temporal cognisance. *Hart v. Marsh*, 5 Dowl. 424; 1 Nev. & P. 62.

A defendant cited in the Ecclesiastical Court must appear before he can apply for a prohibition. *Ex-parte Law*, 2 Dowl. P. C. 528. And in a suit for tithes in the Ecclesiastical Court, if the defendant pleads a plea which raises a question beyond the jurisdiction of the court, but afterwards waives it, this court will not grant a prohibition in that stage of the proceedings. *Cardew v. Cottey*, 7 id. 666.

If an exemption be claimed because of a chapelry, it must be shown that rates are paid in respect thereof. *Craven v. Saunderson*, 1 Nev. & P. 666.

[4] After sentence of a court martial confirmed by the queen prohibition will not lie, for there is no court or person to whom it could be directed. The only remedy of the complaining party is by petition to the queen. *In re Poe*, 2 Nev. & M. 636. *See* further, Court Martial, vol. iii. p. 442.

(E) *Proceedings in Prohibition.*

(*a*) *Application for Writ.*[1]

(*b*) *By whom Application may be made.*[2]

(*c*) *The Court decides the Matter on the Rule, or directs Party to Declare.*[3]

[1] Where a prohibition is moved for, the method is for the party aggrieved in the court below to apply upon affidavits setting forth the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction or manner of process disallowed by the laws of the kingdom, upon which the court grants a rule for the other party to show cause why a writ of prohibition should not issue. Where the application is for a writ of prohibition to be addressed to the judge of a county court, the matter is finally disposed of by rule or order, and no declaration or further proceedings in prohibition can be allowed. (19 & 20 Vic. c. 108, s. 42; *ante*, vol. iii. p. 432.) But where it is to the judge of any other inferior court, then, if upon showing cause it appears to the court that the surmise is not true, or not a competent ground for restraining the inferior jurisdiction, they will deny the prohibition, otherwise they will make the rule for it absolute; if the point be too nice and doubtful to be decided merely upon a motion, the party applying for the prohibition is directed by the court to declare in prohibition. 3 Bl. Com. 113; 1 Wms. Saund. 136, a.

Formerly the motion was grounded upon a suggestion, and the declaration proceeded on a fictitious allegation, that the other party had proceeded in the suit below, notwithstanding the writ of prohibition. But now the proceedings in prohibition are regulated by the 1 Wm. 4, c. 21, s. 1, which, after reciting that the filing of a suggestion of record on application for a writ of prohibition was productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued was an unnecessary form, and that it was expedient to make some better provision for payment of costs in cases of prohibition, enacts that "it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only, and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on behalf of the party and his majesty, and shall contain and set forth in a concise manner so much only of the proceedings in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ, or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse, or otherwise, as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue, and judgment shall be given that the writ of prohibition do, or do not, issue, as justice may require: and the party in whose favour judgment may be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs."

When an action is brought in an inferior court, and the defendant appears at the trial and makes no objection to the jurisdiction of the court while the case is proceeding, but suffers the court to act without protest or objection as if it had jurisdiction, down to actual payment of damages and costs, it is too late to apply for a prohibition, even though the party had no opportunity of applying earlier to the superior court, unless the want of jurisdiction appears upon the face of the proceedings. *Yates v. Palmer*, 6 D. & L. 283.

After execution a prohibition will not issue where the want of jurisdiction does not appear on the face of the proceedings, notwithstanding the objection was taken at the hearing or trial. *Denton v. Marshall and others*, 32 L. J. Ex. 89.

A prohibition may, it seems, be applied for after an appeal. *Harrington v. Ramsay*, 8 Ex. 879; 22 L. J. Ex. 326.

The court refused an application to reopen a rule *nisi* for a prohibition which had been discharged, founded upon fresh affidavits stating facts existing at the time of the previous application. *Bodenham v. Ricketts*, 6 Nev. & M. 537.

[2] Where an inferior court exceeds the jurisdiction, the court is bound to interfere by prohibition upon the application of a stranger, as well as of the defendant himself. *De Haber v. Queen of Portugal*, 17 Q. B. 171; 20 L. J. Q. B. 488.

The queen may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the suit is in derogation of her crown and dignity. So, if the Ecclesiastical Court will hold plea of any matter which belongs not to their jurisdiction, upon information thereof to the queen's court, either by the plaintiff, defendant, or by a mere stranger, a prohibition will issue.

[3] The court, in general, decides the question upon the argument of the rule; but if there is any difficulty it will direct the applicant to declare in prohibition. *Gould v. Gapper*, 3 East, 472. *Rex v. Bishop of Wells*, 1 W. Black. 81. If there appear to

(*d*) *Of the Pleadings in the Suit.*[1] (*g*) *Judgment.*[4]
(*e*) *Staying Proceedings.*[2] (*h*) *Consultation.*[5]
(*f*) *Of the Trial.*[3] (*i*) *Enforcing Writ.*[6]
(*k*) *Costs.*[7]

be no ground for a prohibition the rule will be discharged; and the plaintiff, although he may desire it, will not be allowed to declare. *Lindo v. Lord Rodney*, Dougl. 613, n. *Lloyd v. Jones*, 17 L. J. C. P. 206. If the rule is made absolute, the writ issues at once. In case the writ is refused, application may be made to another court (*Le Caux v. Eden*, Dougl. 620); but error does not lie upon the judgment of refusal. *Free v. Burgoyne*, 5 B. & C. 765.

Where a prohibition is applied for the court will always, on the demand of the party against whom the application is made, put the party applying to declare in prohibition. *Rennington v. Dolby*, 9 Q. B. 176. See *Thompson v. Ingham*, 14 id. 710; 19 L. J. Q. B. 189. *Stephenson v. Raines*, 2 E. & B. 744.

[1] The party seeking a prohibition on the ground that the subordinate court has rejected as irrelevant a defence under a statute which is said to have been misconstrued, must, in order to establish the gravamen, show, not merely that the defence is valid in law, but also that it is true in fact. The defendants in prohibition have, therefore, the opportunity of trying in the proceedings in prohibition the question whether the matter alleged in answer to the libel in the Ecclesiastical Court be true. If it be not established in proof, the judgment will be for a consultation until its truth is established, and no peremptory prohibition will go. If its truth should be established there it will appear to the court judicially, and in a suit between the same parties that any further proceeding in the subordinate court would or ought to be fruitless. Thus the prohibition, if in the event it should go, ought to be peremptory. *White v. Steel*, 31 L. J. C. P. 265. The defendant may plead several pleas. *Hall v. Maule*, 5 Nev. & M. 455.

[2] On the ground that the discretion to declare was in favour of the party applying for the prohibition, and that he might waive it, the court would, previously to the passing of the act 1 Wm. 4, c. 21, stay the proceedings upon his application, on payment of the costs incurred since the rule to declare. *Gegge v. Jones*, 2 Stra. 1149. *Pewtress v. Harvey*, 1 B. & Adol. 154. In the cases in which this was permitted to be done, however, the pleadings had not reached the stage necessary to entitle the opposite party to costs under the statute then in force (8 & 9 Wm. 3, c. 11, s. 3); and it may be doubtful whether, since the statute 1 Wm. 4, c. 21, the court would not require as a condition payment of the costs of the motion, as well as those of the declaration and subsequent costs. Marshall on Costs, 406.

[3] After issue joined the case is taken down for trial; and either plaintiff or defendant may do this without proviso. Chit. Arch. by Prentice, 305. It is tried by a jury in the usual way, with this difference only, that there can be no judgment as in case of a nonsuit, since the defendant may himself take down the record. *Wyndowe v. Bishop of Carlisle*, 11 Moore, 269. After issue tried and verdict found, the party must apply to the court where the rule for a prohibition was originally moved for judgment, and this must be done upon an affidavit containing a summary of all the proceedings down to that time. Corner's *Cr. Pr.* 248.

[4] Formerly the judgment for the plaintiff was, that the prohibition stand; for the defendant, that a consultation go. But now, as in most cases, the plaintiff will be ordered to declare before the writ issues, the effect of a verdict for the plaintiff will be to make the rule absolute; and for the defendant, to discharge the rule. Corner's *Cr. Pr.* 248.

[5] If after writ issued it appear to the court that it ought not to have been allowed, the court will grant a consultation, which is a writ directed to the party prohibited, informing him that he may proceed in the matter as he thinks fit, notwithstanding the prohibition. Lilly's *Entries*, 562. Where the plaintiff has been ordered to declare, it may go before declaration. Cro. Car. 79. And it will issue upon a verdict being found for the defendant in prohibition.

[6] If the inferior court proceed after the delivery of the writ, the party may have another prohibition, and an *alias* and *pluries*, if necessary. Fitz. N. B. 46. Every inferior court, and all persons to whom a prohibition is directed, are bound to obey the writ, and if they disobey are guilty of a contempt of court, and liable to an attachment; and the court may punish them for their disobedience by fine and imprisonment, according to the discretion of the superior court. Bac. Abr. Prohibition. And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as, if a parson libels for tithes and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an attachment will be awarded. (Id.) And although the writ may have issued improvidently, disobedience will, nevertheless, be a contempt. *Iveson v. Harris*, 7 Ves. 251.

[7] If the rule for a prohibition is made absolute, it is not usual to give costs. *Rex v. Kealing*, 1 Dowl. 440. *Barnes v. Marshall*, 21 L. J. Q. B. 388. If discharged, the party

PROCTOR.[1]

PROMISE. *See* Action, vol. i. p. 132; Breach of Promise of Marriage, vol. v. p. 460; Contracts, vol. iii. 193.

PROMISSORY Notes. *See* Bills and Notes, vol. ii. p. 400.

PROPERTY-Tax.[2] *See* also Income-Tax, vol. v. p. 103.

PROTECTIO trahit subjectionem, et subjectio protectionem. 7 Rep. 5; Vaugh. R. 279; Co. Litt. 65, a. *See* Allegiance, vol. i. p. 305.

PROTEST. *See* Bills, vol. ii. p. 473.

PROVIDENT Societies. *See* Friendly Societies, vol. iv. p. 559.

PUBLIC Company. *See* Corporation, vol. iii. p. 263; Joint-Stock Company, vol. v. p. 238.

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showing cause will, in general, be allowed his costs. *Lloyd v. Jones*, 17 L. J. C. P. 206.

As to the Costs in the Suit.—By the 1 Wm. 4, c. 21, s. 1, "the party in whose favour judgment may be given, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same;" and an assessment of damages is not necessary to entitle the plaintiff to costs. See *Wills v. Turner*, Bull. N. P. 331. *Haughton v. Starkey*, 1 Stra. 82. No rule for costs is required. *Ex-parte Tucker*, 4 Man. & G. 1097. If a prohibition goes to part, and a consultation to other part, the plaintiff in prohibition is entitled to costs. *Middleton v. Croft*, 2 Stra. 1062. So, if a verdict be found for the defendant as to part, and a consultation for the residue, the defendant shall have costs. *Malton v. Aclam*, Barnes, 138. See *Brock v. Richardson*, 1 T. R. 427. The party succeeding in the prohibition suit is entitled to the costs in the suit, and of the motion, but not to the costs in the court below; and the court in which the prohibition suit is brought has no power to award him such costs. *Tessimond v. Yardley*, 5 B. & Adol. 458. *White v. Steele*, 32 L. J. C. P. 1.

[1] An officer who formerly had exclusive right to practise in the Admiralty and Ecclesiastical Courts, corresponding with attorney at common law. The 42d sect. of 20 & 21 Vic. c. 77, directs their admission to the Probate Court; and 20 & 21 Vic. c. 85, s. 15, to the Divorce Court.

[2] In debt for rent, the tenant may plead as to part that he has paid landlord's property-tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax. *Tinckler v. Prentice*, 4 Taunt. 549. A lease rendering rent clear of landlord's property-tax, is good as a lease rendering the same rent subject to a deduction thereout of the property-tax. (Id.) *See* 2 Platt on Leases, 178.

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid:—*Held*, that the occupier could not recover back from the landlord any part of the property-tax so paid. *Denby v. Moore*, 1 B. & A. 123. *Andrew v. Hancock*, 3 Moore, 278.

In an action for use and occupation, the property-tax will not be deducted at Nisi Prius (*Pocock v. Eustace*, 2 Camp. 181: *Ellenborough*), unless the tenant has paid it before action brought. *Baker v. Davis*, 3 id. 474: *Ellenborough*.

Where the assignee of a term gave up at Michaelmas to a second assignee the occupation of a house, and afterwards paid three-quarters of a year's landlord's property-tax, due at Michaelmas, and handed over the receipt to the succeeding occupier, it was held that the succeeding occupier paying two-quarters of a year's rent accruing at the following Christmas, might tender in part of his rent the receipt for property-tax given to the former occupier, and might plead it as a payment made by himself. *Clennel v. Read*, 7 Taunt. 50; S. C. 2 Marsh. 371. A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere. *Attorney-General v. Cook*, *Bart.* 4 Price, 183. An exemption of persons coming to reside for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in Great Britain for the period of six successive calendar months, does not include a person taking a house in London, and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment, and resides for the remainder of the year there, leaving behind him some one merely to take care of the house. (Id.) See *Franklin v. Carter*, 1 Man. & G. 750; and 24 & 25 Vic. c. 20; id. c. 91.

PUBLIC HEALTH ACT.

I. Object and General Provisions of Act.[1]

II. Of the Contracts of the Local Board.[2]

III. ,, Rates under the Public Health Act.[3]

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[1] By the Public Health Act (11 & 12 Vic. c. 63), a general board of health was constituted, which has since been superseded by local boards having jurisdiction in each particular place to which the Public Health Act has been applied, or by which it has been adopted. *See* 21 & 22 Vic. c. 95, s. 5; id. c. 98, ss. 12, 15; 25 & 26 Vic. c. 61, s. 41. The local board of health in corporate boroughs is the town council; in other places the members are elected by the owners and ratepayers. The duties of the board are numerous; they are connected with the sewerage, scavenging, and cleansing of streets and buildings, the repair of the highways within the district, the control of streets and roads, the supply of water, and a variety of other matters connected with the sanitary improvement of the place. They have power to borrow money, purchase land, and settle boundaries, and procure the repeal of local acts, through the agency of a principal secretary of state, who may issue a provisional order for such purposes, which must afterwards be confirmed by parliament. 21 & 22 Vic. c. 98, s. 75. The expenses connected with these duties are defrayed out of local rates, made either prospectively or retrospectively, and to be levied in general on the occupiers of property liable to the poor-rate. *See* 23 Vic. c. 12, s. 16; and as to the power of the Privy Council, *see* 18 & 19 Vic. c. 116.

As to the steps necessary to be taken for the purpose of applying the act to any particular place, see *Barber v. Jessop*, 1 H. & N. 578; 26 L. J. Ex. 186.

A local board of health, if other than in a corporate borough, is not made a corporation by the Public Health Act, 1848. *Ex-parte Llanelly*, 22 L. J. Ch. 419; 17 Jur. 107.

[2] As to the contracts of the board, it is required, by s. 85, in the case of non-corporate districts, that they shall cause a seal to be made, and that contracts above 10*l.* shall be sealed with the seal of the board, in addition to being signed by five or more members. This has been held to be imperative, and that such a contract is void unless it be sealed. *Friend v. Dennett*, 5 C. B. (N. S.) 576; 27 L. J. C. P. 314. *See* 2 F. & F. 406.

A contractor employed by a local board to execute works under s. 69, is entitled to recover against such board, notwithstanding they have not placed themselves in a position to collect the money from the owners of the premises upon which the works have been done, by giving the proper notices, as an undertaking must be implied on the part of the local board that they were in a position to collect the money from the parties liable, and pay it over to the plaintiff. *Worthington v. Sudlow*, 31 L. J. Q. B. 131.

A contract was entered into with the defendants by five persons named, who were members of a local board of health. The five covenanted "for themselves, their heirs," &c., but the contract professed to be entered into by them "for and on behalf of the local board of health;" it was held that the clerk of the local board was the proper person to sue for a breach of this contract under the 138th section. *Cobham v. Holcombe*, 8 C. B. (N. S.) 815.

A local board of health entered into a contract for the execution of certain paving works in a street not being a highway within the 69th sect. of 11 & 12 Vic. c. 63; it was held that no estimate was necessary to be made before commencing the work, as the board were not bound to keep the paving in such street in repair. *Reg. v. Cunningham*, 26 L. J. Ex. 33.

[3] By 21 & 22 Vic. c. 98, s. 55, it is provided, that general district rates shall be made and levied upon the occupiers of all such kinds of property as, by the laws in force for the time being, are or may be assessable for the relief of the poor. See *Guardians of Toxteth Park v. Local Board of Toxteth Park*, 30 L. J. M. C. 154. *See* 27 L. J. M. C. 73.

The expense of repairing the highways within a district under the Public Health Act must in all cases be defrayed by a district rate, a local board having no power to impose a highway-rate. *South Wales Railway Co. v. Local Board of Cardiff*, 6 W. R. 58; 8 E. & B. 535. Nor can a special district rate be made for the purpose of defraying the expense of defending a suit in Chancery, instituted to restrain the local board from emptying a sewer into a certain canal, and of defending *quo warranto* proceedings against certain members of the board, the validity of whose election was disputed. *Reg. v. Marris*, 5 W. R. 254.

The proviso in sect. 88 of 11 & 12 Vic. c. 63, that if any kind of property before the passing of the act has been exempt from rating by any local act, in respect of purposes for which district rates may be levied under the Public Health Act, 1848, the same kind of property in respect of the same purposes, and to the same extent, shall be exempt from district rates under the last-mentioned act, applied only to exemptions in respect of the nature of the property; not, therefore, to property exempt under a local act in respect merely of its locality, although the property so locally situate was exempt from poor-rate. *Tait v. Carlisle Board of Health*, 2 El. & Bl. 493. *See* 8 E. & B. 116–231.

As to the exemption of lands and premises under a local act, see *Reg. v. Luscombe*, 6 W. R. 745; 31 L. T. 314; 27 L. J. M. C. 299.

IV. Power to Charge Improvements against Owners of Premises.[1]

V. Compensation for Damages to Owner of Premises.[2]

VI. Actions by and against Local Board.[3]

(A) *Parties.*[4]

(B) *Officers are Protected against Personal Liability.*[5]

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[1] The Public Health Act, sect. 69, enacts, that "in case any present or future street, or any part thereof, not being a highway, be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises forming, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require them to sewer, &c., the same within a time specified, and in case of default they are empowered to execute the works themselves, and charge such owners with the expense, and to recover the same in a summary manner, or to declare the expenses to be private improvement expenses, and recoverable as such. It has been held that this section applies only to *existing* streets which are out of repair, and which are not highways; and that the local board could not, therefore, charge the owners of adjoining land with the expense of widening, levelling, paving, &c., a new street or road made by the local board, or of converting a public footpath, repairable by the parish, into a wide road, with a carriage-way. *Local Board of Health of Kingston-upon-Hull v. Jones*, 1 H. & N. 489; 26 L. J. Ex. 33. *Wallington v. White*, 30 L. J. M. C. 209. *Shiel v. Sunderland*, 6 H. & N. 796.

After agreeing with the owner that the expense of permanent improvements should be raised by mortgage, the local board cannot proceed to recover the same by summary proceedings under 11 & 12 Vic. c. 63, s. 129. *Eddlestone v. Francis*, 7 C. B. (N. S.) 568.

The discretion as to the work to be done under sect. 54 is vested in the local board, and not in the justices: the justices have, therefore, no jurisdiction to reverse an order for the doing of such works on the ground that, in their opinion, they were unnecessary. *Hargreave v. Taylor*, 11 W. R. 562.

[2] The necessity for a reference to arbitration, in case of a disputed claim to compensation from the board, arises only where the amount is disputed, and not where the question in dispute is the liability to make compensation at all. *Reg. v Burslem Local Board of Health*, 7 W. R. 551, Q. B.

[3] Section 139 of the Public Health Act does not deprive the courts of the power to change the venue in actions against local boards. *Itchin Bridge Co. v. Local Board of Southampton*, 27 L. J. Q. B. 128; 21 Jur. 1261.

[4] Where the town council of a corporate borough is the local board, they may sue or be sued in their corporate name. By the 11 & 12 Vic. c. 62. s. 138, "the local board of health of any non-corporate district may sue and be sued in the name of the clerk for the time being for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things vested, or to become vested, in them, by reason of the provisions of this act, or relating to any matter or thing whatsoever entered into or done, or intended to be entered into or done, by them under the provisions of this act; and in any action of ejectment brought or prosecuted by such local board, it shall be sufficient to lay the demise in the name of the said clerk; and in proceedings by or on the part of such local board against any person for stealing or wilfully injuring or otherwise improperly dealing with any property, works, or things belonging to them, or under their management, it shall be sufficient to state generally that the property or thing in respect of which the proceeding is instituted is the property of the said clerk, and all legal proceedings by, on the part of, or against such local board under this act, may be preferred, instituted, and carried on in his name; and no proceedings whatever shall abate or be discontinued by the death, resignation, or removal of the clerk, or by reason of any change or vacancy in such local board by death, resignation, or otherwise: Provided always, that the clerk in whose name any such action or suit, complaint, information, or proceeding, may be brought, preferred, instituted, or defended as aforesaid, shall be fully reimbursed out of the general district rates to be levied under this act, all such costs, charges, damages, and expenses as he shall or may be or become liable to pay, sustain, or be put into by reason of his name being so used."

[5] By 11 & 12 Vic. c. 63, s. 140, "no matter or thing done, or contract entered into by the local board of health, nor any matter or thing done by any superintending inspector, or any member of the said local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, shall, if the matter or thing done, or the contract entered into *bonâ fide* for the purpose of executing this act, subject them, or any of them personally, to any action, liability, claim, or demand whatsoever, and any expense incurred by any such local board, member, officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of this act."

A contractor employed by a local board to execute work on a highway is not relieved by sect. 140 of the Public Health Act from liability for negligence in executing the works productive of damage to a third party. *Arthy v. Coleman*, 6 W. R. 34; 30 L. T. 101.

Where an action was brought against four

(C) *And have Privileges when Sued.*[1]

VII. Removal of Nuisances.[2]

PUBLIC Meetings.[3]

PUBLIC Officer, Actions by and against.

See Joint-Stock Company, vol. v. p. 254.

members of a local board of health for the plaintiff's expenses as a witness before a parliamentary committee in opposition to a gas bill, the court held that the defendants were not personally liable, as it appeared by the circumstances set out in the case that the instructions to the plaintiff had been given, and the opposition to the bill conducted, by the local board. *Bailey v. Cuckson*, 7 W. R. 16; 32 L. T. 124.

An action is maintainable against a local board of health for negligence in the construction and management of a sewer within their district, whereby damage has been sustained. *Itchin Bridge Co. v. Local Board of Health of Southampton*, 6 W. R. 223; 30 L. T. 256. *Bayley v. Wolverhampton*, W. & W.; 6 H. & N. 241; and *see* 8 E. & B. 801; 28 L. J. Q. B. 41.

[1] In actions against officers acting under the act, or against the local board, or persons acting under their direction, "for anything done or intended to be done" under the provisions of the act, one month's notice of action must be given, and the action must be commenced within six months after the grievance. The defendant in such action is at liberty to plead the general issue, and give special matter in evidence under such plea, and to tender amends or pay amends into court, with privileges as to costs. 11 & 12 Vic. c. 63, s. 139. As to pleading cause if claim did not accrue within six months, E. & B. 340.

[2] This power, independently of the common-law right (*see* vol. i. p. 4), is conferred by 18 & 19 Vic. c. 121, which repeals all former acts on the subject (*see* 23 & 24 Vic. c. 77), and directs, in places where there is no local board of health, town-council, body of trustees, commissioners, highway-board, nuisances-removal committee, or inspectors under the Highway and Watching Act, the guardians and overseers of the poor, and the surveyors of highways are to be the local authority to execute the act. (Sect. 3.) The statute is not to impair any power of abating nuisance, at common law, or any jurisdiction in respect of nuisances that may be possessed by any authority under the Smoke Act (16 & 17 Vic. c. 128); or the Common Lodging-Houses Acts (14 & 15 Vic. c. 28, 1851, and 16 & 17 Vic. c. 41, 1853); the Municipal Corporation Act (5 & 6 Wm. 4, c. 76); the Public Health Act (11 & 12 Vic. c. 63); or any improvement act respectively, or any act incorporated with such act. *See* Glen's *Law of Public Health.*

[3] The following general principles as to the mode of conducting public assemblies or meetings may be useful:—The common-law mode of election is by show of hands or by poll, and the party electing is then said to have a voice in the election. It is clear that at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed. It presents an insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted. See *Faulkner v. Elger*, 4 B. & C. 449.

These reasons are equally cogent against voting by proxy; but an election by a committee reducing the number of candidates, and selecting one of the reduced number, is not necessarily bad. *Ex-parte Lecrew*, 2 Dowl. & L. 571.

Where several persons are put in nomination, and more than one is to be elected, a show of hands will not decide the election; and where a plurality of votes is allowed, a poll is absolutely necessary (*Campbell v. Maund*, 5 Ad. & E. 865. *R. v. Rector of Birmingham*, 7 id. 254); and it is no objection in such a case that the chairman directed a poll without taking a show of hands, though one was demanded. (Id.) A poll is generally demandable as a matter of right, provided the question before the meeting be a legal one; the decision of the chairman upon the show of hands is not conclusive. *R. v. St. Saviour's*, 1 id. 380. *Reg. v. St. Pancras*, 11 id. 15. All qualified persons are entitled to vote at the poll, whether present at the show of hands or not, and a resolution confining the poll to those who were so present is inoperative. *Reg. v. St. Mary, Lambeth*, 8 id. 356. *Reg. v. Hedger*, 12 id. 139. And where a poll is demanded the show of hands becomes null. *Anthony v. Seger*, 1 Hagg. Cas. Consist. 913. The president of the meeting is the proper party to grant a poll, and also to adjourn the meeting (*Reg. v. Hedger, supra*), and to decide upon the validity of votes (*R. v. Gaborian*, 11 East, 77), subject to an action on the case if he refuses a vote maliciously. *Cullen v. Morris*, Corb. & Dan. El. Cas. 160. He has the power of proposing the business to be done, and of regulating the proceedings (*Machell v. Nevinson*, 11 East, 85, 87, n.), and of dissolving the assembly. *Vide per Lord Ellenborough*, 11 id. 89, 90. *R. v. Parkyns*, 3 B. & A. 677. An action will lie against the presiding officer for refusing a poll (*Hunt v. Dowman*, 2 Rob. R. 21), and generally where an officer does anything against the duty of his place and office, and damage thereby accrues to any party, he has an action against the officer. *Turner v. Sterling*, 2 Vent. 26; 1 Vin. Abr. 572, pl. 33. *Ferguson v. Earl of Kinnoul*, 9 Clark & Fin. 280. On the other hand, the presiding officer may have an action on the case against any person who interrupts and prevents him from taking the

PUBLIC Way.

See Highways, vol. v. p. 33 ; *post*, Turnpike Roads.

PUIS darrein Continuance, Plea.[1]

I. Nature of Plea, and Consequences on Pleading it.[2]

poll. *Shaw v. Colchester*, 2 Mod. 228. Again, if he make default in the performance of any part of his duty as presiding officer, he may be compelled to perform it by *mandamus*. *R. v. Everett*, Ca. Temp. Hard. 261. *R. v. Williams*, 2 M. & S. 144. One part of his duty is to exclude all irrelevant motions, and to admit voting only upon such as are within the purpose and competency of the meeting. *Gosling v. Veley*, 7 Q. B. 46.

[1] The entry of continuances having been abolished, the plea is now denominated a plea *to the further maintenance of the action*.

[2] Such a plea confesses that the action is rightly brought and maintained up to the time of the plea, for the form is that the plaintiff ought not *further* to maintain his action. The plaintiff is in no case compellable to go on with his suit after such a plea, but may admit the truth of the defence which has arisen, and abandon his action without being liable to costs. *Woolen v. Smith*, 9 Ad. & E. 505.

A plea containing a defence arising after the commencement of the action may be pleaded, together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned pleas. But this rule does not apply to one of several defendants. Reg. Gen. (Pl.) T. T. 1853, r. 22.

Where a plea of payment of the sum claimed after action brought is pleaded, care should be taken to include the costs, otherwise the plaintiff is entitled to go on with the action, and will recover nominal damages, and become entitled to his costs. *Cook v. Hopwell*, 11 Ex. 555. *See* also *Kemp v. Balls*, 10 id. 607. *Goodwin v. Cremer*, 18 Q. B. 757.

A plea to further maintenance may be pleaded before the jury have actually returned their verdict. *Todd v. Emly*, 9 Mee. & W. 606. Thus, the defendant may plead a release (*Wright v. Burrowes*, 4 D. & L. 226); accord and satisfaction (*Flockton v. Hall*, 14 Q. B. 380); that plaintiff has become an alien enemy (*Alcenous v. Nigren*, 4 E. & B. 217); bankruptcy of the plaintiff (*Bretherton v. Osborne*, 1 Dowl. 457), or of the defendant (*Todd v. Maxfield*, 6 B. & C. 105; 9 D. & R. 171, where it was held that if he did not plead it before verdict he could not do so to an action on the judgment); an award (*Storey v. Bloxam*, 2 Esp. 505. *Lewis v. Kermode*, 2 Moore, 30); judgment recovered for the same cause of action (*Minshull v. Evans*, 4 C. & P. 555). So, if an executor, he may plead judgment recovered against him since plea pleaded (*Prince v. Nicholson*, 5 Taunt. 333, 665; 1 Marsh. 70, 280. *Lyttelton v. Cross*, 3 B. & C. 317. In ejectment, he may plead entry of the plaintiff on part of the premises. *Moore v. Hawkins*, Yelv. 180; Cro. Jac. 261. See *Doe v. Brewer*, 2 Chit. Rep. 323; 4 M. & S. 301. A set-off cannot be thus pleaded. *Richards v. James*, 2 Ex. 471. *See post*, Set-Off.

Where two actions were brought on a bill of exchange against the drawer and acceptor, and the drawer paid the debt and costs, it was held the acceptor could not plead this as a plea to the further maintenance of the action. *Randell v. Moore*, 12 C. B. 261. Execution against the garnishee out of the Lord Mayor's Court may be so pleaded. *Webb v. Hurrell*, 4 C. B. 287. The plea may be adopted though the defendant is under terms to plead issuably, and take short notice of trial (*Bryant v. Perring*, 5 Bing. 414; 2 M. & P. 760); or though the trial has been entered as undefended and postponed (*Whitmore v. Bantock*, 1 M. & M. 122); or though judgment had been given for the plaintiff on an issue of *nul tiel record*, there being another issue still to be tried (*Wagner v. Imbrie*, 6 Ex. 380; 2 L. M. & P. 333); but it cannot be pleaded after a verdict (*Lovell v. Eastaff*, 3 T. R. 554); and if it is pleaded after a demurrer and joinder in demurrer, it operates as a retraxit of the demurrer. *Soloman v. Graham*, 24 L. J. Q. B. 332. *Stoner v. Gibbons*, Moore, 871. *See* also *Wagner v. Imbrie*, 2 L. M. & P. 333.

By Common-Law Procedure Act, 1852, s. 69, "in cases in which a plea *puis darrein continuance* has heretofore been pleadable *in banco* or at Nisi Prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, and such plea may, when necessary, be pleaded at Nisi Prius between the 10th of August and the 24th of October; but no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order."

The court allowed the plea after eight days where the defendant had become a bankrupt, and the delay had arisen from no culpable neglect on his part. *Dunn v. Loftus*, 8 C. B. 76; 7 D. & L. 158.

An affidavit of the truth of the plea is absolutely necessary. *Powell v. Duncan*, 5 Dowl. 550. The court have allowed the plea, though the matter did not arise within eight days next before the pleading, where one of the defendants had been made bankrupt, and the defendant understood the plaintiff did not intend to prosecute the action. *Kibblethwaite v. Reynolds*, 7 Scott, 232. *Dunn v. Loftus*, *supra*. Where the

plea is pleaded at Nisi Prius, the subject-matter arising during the trial, the judge may dispense with an affidavit. *Todd v. Emly*, 1 Dowl. N. S. 598; 9 Mee. & W. 606. If an affidavit is required at Nisi Prius, it should be sworn before one of the judges of assizes or at sittings. *Bartlett v. Leighton*, 3 C. & P. 408. When pleaded during the action *in banco*, the plea is delivered to the opposite attorney, with the necessary affidavit. If the plea can be pleaded at Nisi Prius, it may be delivered to the judge (*Payne v. Shenstone*, 4 D. & L. 396) any time before the verdict has been given, and the attorney afterwards transcribes it on the Nisi Prius record (*Myers v. Taylor*, R. & M. 404; 2 C. & P. 306), and it is returned to the court above. *Corporation of Ludlow v. Tyler*, 7 C. & P. 537. *Abbott v. Rugeley*, 2 Mod. 307), when the plaintiff may reply or demur to the plea. If the eight days are likely to elapse before the cause is called on, it should be tendered to the judge before such time. *Townsend v. Smith*, 1 C. & Kir. 160. The judge has no discretion to refuse it. *Todd v. Emly*, 1 Dowl. N. S. 598. If one of several defendants plead a plea of bankruptcy at Nisi Prius, the plaintiff cannot confess such plea, and go on with the trial as to the other defendants. *Pascall v. Horsley*, 3 C. & P. 372.

It is said that a plea *puis darrein continuance* can only be once pleaded. Bro. Abr. Continuance, 541; 1 Salk. 178. It supersedes or waives the former pleadings (*Barber v. Palmer*, 1 Salk. 178. *Dunn v. Hill*, 11 Mee. & W. 470), and hence ought not to be used unless the defence it furnishes is better. Where the matter arose after the commencement of the action, but in time to be pleaded with the other pleas, the plaintiff may confess such plea, and is thereupon entitled to the costs of the cause up to the date of pleading. Reg. Gen. (Pl.) T. T. 1853, r. 22. The court has, however, allowed the plea to be withdrawn after the plaintiff confessed it, and the action to go on on the old pleas. *Plummer v. Hedge*, 24 L. J. Q. B. 24. If the plea *puis darrein continuance* be pleaded for delay, it seems the judge at Nisi Prius or the opposite attorney must still receive it (*Corporation of Ludlow v. Tyler, supra*), though it is clearly bad on the face of it. *Paris v. Salkeld*, 2 Wils. 137. *Fitch v. Toulmin*, 1 Stark. 62. *See* Bull. N. P. 309. If the plea is used for the mere purpose of delay, and the plaintiff demur to it, the judge may order the demurrer to be argued on the first paper day in term. *Fitch v. Toulmin*, 1 Stark. 62. *Great Northern Railway Co. v. Kennedy*, 10 L. J. Ex. 11 *Hall v. Popplewell*, 5 Mee. & W. 341. If there was fraud in obtaining the release pleaded, the court will, in many cases, set the plea aside. *Innell v. Newman*, 4 B. & Ald. 419. *Rawstone v. Gandell*, 15 Mee. & W. 304. *Jones v. Bonner*, 2 Ex. 230. Thus, where a pauper plaintiff, behind his attorney's back, to deprive the latter of costs, gave a release to the defendant, who pleaded it, it was set aside at the instance of the attorney. *Wright v. Burroughs*, 3 C. B. 344.

In *Baker v. Morry*, 1 M. & P. 138, the plaintiff failing to reply to a plea *puis darrein continuance*, the defendant signed judgment of *non pros.* and proceeded to tax his costs. The court stayed the proceedings on the judgment of *non pros.*, saying it was quite clear the defendant could not be entitled to any costs incurred previously to the plea of *puis darrein continuance*, and it is but seldom that a plaintiff takes any step after such a plea has been delivered.

If the plea is in bar, it seems that it may be amended as in other cases. *Holroyd v. Reed*, 1 Dav. & M. 483. When the plea is pleaded *in banco*, the court, on allowing an amendment, may impose the terms of taking short notice of trial. *Lindo v. Simpson*, 2 Smith, 659. So, as to a plea pleaded at Nisi Prius. *Holroyd v. Reed*, 5 Q. B. 594.

[1] *Form of Plea in Banc.*

[*Title of Court.*]

The day of A.D.

D. ats. B. } The defendant by his attorney says, that after the last pleading in this action, and before this day [*here state the plea, as the case may be*].

Plea at Nisi Prius.

[*Title of Court.*]

The day of A.D.

D. ats. B. } And now at this day, before the Right Hon. Sir assigned to hold pleas in her majesty's court of comes the defendant by his counsel, and says, that after the last pleadings in this action, &c.

Plea at the Assizes.

—— before the Right Hon. Sir and Sir justices of our Lady the Queen, assigned to take the assizes in and for the county of aforesaid, comes, &c.

[2] When one of several pleas contains a defence arising after the commencement of the action, and the plaintiff confesses it, he is entitled to the costs of the cause up to the time of pleading. Reg. Gen. (Pl.) T. T. 1853, r. 22. "When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea: Provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants." (Id.) See *Plummer v. Hedge, supra.* If the plea goes to a part only of the action the plaintiff may enter a *nolle pros.* or discontinuance as to

PUTTING to Silence.[1]

Q.

QUAKERS and MORAVIANS.[2]

QUANDO aliquid mandatur, et omne per quod pervenitur ad illud. 5 Rep. 116. *When the law requires a thing to be done, it also requires the performance of such acts as are necessary for its attainment.*

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such part; but if he replies or demurs, and the plaintiff succeeds, the latter will be entitled to his costs thereof up to the time of pleading. *Lyttleton v. Cross*, 4 B. & C. 117.

An action well brought may be afterwards frivolously and vexatiously carried on; and when the plea is pleaded the plaintiff has the option of submitting or proceeding with the action. If he choose to proceed, and put in a replication bad in law, or untrue in fact, certain costs are by his act incurred; for these costs he is liable: but not for the costs before the plea, inasmuch as the action appeared to be at first well founded. (Id.)

[1] The term applied in the Scottish law to a suit having the same object as a suit for jactitation of marriage.

[2] By 9 Geo. 4, c. 32, ss. 1 and 2, the solemn affirmation of Quakers or Moravians has become of the same validity to enable them to give evidence as an oath administered in the usual form, in all cases, whether civil or criminal; and a false affirmation is tantamount to perjury, and punishable in the same manner. They are enjoined, in lieu of the oaths to Government, to make a declaration of fidelity (8 Geo. 1, st. 2, c. 6, s. 1), an affirmation of abjuration (Id. s. 3; as to Moravians, 22 Geo. 2, c. 30), and a profession of Christian belief. 1 W. & M. sess. 1, c. 18, s. 13. These, when lawfully required, must be taken, made, and entered at the general quarter sessions of the peace for the county, city, or place of residence of the party qualifying. 1 Wm. & M. sess. 1, c. 18, s. 13.

By the 3 & 4 Wm. 4, c. 49, Quakers and Moravians may make a solemn affirmation or declaration instead of an oath in all places and for all purposes where an oath is by law required, and a false affirmation or declaration is punishable as perjury. And the same is enacted as to Separatists by 3 & 4 Wm. 4, c. 82. *See* 17 & 18 Vic. c. 125, s. 20; vol. i. p. 265; and *ante*, p. 19.

By 7 & 8 Wm. 3, c. 34; 1 Geo. 1, c. 6; and 27 Geo. 2, c. 20, amended by 53 Geo. 3, c. 127, any Quaker objecting to pay tithes, rates, &c., in amount under 50*l.* may, on complaint of any person entitled to receive or collect such tithes, be summoned before two justices, who are to ascertain what is due, and by order under hand and seal to direct payment, to be enforced by distress and sale.

As to small tithes, &c., *see* 7 & 8 Wm. 3, c. 6, to the same effect to the amount of 10*l.*

By 5 & 6 Wm. 4, c. 74, no proceeding shall be had in any of his majesty's courts against Quakers in respect of any tithes, or under the value of 50*l.*, but all complaints touching the same shall be determined under the provisions of the above statute (extended to ecclesiastical courts by 4 & 5 Vic. c. 36).

By 42 Geo. 3, c. 90, s. 50, a Quaker refusing to serve in the militia or find a substitute is liable to have the sum necessary for procuring one levied on him by distress and sale, under the warrant of two deputy-lieutenants; if there are no goods, and he is able to pay 10*l.*, they may commit him for three months. (See also sec. 27 as to the proof required of him as Quaker, and s. 33.) *See* also 46 Geo. 3, c. 90 (the act for the defence of the realm), ss. 21, 28, as to the power of justices to appoint deputies for Quakers refusing to act as constables.

Their Marriages.— Quakers are expressly exempted from the operation of the Marriage Acts, and enjoy the liberty of solemnising matrimony in their conventicles, where both the contracting parties are of this denomination.

Their conjugal rights are the same as in other cases; nor would the title of the husband, it is presumed, to administer the effects of his deceased wife, be now disputed; for it was before the passing of the Marriage Act (26 Geo. 2, c. 33), as that specially exempts them from its operation. *Haydon v. Gould*, 1 Salk. 120. See *Hutchinson v. Brookebanke*, 3 Lev. 376.

By various acts of parliament Quakers are locally exempted from offices opposed to their religious scruples, but it is not necessary to enumerate them here; and their charitable foundations and donations are not included in the act for registering and securing charitable donations in general (52 Geo. 3, c. 102).

By 52 Geo. 3, c. 38, if any constable, overseer, &c., be a Quaker, and refuse to perform the duties, two justices may order

QUANDO aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. 2 Inst. 48. *Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.* Broom, 367. *Booth v. Bank of England*, 7 Clark & Fin. 509; Co. Litt. 228, b; 8 T. R. 301, 415; 4 B. & C. 187; 2 T. R. 251; 15 Mee. & W. 71.

QUANTUM meruit et valebant.[1]

QUARANTINE.[2]

QUARE impedit. *See* vol. i. p. 233–238.

QUARTER SESSIONS. *See post*, Sessions.

I. Jurisdiction of Justices at. *See* Justices, vol. v. p. 285.

II. Appeal to, p. 296.

(A) *In what cases Appeal lies*, p. 296.

(B) *Within what time Notice of Appeal must be given*, p. 296.

(C) *Of the Form of the Notice, and Statement of Grounds of Appeal*, p. 297.

II. Appeal to (*continued*).

(D) *To Whom, and How the Notice should be given*, p. 297.

(E) *Recognisance upon Appeal*, p. 298.

(F) *Jurisdiction of Quarter Sessions to Amend Proceedings. See* Amendment, vol. i. p. 343.

(G) *Costs of Appeal*, p. 298.

II. Appeal to Quarter Sessions.

(A) *In what cases Appeal lies.*[3]

(B) *Within what time Notice of Appeal must be given.*[4]

him to appoint a deputy to execute the office.

Church-rates may be recovered in the ecclesiastical courts, or before justices, in the same manner as tithes.

[1] These counts were formerly inserted in declarations where there was no fixed price for work and labour, goods sold, &c. They are now disused, the *indebitatus* counts sufficing.

[2] A period of time, originally consisting of forty days, but now of variable length, during which a vessel from certain coasts or ports said, or supposed to be infected with certain diseases, is not allowed to communicate with the shore, except under particular restrictions. (Brande.) The word is derived by this author from the Italian *quaranto*, forty.

In case of ships being compelled to perform quarantine before their entry into the port of London, it is usual for the consignee to send persons at his own expense to pack and take care of the goods; and if he do not, and the goods be damaged, he has no right to call upon the master for compensation. *Dunnage v. Jolliffe*, Abbott on Shipping.

[3] The power to appeal to the quarter sessions is not of general but of particular right, and is not to be implied in any case where not expressly given. *Rex v. Hawse*, 4 B. & Ald. 519. *Rex v. Skone*, 6 East, 504. *Reg. v. Stock*, 8 Ad. & E. 405. *Reg. v. Recorder of Bath*, 9 id. 871. *Rex v. Recorder of Ipswich*, 8 Dowl. 103. *Reg. v. Justices of Worcestershire*, 3 E. & B. 487. But if expressly given, it is not to be inferentially taken away by deductions from other clauses of the act. *Rex v. Justices of Hants*, 1 B. & A. 654. *Rex v. Justices of Salop*, 2 id. 145. *Rex v. Justices of Cumberland*, 1 B. & C. 64.

[4] The time allowed for the giving of notice of appeal depends upon the condition in this respect annexed to the right of appeal by the particular statute conferring the right. If required to be given immediately, there must be no delay whatever; but it must be given promptly and expeditiously under the circumstances of the case. *Reg. v. Aston*, 19 L. J. M. C. 236; 14 Jur. 1045. If required to be given so many days "at least," they must be clear days. *Reg. v. Justices of Middlesex*, 14 L. J. M. C. 139. *Zouch v. Empsey*, 4 B. & Ald. 522. Where required to be given within twenty-four hours, it was held that the order being made at five o'clock on Saturday afternoon, a notice of appeal served on the Monday morning was in time. *Reg. v. Justices of Middlesex*, 17 L. J. M. C. 111.

By the 12 & 13 Vic. c. 45, s. 1, it is enacted, "that in every case of appeal (except as hereinafter mentioned) to any court of general or quarter sessions of the peace, fourteen clear days' notice of appeal at least shall be given, and such shall be sufficient notice, any act or acts, or any rule or practice of any court or courts to the contrary notwithstanding; and such notice of

(C) *Of the Form of the Notice, and Statement of Grounds of Appeal.*[1]

(D) *To Whom, and How the Notice should be given.*[2]

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appeal shall be in writing, signed by the person or persons giving the same, or by his, her, or their attorney on his, her, or their behalf, and the grounds of appeal shall be specified in every such notice: Provided always, that it shall not be lawful for the appellant or appellants, on the trial of any such appeal, to go into or give evidence of any other ground of appeal besides those set forth in such notice."

By sect. 2, "none of the provisions hereinbefore contained relating to notices of appeal shall be construed to affect or alter the law as to notice of appeal against a summary conviction, or against an order of removal, or against an order under any statute relating to pauper lunatics, or against an order in bastardy, or against any proceeding under or by virtue of any of the statutes relating to her majesty's revenue of excise or customs, stamps, taxes, or post-office; but the law with regard to notices of all such appeals shall be deemed and taken to be the same as if the provisions hereinbefore contained had not been enacted."

If the statute enables a party to give notice of appeal within a certain time after judgment, or adjudication, or the making of the order, in general the time will be computed to run from the period when the judgment, adjudication, or order, was pronounced or made, and not when it was served or executed. *Rex v. Justices of Staffordshire*, 3 East, 151. *Rex v. Justices of Pembrokeshire*, 2 id. 213. *Reg. v. Justices of Derbyshire*, 7 Q. B. 193. As to appeals against affiliation orders, *see* vol. i. p. 262.

A regulation of the court of quarter sessions with respect to the length of notice of appeal is binding, if reasonable and not contrary to any statutable provision. *Reg. v. Justices of Surrey*, 18 L. J. M. C. 175. *Reg. v. Justices of Montgomeryshire*, 14 id. 142. *Reg. v. Justices of Warwickshire*, id. 39.

When the statute directs that the appeal shall be to the *next* sessions, that is construed to mean the next practicable sessions. *Rex v. Justices of Kent*, 8 Ad. & E. 639. *Rex v. Shackwell and others*, 4 B. & C. 62. *Rex v. Justices of Surrey*, 15 L. J. M. C. 1.

Where an appeal is given simply, there is an implied condition that, before the hearing, notice should be given to the other party, so that both may be heard. *Ex-parte Blues*, 5 E. & B. 291; 24 L. J. M. C. 138.

Where the sessions are held by adjournment in different divisions of a county, the first day of sessions means the first day of holding the sessions in the county, and not the first day of sessions held by adjournment. *R. v. Suffolk*, 16 L. J. M. C. 36. *R. v. Lancashire*, 27 id. 161.

[1] The notice may be verbal, if not required by the act to be in writing (*Rex v. Justices of Salop*, 4 B. & A. 626. *Reg. v. Justices of Surrey*, 5 id. 539. *Reg. v. Justices of Huntingdonshire*, 19 L. J. M. C. 127); but convenience in every case demands that it should be in writing; and in general the statute requires that it should be in writing. Further, all notices under 12 & 13 Vic. c. 45, s. 1, must be in writing, and signed in accordance with that statute. *See ante*, p. 296.

The statute frequently requires that the grounds of appeal should be stated in the notice, and where that is the case, care must be taken that they are stated with certainty and clearness. *Rex v. Justices of Oxfordshire*, 1 B. & C. 279. *Rex v. Sheard*, 2 id. 856. *Rex v. Justices of Westmoreland*, 10 id. 226. *Rex v. Justices of Newcastle-upon-Tyne*, 1 M. & S. 411.

The statements must not be in general terms, but must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of inquiry; and all the information the appellants possess should be given. *R. v. Derbyshire Justices*, 6 Ad. & E. 893. *R. v. North Bovey*, 2 Q. B. 504.

[2] The statute in general provides for the person or persons to whom the notice in each particular case should be given, and its provisions in this respect must be complied with; and the notice should be directed to all the persons to whom it is given, and describe them by their offices, if they have acted in an official capacity, as well as their names. In the absence of any such direction, the persons naturally respondents should be served with the notice; *i.e.* the notice should be given to the justices whose adjudication is complained of, and to the persons by whose instrumentality they were set in motion. *Re Blues*, 5 E. & B. 299. Unless personal service be required by the statute, leaving the notice at the dwelling-house with the wife, servant, or some member of the respondent's household, is, in general, sufficient, for it may reasonably be presumed to have reached the respondent's hands. *Reg. v. Justices of North Riding of Yorkshire*, 7 Q. B. 151; 14 L. J. M. C. 91. It must be delivered to each respondent. *Rex v. Justices of Bedfordshire*, 11 Ad. & E. 138. And when a statute requires that notice of appeal shall be given to the justices who make an order or sign a conviction, it must be given to all of them. *R. v. Justices of Cheshire*, id. 139. *R. v. Bedfordshire Justices*, id. 134, overruling *R. v. Justices of Staffordshire*, 4 id. 482.

The notice may, in general, be given by the attorney of the appellant (*Reg. v. Justices of Middlesex*, 20 L. J. M. C. 42. See *R. v. Justices of Lancashire*, 4 B. & A. 289. *R. v. Suffolk*, 18 Q. B. 416); and in some instances the statute allows of its being sent through the post. *See* 12 & 13 Vic. c. 45.

If there be evidence to go to the justices of due service of a notice of appeal, the

Court of Queen's Bench will not interfere with their judgment as to its sufficiency. *R. v. Justices of Gloucestershire*, 16 L. J. M. C. 57; 11 Jur. 674.

[1] Where the statute requires that the appellant shall enter into recognisances to prosecute the appeal, &c., this condition must be strictly complied with. *See* Affiliation, vol. i. p. 262.

By 12 & 13 Vic. c. 45, s. 8, after reciting that appellants are liable to be prevented from trying their appeals upon their merits, in consequence of imperfections in taking recognisances, it is enacted, "that when any recognisance or recognisances which shall have been entered into, within the time by law required, before any justice or justices, for the purpose of complying with any such condition of appeal, shall appear to the court before which such appeal is brought, to have been insufficiently entered into, or to be otherwise defective or invalid, it shall be lawful for such court, if it shall so think fit, to permit the substitution of a new and sufficient recognisance, or new and sufficient recognisances, to be entered into before such court, in the place of such insufficient, defective, or invalid recognisance or recognisances, and for that purpose to allow such time, and make such examination, and impose such terms as to payment of costs to the respondent or respondents, as to such court shall appear just and reasonable, and such substituted recognisance or recognisances shall be as valid and effectual, to all intents and purposes, as if the same had been duly entered into at any earlier time or times, as required by any statute or statutes for that purpose."

It is frequently a ground of appeal that the order, conviction, &c. appealed against is bad on the face of it, and in such a case, if the ground stand alone or be joined with objections of fact only, the appellants may go into any specific objections pointing out defects in such order, &c. (*R. v. Middleton*, 10 Ad. & E. 688. *R. v. Flockton*, 2 Q. B. 535. *R. v. Witham*, 12 id. 88); but if such general ground be followed by others, alleging specific defects on the face of the proceedings to which such general ground refers, the appellants will not be allowed to avail themselves of the general ground to go into a particular objection not specified; for if that particular objection had been pointed out the respondents might upon that have withdrawn from supporting the order, but by the omission to specify it they are induced to proceed, not thinking that it will be relied upon. *R. v. Staple-Fitzpaine*, 2 Q. B. 488. *R. v. Birmingham*, 8 id. 410. And upon a like principle, where a ground of appeal against an order of removal alleged that the statements contained in the examinations were not true, and there was no ground denying any particular fact stated in them (though there were several raising objections on the face of them), the court held, the whole was put in issue. *R. v. St. Pancras*, 12 Q. B. 31. See *R. v. Widecombe-in-the-Moor*, 9 id. 894.

A ground of appeal, stating that the appellant "is not guilty of the said offence," is sufficient to put in issue all the matters, without the concurrence of which the offence could not have been committed. *R. v. Newcastle-upon-Tyne*, 1 B. & Adol. 933.

In the cases excepted from the 12 & 13 Vic. c. 45, s. 1, the notice of appeal need not contain any statement of grounds, unless required by the particular statute giving the appeal. *R. v. Westmoreland Justices*, 10 B. & C. 226. *R. v. Recorder of Derby*, 20 L. J. M. C. 44.

The attorney for the appellant may amend an informal notice by inserting mere corrections to carry out the original purpose for which the notice was signed, without express authority or fresh signatures. *R. v. Justices of Somersetshire*, 2 N. C. 645.

The respondents are not bound to prove any statement not traversed by the grounds of appeal. *R. v. Hockworthy*, 7 Ad. & E. 492. *R. v. St. John, Margate*, 1 Q. B. 252.

By 12 & 13 Vic. c. 45, s. 9, "the decisions of the court of general or quarter sessions of the peace upon the hearing of any appeal as to the sufficiency of the statement of any ground or grounds of appeal, and as to the amending or refusing to amend any order or judgment of a justice or justices appealed against, or the statement of any ground or grounds of appeal, and as to the substitution of any new recognisance or recognisances as aforesaid, shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or *mandamus*, or otherwise."

As to sufficiency of notice in particular cases, *see* Affiliation, vol. i. p. 256; *post*, Settlement.

[2] By 12 & 13 Vic. c. 45, s. 5, "upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party against whom the same shall be decided to pay to the other party such costs and charges as may to such court appear just and reasonable." This section was meant to apply to all cases in which an appeal is disposed of. It includes a case in which an appeal is dismissed on the ground of want of jurisdiction. Thus, where an appeal on a matter under the Highway Act was dismissed on the ground that the quarter sessions had no jurisdiction to hear it; although, in such a case, costs could not be given under the Highway Act, which authorises the giving of costs upon the hearing and finally determining the matter, that is, determining the *merits* of the appeal; yet, under the 12 & 13 Vic. c. 45, the court may order the costs to be paid by the appellants to the respondent, because the dismissal of the

appeal is a deciding upon it within the meaning of that section, although such decision is not upon the merits. *Reg. v. Padwick*, 27 L. J. M. C. 113. It is to be observed that the subsequent statute, 20 & 21 Vic. c. 83, by which an appeal is given to the sessions from the order of justices for the seizure and destruction of obscene books and prints, the court is authorised, "upon hearing and finally determining such appeal," according to their discretion, to award such costs to the party appealing or appealed against as they shall think proper. It would appear, that under this statute the court could not award costs where they dismiss the appeal on the ground of the want of jurisdiction to hear it, since in such a case they would not "hear and finally determine" the appeal.

As to appeals under the Highway Act, *see* Highways, vol. v. p. 33.

The court ought to consider the question of costs with reference to each particular case, and if they are of opinion that costs ought to be given, they should either themselves find the amount or refer it to the clerk of the peace, or some other officer, to find what amount ought to be awarded (*Reg. v. Justices of Glamorganshire*, 1 L., M. & P. 336. *Reg. v. Justices of Merionethshire*, 6 Q.B. 163. *Rex v. Sweet*, 9 East, 25), taking care, if they pursue the latter course, to adopt his finding, and have the amount inserted in the order before the conclusion of the sessions. *Reg. v. Long*, 1 Q. B. 740; 1 Gale & D. 367. See *Reg. v. Lambeth*, 3 C. L. R. 35. *Sellwood v. Mount*, 1 Gale & D. 358. *Ex-parte Holloway*, 1 Dowl. 26, *contra*. *Reg. v. Justices of Westmoreland*, 1 D. & L. 178. An adoption, however, of the taxation at an *adjourned* sessions is, it seems, sufficient. *Reg. v. Justices of Ely*, 5 E. & B. 489; but see *Reg. v. Mortlock*, 7 Q. B. 459.

The court may visit upon the appellant the costs occasioned by the introduction into the notice of appeal of frivolous grounds. 12 & 13 Vic. c. 45, s. 4; *see* also 11 & 12 Vic. c. 31, s. 5.

If a party give notice of appeal and afterwards abandon the appeal, the court may award to the respondent the costs which that proceeding has occasioned. 11 & 12 Vic. c. 43, s. 6. See *Ex-parte London, Brighton, and South-Coast Railway Co.* 5 D. & L. 597.

Notwithstanding after receiving notice of appeal the party intimates his desire to abandon the order of the justices in his favour, and gives notice to the appellant that he does abandon it, the appellant may carry the appeal to the sessions for the purpose of obtaining an order for his costs. *Reg. v. Justices of Merionethshire*, 1 Q. B. 136. *Reg. v. Townsend*, 3 id. 357.

As to the Order for Costs of Appeal.—By the statute 12 & 13 Vic. c. 45, s. 5, we have seen, that "upon any appeal to any court of general or quarter sessions of the peace the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable." By the prior act of the 11 & 12 Vic. c. 43, s. 27, it is enacted, that if upon any appeal from the summary conviction or order of a justice or justices of the peace "the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid." This section relates only to appeals against summary convictions and other orders of justices mentioned in the statute, and does not extend to appeals against poor-rates. And although the words of the 5th section of 12 & 13 Vic. c. 45 would, in their ordinary meaning, authorise all orders for costs to be paid by the one party to the other, and even if the addition, making such costs recoverable in the manner pointed out by stat. 11 & 12 Vic. c. 43, s. 27, can be thought to require the original order to direct the costs to be paid to the clerk of the peace, still it does not take away any former power of awarding costs, nor alter the form of awarding costs under such former power. *Reg. v. Huntley*, 3 E. & B. 173. *Reg. v. Justices of Ely, supra. Reg. v. Hellier*, 17 Q. B. 229. It seems that an error in directing the costs to be paid to the clerk of the peace instead of to the party is a mere defect in form. *Reg. v. Binney*, 1 E. & B. 810.

As to the Enforcing the Order for Payment of Costs of Appeal.—If ordered to be paid to the clerk of the peace, under 11 & 12 Vic. c. 43, s. 27, the same section provides for enforcing payment by distress. And the same remedy applies where the costs are directed to be paid by the one party to the other. 12 & 13 Vic. c. 45, s. 5. The 12 & 13 Vic. c. 45, s. 5, contains a cumulative general authority upon all appeals to give costs; and the better construction seems to be to give to the successful party the right to proceed for the recovery by applying for a distress warrant, and, if need be, a commitment under sect. 5; and also, if need be, by removing the order by *certiorari* to take out execution as upon a judgment under sect. 18. *Reg. v. Huntley*, 3 E. & B. 172. By the 12 & 13 Vic. c. 45, s. 18, it is enacted, "that in all cases where any order shall be made by any court of general or quarter sessions of the peace it shall be lawful for the Queen's Bench, or for any judge of that court at chambers, either in term or vacation, upon the application of any person entitled to enforce such order, and upon production of a copy of such order under the hand of the clerk of the peace or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the quarter or general sessions to be removed into the Queen's Bench, and thereupon such order shall be of the same force and effect, and

QUARTO die post.[1]

QUAY. *See* vol. v. pp. 526, 532; *ante*, p. 4; and *post*, Wharf.

QUEEN'S Remembrancer.[2]

QUESTION of Fact. *See* vol. iv. p. 290; and Issue of Fact without Pleadings, vol. v. p. 236.

QUI facit per alium facit per se. Co. Litt. 258, a. *He who does an, act through the agency of another does it himself.* *See* Principal and Agent, *ante*, p. 220.

QUI prior est tempore potior est jure. Co. Litt. 14, a. *He has the better title who was first in point of time.* Broom's *Max.* 260.

QUI sentit commodum sentire debet et onus. 2 Inst. 489. *Who enjoys the benefit ought to bear the burden.*[3]

QUI tam.[4]

QUICQUID plantatur solo, solo cedit. Broom's *Max.* 295. *Whatever is affixed to the soil belongs thereto.*[5]

QUO WARRANTO.[6]

I. Information in Nature of.[7]

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may be enforced in the same manner, as a rule made by the Court of Queen's Bench; and all reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order."

[1] *Quarto die post.* (L. Lat.) "On the fourth day after." The name given to the fourth day inclusive after the return of a writ, upon which, if a defendant appeared, it was sufficient. 3 Bl. Com. 278; *see Fleta*, lib. ii. c. 65, s. 1. Hence called the Appearance Day. 1 Tidd's Pr. 107; Crabb's *Hist.* 218. It was the first day in full term on which the courts sat for the despatch of business. 3 Bl. Com. *ub. sup.*; 1 Tidd's Pr. *ub. sup.* *See* vol. i. p. 390.

[2] The Queen's Remembrancer, an officer on the revenue side of the Court of Exchequer. The office is held and the duties discharged by one of the masters of the court. 22 & 23 Vic. c. 21. As to the fees in the office, *see* 5 & 6 Vic. c. 86.

[3] The maxim in the text is applicable to those cases where covenants are construed to run with the land. *See* Covenant, vol. iii. p. 487.

[4] [*Who as well.*] The name given to an action brought by an informer where part of the penalty or forfeiture sued for is given to the queen, the state, the poor, or to some public use, and the other part to the informer or prosecutor. *See* Statute, Action on.

[5] It is a general rule that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subjected to the same rights of property as the soil itself. In the Institutes of the Civil Law it is laid down, that if a man builds on his own land with the materials of another, the owner of the soil becomes in law the owner of the building also. 1 T. 1, 29; D. 47, 3, 1. And that if a man build, with his own materials, on the land of another, the house belongs to the owner of the soil. 1 T. 1, 30. So of trees planted. Bracton, c. 3, ss. 4, 6; *Fleta*, lib. iii. c. 2, s. 12. Where a man, supposing that he has a good title to an estate, builds upon the land with the knowledge of the real owner, who stands by and suffers the erections to proceed, without giving any notice of his own claim, he will be compelled by a court of equity, in a suit brought for recovery of the land, to make due allowance and compensation for such improvements. 1 Stor. *Eq. Jur.* s. 388; Sugd. V. & P. 327. *Austin v. Chambers*, 6 Clark & Fin. 31. *Perritt v. Palmer*, 3 Mylne & K. 640. *See* Emblements, vol. iv. p. 241; Fixtures, id. 474; Landlord and Tenant, vol. v. p. 307.

[6] *See* Cole on Criminal Informations and Quo Warranto; Archbold's *Practice of Crown Office*; Corner, id.; Grant on Corporations.

[7] The ancient writ was in the nature of a writ of right for the Crown against persons who claimed or usurped any office, franchise, or privilege belonging to the sovereign, to inquire by what authority they maintained their claim. The writ fell into disuse from the delay with which it was attended. A more expeditious proceeding has been

II. When it Lies.[1]

adopted — an information filed by the attorney-general in nature of a quo warranto, in which the person usurping is considered as an offender, and consequently punishable by fine. The court will not extend this remedy beyond the limits of the old writs. *Rex v. Shepherd*, 4 T. R. 381. *Rex v. Howell*, Ca. Temp. Hard. 247; Stra. 1196; Cole, 114.

By stat. 4 & 5 Wm. & Mary, c. 18, the clerk of the Crown Office shall not, without express order of the court, receive or file any information for trespass or other misdemeanor, or issue any process thereon, before he shall have taken, &c. a recognisance from the prosecutor to the defendant in the penalty of 20*l.* to prosecute with effect; and in case the defendant shall appear and plead to issue, and the prosecutor shall not, at his own costs, within one year after issue joined, procure the same to be tried, or in case the defendant shall have a verdict, or a *nolle prosequi* be entered by the informer, the court may award the defendant's costs, &c., unless the judge shall, at the trial, certify that there was a reasonable cause for exhibiting the information; and if the informer does not pay the costs taxed within three months after demand, the defendant shall have the benefit of the recognisance to compel him.

Although the words of this statute relate only to informations for trespasses and other misdemeanors, yet it has been holden to extend to informations in nature of quo warranto to try the right of usurping public franchises; consequently, such informations cannot be filed without leave, nor can process be issued thereon without a recognisance (Carth. 50; Salk. 376); and the defendant is entitled to 20*l.*, but not more. *Rex v. Howell*, Ca. T. Hard. 249. *Rex v. Morgan*, Stra. 1042, *Rex. v. Filewood*, 2 T. R. 145. *Rex v. Brooke*, id. 197. The usurpation of offices and franchises in corporations constitutes the principal ground for such applications. By the common law, such usurpations could be punished only by a prosecution at the king's suit, though the dispute were really between party and party. To remedy this, it was enacted by 9 Anne, c. 20, s. 4, that in case any person should usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises (5 T. R. 379; 1 Bl. Rep. 95), the proper officer may, with leave of the courts, exhibit informations in the nature of quo warranto, at the relation of any person desiring to prosecute the same, and who shall be mentioned in the information as the relator against the person usurping, and proceed therein as is usual in such informations; and if it shall appear to the court that the several rights of divers persons may properly be determined on one information, the courts may give leave to exhibit one information against several persons. The parties prosecuted are to plead the same term or sessions in which the information is filed, unless farther time be allowed by the courts. By the 5th sect. the courts are authorised to give judgment of ouster against, and to fine the parties, and to award costs to the relator or defendants.

The courts will not stay proceedings until the prosecutor gives security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. 2 M. & S. 346.

[1] It will lie for the usurpation of any office, whether created by charter of the Crown alone, or by the Crown with consent of Parliament, provided the office is of a public nature, and a substantive office, not being merely the function or employment of a deputy or servant, held at the will or pleasure of others. *Darby v. Reg.* 12 Clark & Fin. 520. See *Reg. v. Mouseley*, 8 Q. B. 946; 16 L. J. Q. B. 89. It lies for the office of constable (*Reg. v. Booth*, 12 Q. B. 884; 18 L. J. M. C. 25); or for the office of clerk to the board of guardians of a poor-law union (*Reg. v. St. Martin-in-the-Fields*, 17 Q. B. 149; 20 L. J. Q. B. 423. *Hill v. Reg.* 8 Moo. P. C. 139); but not of clerk to the justices of a borough, who holds his appointment under 5 & 6 Wm. 4, c. 76 (*Reg. v. Fox*, 8 E. & B. 939; 27 L. J. Q. B. 151); though it does for the office of superintendent registrar of births, deaths, and marriages, in a union under 6 & 7 Wm. 4, c. 86. *Reg. v. Acason*, 31 L. J. Q. B. 227.

If circumstances are very strong in favour of a corporate franchise, and against the application, the rule *nisi* will be discharged, and with costs. *Rex v. Wardroper*, 4 Burr. 1963. An information lies for the office of bailiff to a borough and manor. *Rex v. Bingham*, 2 East, 308. Such an information will not be granted against a member of a corporation which has been dissolved for continuing the exercise of his office. *Rex v. Saunders*, 9 East, 119. A swearing in, though defective, is a sufficient user. *Rex v. Tate*, 4 id. 337. An information will be granted where the right depends upon a matter of doubtful law, that it may be finally settled. *Rex v. Carter*, Cowp. 58. *Rex v. Mein*, 3 T. R. 596. The court will not decide the validity of the election of a corporation if the question is new or doubtful, on a rule to show cause for an information in nature of quo warranto. *Rex v. Godwin*, Dougl. 397.

The election of a portreeve of a borough and manor (*Rex v. Mein*, *supra*), or the claim of a right to vote in virtue of a burgage tenement, may be the subject of a quo warranto (*Boroughmen of Horsham, case of*, 3 T. R. 599, n.); but not the office of churchwarden. *Re Barlow*, 30 L. J. Q. B. 271.

A quo warranto will not lie against individuals for usurping a franchise of a mere private nature (*Rex v. Ogden*, 10 B. & C.

III. Of the Application for.

(A) *How to be made.*[1]

230); nor for exercising the office of a guardian of the poor. *Rex v. Carpenter*, 1 Nev. & P. 773. And a party who seeks to disturb another elected to an office, that he had not a majority of votes, must show the qualification of the electors, and that another candidate had the majority of those duly qualified. *Rex v. Mashiter*, id. 314. And where a party had been elected, and had acted as town-clerk previous to the passing of the Municipal Corporation Act, but was not a burgess at the time of his election, and had not taken the oaths of allegiance and supremacy, &c., the court refused, at the instance of a private individual, to grant a quo warranto information against him for the purpose of showing that he was not an officer of the corporation, and therefore not entitled to compensation on being removed from his office. *Rex v. Harris*, id. 576. And it will not lie where a town-councillor was a bankrupt at the time of his election; 5 & 6 Wm. 4 only applies where bankruptcy takes place after election. *Rex v. Chitty*, id. 78. And it will not lie for the office of governor of the poor under a local act. *Rex v. Ramsden*, 3 Ad. & E. 456; 5 Nev. & M. 325. But a quo warranto has been held to lie against a party claiming to act as a commissioner under a local act for paving, &c. (*Rex v. Beedle*, 3 Ad. & E. 467), and for an office connected with the return of a member of parliament. *Rex v. M'Kay*, 4 B. & C. 351; 6 D. & R. 432. And it is no objection to granting the writ against individual members of a corporate body, at the instance of a private relator, that the objection made to the party holding the office may be made to every member of the corporation, and tends to dissolve it altogether. *Rex v. White*, 1 Nev. & P. 84.

Where to an application for a quo warranto impeaching the election of the master of a corporate company, upon objections that the body of the electors was narrowed by a by-law, and also the number of persons eligible: — *Held*, 1st, that a by-law as to the former might be valid, and its existence inferred by the court from ancient usage, without the intervention of a jury; and, 2ndly, that, although as to the latter such a by-law would be invalid, yet it would not be inferred from the mere fact of the elections having almost uniformly fallen upon persons of the limited body; and where no reasonable doubt was raised upon the affidavits, the court refused to grant the information. *Rex v. Attwood*, 1 Nev. & M. 287; 4 B. & Adol. 481.

An information will be granted where the right is doubtful and disputed, in order to try it, unless there has been such an acquiescence as ought to prevent it. *Rex v. Latham*, 3 Burr. 1485. And the rule that an information in the nature of quo warranto will not be granted at the instance of those who have concurred in the defendant's election, only holds where they knew of the defect which rendered it invalid. *Rex v. Smith*, 3 T. R. 573. *R. v. Latham*, *supra*. *R. v. Morris*, 3 East, 213. An information cannot be filed, at the instance of a private prosecutor, for setting up a warren (*Rex v. Lowther*, Stra. 637; 2 Ld. Raym. 1409); or for holding a court-leet at the instance of the lord of the hundred (Andr. 15); or for a forfeiture by non-attendance (*Lord Bruce's case*, 2 Stra. 819); or where the only acting is voting for a member of parliament as burgesses, the parties having, in fact, a right to vote, though not as burgesses. *Rex v. Harvey*, Stra. 547. But an information lies against the steward of a court. *Anon.* 11 Mod. 383. *Rex v. Hulston*, Stra. 621, S.C. And against a person for acting as a trustee under an act of parliament without due appointment (*Rex v. Nicholson*, Stra. 299); or for setting up a new office (*Rex v. Boyles*, id. 836); or a fair, or a market; and there may be two judgments, one for a seizure, and the other for a fine. *Anon.* 6 Mod. 184. It lies for the office of constable (*Rex v. Gudge*, Stra. 1213); or for a ferry. *Rex v. Reynell*, id. 1161.

The court have established a general rule to guide them in exercising their discretionary power of permitting informations in nature of quo warranto to be filed, that they will not permit one corporator to object to the title of another if he has concurred in the election of that other, or acknowledged his title by acting with him; or if the objection that he makes to the title of that other be equally applicable to his own or to the title of those under whom he claims. *Rex v. Cudlipp*, 6 T. R. 503. Neither is it competent to a stranger to the corporation, although an inhabitant of the town, to impeach the title of a corporator (*Rex v. Hodge*, 2 B. & A. 344, n.), unless he can show that, as an inhabitant, he is subject to the local jurisdiction of the body corporate. Before the application for a quo warranto the party must be disfranchised. *Rex v. Heaven*, 2 T. R. 772. In general, to found the writ, there must have been a possession or exercise of the office. *Rex v. Whitwell*, 5 id. 85.

[1] By 6 & 7 Vic. c. 89, s. 5, after reciting that it is expedient to render certain proceedings by way of quo warranto, so far as they affect corporate offices in boroughs, more summary and expeditious, it is enacted, "that in all cases of intended application to the Court of Queen's Bench for an information in the nature of a quo warranto against any person claiming to be a corporate officer of and in any boroughs aforesaid, the party intending to make such application is to give notice in writing thereof to the party to be affected thereby, at any time not less than ten days before the day in the said notice specified for making such appli-

cation, in which notice shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time he is to deliver with such notice a copy of the affidavits whereby the application will be supported, and thereupon it shall be lawful for the said last-mentioned party to show cause in the first instance against such application, and if no sufficient cause be shown to the court, on proof of the due service of such notice and statement, and of the delivery of a copy of the affidavits, may make the rule for the information absolute in the first instance, and may also direct that the venue in the information be laid in Middlesex or London." A burgess is not a corporate officer within this provision, and cannot, therefore, be called upon to show cause in the first instance. *Reg. v. Milner*, 5 Q. B. 589; 13 L. J. Q. B. 186. The objection intended to be made to the title of the defendant should be stated in the rule to show cause. *Reg. v. Preece*, 5 Q. B. 94; 12 L. J. Q. B. 335. *Reg. v. Edye*, 12 Q. B. 936; 18 L. J. Q. B. 6. In support of the application the relator may use the affidavits of those who have concurred in the defendant's election. *Rex v. Symmons*, 4 T. R. 223.

By Reg. Gen. (K. B.) M. T. 1853 (2 Nev. & M. 287), it is ordered, "that no information in the nature of a quo warranto be filed without an affidavit, at the time of filing, being made at the instance of the party as relator, who shall be deemed and named as such in the information, if filed, unless the court shall otherwise order."

It is no objection to an affidavit in support of an application for the writ, that it is made by a party who cannot himself be a relator, there being otherwise a sufficient one. *Rex v. Browne*, 1 Nev. & P. 664.

Under this rule the affidavit in support of a motion for a quo warranto information must state at whose instance the application is made. It is not enough for a party to depose, that if the court grant the information it is his intention to become really and *bonâ fide* the relator. *Reg. v. Hedges*, 11 Ad. & E. 163; 9 Dowl. P. C. 493. It should show that the acts have been done which are necessary to constitute an acceptance of the office (*Reg. v. Slatter*, 3 Per. & D. 263), or allege that the defendant had taken upon himself the office, and acted in it. *Reg. v. Quayle*, 11 Ad. & E. 508.

The affidavit must state the mode of election to the office in question. *Rex v. Mein*, 3 T. R. 596.

An affidavit for usurping a corporate office contrary to the provisions of a charter must state that such charter has been accepted; or, whence the same thing may be inferred, being acted upon. It must appear that the constitution alleged to have been violated is an existing one. *Rex v. Barzey*, 4 M. & S. 253. But if the affidavits in support of an information be deficient in the statement of necessary facts, recourse may be had to the affidavits in answer, in which they are detailed. *Rex v. Mein, supra.* Where the merits of the election, if any, are sufficiently brought into question by the affidavits, and where it is not denied by the defendant, an information will be granted, though the facts of the election are not precisely sworn to. *Rex v. Harwood*, 2 East, 177. But an affidavit in support cannot be amended. *Rex v. Barzey, supra.*

The affidavits impeaching an election only showed that bad votes were given for the party whose election was questioned, and that, if the votes only of duly qualified electors had been received, he would not have been elected. The court held it insufficient, without showing who was duly elected. *Rex v. Jefferson*, 2 Nev. & M. 487.

The court will not, on the motion for a quo warranto, enter into the questions as to the qualification of voters. *Reg. v. Quayle, supra.*

Where a charter of incorporation had been granted, the court discharged a rule for a quo warranto information, at the instance of a private relator, against a coroner appointed under the charter, on the ground that all the objections taken to his title applied equally to the charter itself, and that the charter itself could not be attacked through him. *Reg. v. Taylor*, 3 Per. & D. 652; 9 Dowl. P. C. 548.

If on a quo warranto the attorney-general has granted his fiat for a writ of error to issue, the court will not interfere, the fiat being conclusive. *Reg. v. Clarke*, 7 W. R. 601.

Where the charge was exceedingly groundless and frivolous, and could not but have been known to the prosecutor to be so, the court discharged the rule with costs. *Rex v. Lewis*, 2 Burr. 780. *Rex v. Carpenter*, 2 Stra. 1039. *Rex v. Wardroper*, 4 Burr. 2024.

If it appears that an insolvent has been put forward with a view to screen from the costs the party on whose behalf the application is really made, the court may, upon discharging the rule, if the fact appears by the affidavits in support of the rule, or by a subsequent application if the fact does not appear thereby, order that such party shall pay the costs of showing cause against the rule. *Reg. v. Greene*, 4 Q. B. 646.

After a quo warranto has been granted, the court will not interfere or control the manner of conducting it. *Rex v. Brown*, 4 T. R. 276. Though both parties consent, the court will not quash a quo warranto. *Rex v. Edgar*, 4 Burr. 2297.

After two rules discharged for a quo warranto, a third will not be granted on the same ground. *Rex v. Langhorn*, 2 Nev. & M. 186. And where a previous application had been discharged on the affidavits in answer, and a second was made on the same grounds, impeaching the former opposing affidavits, the court discharged the rule without allowing the merits to be gone into. *Rex v. Orde*, 8 Ad. & E. 420, n.

The court has not power to compel the

(B) *Of the Parties.*[1]

(C) *Limitation of Time for Granting.*[2]

IV. Of the Pleadings.[3]

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relators and defendants in several quo warranto informations to submit to be bound by the result of one, although the objection in all is the same. *Reg. v. Cozens*, 6 Dowl. P. C. 3; S. C. 2 Nev. & P. 164.

As to the form of the rule *nisi*, see *Reg. v. Anderson*, 2 Q. B. 740; 2 Gale & D. 113. The points for argument should be stated distinctly. S. C. 1 Q. B. 878; 1 Gale & D. 429.

[1] One information may be exhibited against several persons for usurping different franchises. *Symmer v. Rex*, Cowp. 489. But there must be separate informations against several for usurping separate offices of the same corporation. *Rex v. Warlow*, 2 M. & S. 75. The practice is for the parties, upon whose affidavits the rule for the information is obtained, afterwards to make such person as they think fit relator, so that the relator is often not the real prosecutor, though he is *primâ facie* considered so to be. An application, therefore, that the prosecutor may give security for costs on account of his poverty will be dismissed, unless it be shown that he was only an instrument in the hands of others. *Rex v. Sir W. W. Wynne*, 2 M. & S. 346. It is otherwise where the relators do not act *bonâ fide*. 7 Dowl. P. C. 700.

A town councillor is disqualified to be a relator on a motion for a quo warranto to question the election of another town councillor, he having been conusant of the objection before the election, been present at the election, and having afterwards administered to him without protest the declaration required by 5 & 6 Wm. 4, c. 76, s. 50. *Reg. v. Greene*, 2 Q. B. 460; 2 Gale & D. 24.

A burgess may be relator as to the town-clerk's election. *Rex v. Davies*, 1 M. & R. 538.

Where the relator did not concur in the election of the defendant, although he appeared afterwards to have acted and attended corporate meetings with him:—*Held*, that this was not a sufficient objection to his sustaining the application for a quo warranto. *Rex v. Benney*, 1 B. & Adol. 684. A relator is entitled to the interference of the court, though he is acting with others not qualified. *Rex v. Parry*, 6 Ad. & E. 810. A corporator voting and concurring in the election cannot become a relator to an information to impeach it. *Rex v. Slythe*, 6 B. & C. 240. *Rex v. Parkyn*, 1 B. & Adol. 690.

Where the information is against a whole corporation, it can only be in the name of the attorney-general. *Rex v. Ogden*, 10 B. & C. 230.

An information against persons by the name of the mayor and citizens of O. for claiming to be a body corporate imports not that they are a corporation, but the contrary. *Rex v. Amery; Same v. Monk*, 2 T. R. 515.

[2] By 6 & 7 Vic. c. 89, s. 1, no election of a mayor in a borough shall be liable to be questioned, by reason of defect in the title of such person, to the office of alderman or councillor, to which he may have been previously elected, unless application is made to the Court of Queen's Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor within twelve calendar months after his election to the office of alderman or councillor; and every election to the office of mayor, alderman, councillor, or any other corporate office, which shall not be called in question by such application to the Queen's Bench, within twelve calendar months from such election, shall be deemed a good and valid election to all intents and purposes. *Reg. v. Francis*, 21 L. J. Q. B. 304. *Reg. v. Grimshaw*, 10 Q. B. 747; 16 L. J. Q. B. 385. *Reg. v. Preece*, 5 Q. B. 94; 12 L. J. Q. B. 335.

The stat. 32 Geo. 3, c. 58, which was passed for the quieting the possession of persons who had exercised franchises, and for preventing others from lying by for a length of time with latent objections to their titles, enables a defendant to an information to plead that he held or executed the office six years before the exhibition of the information. This period must be dated from the making the rule absolute, and not from the time of obtaining the rule *nisi*. *Rex v. Stokes*, 2 M. & S. 71. See *Rex v. Newling*, 3 T. R. 310.

Previous to the above statute, the courts laid down that twenty years was the *ne plus ultra*, beyond which the court would not disturb a peaceable possession of a franchise; but that in every case within twenty years their granting the rule, or refusing to grant it, would depend upon the particular circumstances of the case that should be in question before them. 4 Burr. 1692. *Rex v. Stacey*, 1 T. R. 1; 3 T. R. 14. *Rex v. Dawes*, 4 Burr. 2121. The application is not answered by a resignation. *Rex v. Warlow*, 2 M. & S. 75.

[3] The time to plead is regulated thus:—After defendant has appeared, two four-day rules to plead must be given; at the expiration of the last, a peremptory rule to plead may be moved for in term: if not moved for, defendant has until next term. *Rex v. Giniver*, 6 T. R. 594.

By Reg. Gen. H. T. 1827, K. B. (6 B. & C. 267), "whereas much vexation and expense have been occasioned to defendants on informations in the nature of quo warranto, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the court; it is ordered, that from henceforth the objections intended to be made to

(A) *Amendment of.*[1]

V. Of the Judgment.[2]

VI. Of the Costs.[3]

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the title of the defendant shall be specified in the rule to show cause, and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the court, or of some judge thereof."

Under the 32 Geo. 3, c. 58, defendant may plead double. *Rex v. Autridge*, 8 T. R. 467; but see *Rex v. Richardson*, 9 East, 469. The defendant may, under terms, withdraw his plea, and plead *de novo*. *Rex v. Grimes*, 4 Burr. 2147.

Where a plea to a quo warranto stated that by charter an office became vacant on a certain event, it was holden that it must not only show that that event has occurred, but what the circumstance was. *Rex v. Smith*, 2 M. & S. 583.

By a new charter, the election to an office in the corporation was to be made in the mode in use at a particular period. A plea to an information in nature of quo warranto for exercising the office, claiming it under an election pursuant to the charter, must show what the mode of election was at the named period, in what way soever it originated. *Rex v. Birch*, 4 T. R. 608. If the plea be insufficient, it amounts to a confession of the usurpation. *Rex v. Philips*, Stra. 394.

To a quo warranto the prosecutor is allowed to reply specially, and to put as many matters in issue as he pleases, but it must be consistent with the plea. *Rex v. Knight*, 4 T. R. 419. And where defendant demurred to the prosecutor's replication, the plea being defective, it was holden that the replication being unanswered, it was an answer to the plea. *Rex v. Smith, supra.*

In *Rex v. M'Kay*, 4 B. & C. 351; 6 D. & R. 432, the court held, when defendant not having traversed that the office "was one of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in parliament," had admitted it to be so, and that the Crown has a right to traverse the facts stated, and, lastly, that the general replications being clearly good, and the demurrer being to all of them, judgment must be given for the Crown. The Crown will be entitled to judgment if the pleas rely upon a custom which is bad in law. See *Rex v. Hill*, 4 B. & C. 426; 6 D. & R. 593.

[1] The court will permit an information quo warranto to be amended, if it will not tend to delay the trial. *Rex v. Ellams*, 7 Mod. 220; Cole, 70. *See* 7 Geo. 4, c. 64.

The plea, even after argument on demurrer, may be amended. *Rex v. Birch*, 4 T. R. 608.

The court has an inherent power to change the venue. *Clerk v. Reg.* 5 L. T. (N. S.) 66; 29 L. J. Q. B. 232; 31 id. 175; 9 H. L. C. 184.

[2] If the defendant fails in the title he sets up judgment is given for the Crown. *Rex v. Leigh*, 4 Burr. 2143. It seems that if the title to a corporate office be only defective from an irregular swearing in, the judgment ought to be *capiatur pro fine* for the temporary usurpation, or a judgment of *quousque*, and not a general judgment of ouster. *Rex v. Clarke*, 2 East, 75. *R. v. Courtney*, 9 id. 246 But *see* Cole, 238.

One who has had judgment of complete ouster against him, upon a disclaimer generally, is precluded from afterwards setting up his original right, though he be sworn in subsequent to the judgment under a peremptory *mandamus*. *Rex v. Clarke, supra. Rex v. the Burgesses of Truro*, 3 B. & A. 590. Judgment of seizure *quousque* is given on the non-appearance of a corporation (*Rex v. City of Chester*, 2 Show. 366); and on a *nihil dicit* the judgment is *quod capiatur*. *Rex v. Tyrell*, 11 Mod. 235. Where the franchises are usurped, the judgment is *quod extinguatur;* but when they are abused, it is *quod capiatur in manus domini regis*. *Smith's case*, 4 id. 54, 56.

A judgment that the liberties be seised into the king's hands held not to dissolve the corporation, or remove the members from their corporate offices. *Smith's case*, 4 Mod. 53. Where in quo warranto some issues are found for the queen and others for the defendant, but it appears defendant has no title, judgment must be against him. *Rex v. Henden*, And. 391, 392. There must be a judgment of ouster where the party is found duly elected but not sworn. *Mayor of Penryn's case*, 1 Stra. 582; 2 Bro. P. C. 294. If a usurpation be confessed by the defendant for any part of the time laid in the declaration, a general judgment of ouster is erroneous. *Rex v. Taylor*, 7 Mod. 169; 1 Stra. 952, S. C. The queen is concluded upon a verdict in the mere right in a quo warranto, but not in the information. *Rex v. Carpenter*, 2 Show. 47. The judge may discharge the jury, without consent of the parties, from giving a verdict on immaterial issues. *R. v. Johnson*, 5 Ad. & E. 488.

[3] By stat. 9 Anne, c. 20, s. 5, it is enacted, "that in case any person against whom any information in the nature of a quo warranto shall be exhibited in any of the courts, shall be found guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall be lawful for the said courts as well to give judgment of ouster against such person from any of the said offices or franchises, as to fine such person for his usurping, &c. any of the said offices, and the said courts may give judgment, and that the relator shall recover his costs of such prosecution; and if judgment shall be given for the defendant in such informa-

VII. Execution.[1] VIII. New Trial.[2] IX. Error.[3]

QUOD est necessarium est licitum. *What is necessary is lawful.* Jenk. Cent. 76, case 45.

QUOD fieri debet facile præsumitur. *What ought to be done is easily presumed.* Year B. 20 Hen. 6, pl. 20.

QUOD nullius est id ratione naturali occupanti conceditur. *That which is the property of no one is by natural reason given to the (first) occupant.* Dig. 41, 1, 3. Inst. 2, 1, 12. Adopted in the common law. 2 Bl. Com. 258. He who can first declare his intention of appropriating to his own use that which before belonged to nobody, and in pursuance of such intention actually takes it into possession, shall thereby gain the absolute property in it. *See* id. 411; Broom's *Max.* 329, 330 (260); 2 Kent's Com. 319.

QUOD per me non possum nec per alium. *What I cannot do by myself I cannot do by another.* 4 Co. 24, b; 11 Co. 87, a.

R.

RAILWAY and Canal Traffic Act. *See* Carriers, vol. iii. p. 41.

RAILWAYS.

I. Of the Compensation for Lands Taken. *See* Lands Clauses Consolidation Act, vol. v. p. 310.

II. Of the Distribution of Capital, and Action for Calls. *See* Joint-Stock Company, vol. v. p. 238.

III. Of the Obligations of Railway Companies as Carriers, and under the Railway and Canal Traffic Act. *See* Carriers, vol. iii. p. 29.

IV. Of the Contracts of Railway Companies. *See* Corporations, vol. iii. p. 263; Joint-Stock Company, vol. v. p. 246.

V. Of the Liability of Railway Companies for Torts. *See* also Corporations, vol. iii. p. 266; Negligence, vol. v. p. 517.

(A) *Of the Liability of the Company for Defective Fences.*[4]

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tion, he shall recover his costs against such relator, such costs to be levied in manner aforesaid." The statute applies only to corporate offices. *Rex v. Wallis*, 5 T. R. 375; but see *Lloyd v. Reg.* 31 L. J. Q. B. 209. And in cases not within the statute, notwithstanding there may be judgment of ouster, yet the relator cannot have judgment for his costs. *Rex v. Wallis, supra. Rex v. Grimshaw*, 5 D. & L. 249.

The defendant cannot, in any case within the statute of Anne, be allowed to disclaim without payment of the costs of the information and ouster, and payment of such costs cannot be imposed upon the relator. The reason is, that the office being full there must be a formal information and ouster to set the corporation right, and then the costs of an information and ouster are regulated by the statute; and the court has no power to deprive the relator, who has committed no fault, of the costs which the law gives him. *Reg. v. Hartley*, 3 E. & B. 143. *Reg. v. Earnshaw*, id. n. *Reg. v. Sidney*, 2 L. M. & P. 149; but see *Reg. v. Mey*, id. 144. *Reg. v. Morton*, 4 Q. B. 146; 12 L. J. Q. B. 123. *Reg. v. Green*, id. 239. *See* Cole, 237.

[1] A defendant in execution under a quo warranto, as well for the contempt as for the relator's costs, is not entitled to his discharge on payment of the fine only. *Rex v. Pickerill*, 4 T. R. 809.

[2] A new trial may be had after verdict for the prosecutor (*Rex v. Malden*, 4 Burr. 2135); or defendant, *Rex v. Francis*, 2 T. R. 484.

[3] Affirmance in the Exchequer Chamber of the judgment of the court below in a quo warranto information, does not entitle the defendant in error to the costs in error. *Rowley v. Reg.* 6 Q. B. 668.

[4] The company are required by 8 & 9 Vic. c. 20, s. 68, to have sufficient posts, rails, hedges, ditches, mounds, or other fences, for

(B) *Liability for Damage by Negligent Management of Gate across Highway.*[1]

(C) *Negligent Management of Railway Stations, &c.*[2]

VI. Of the Bye-Laws of the Company.[3]

separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying. This enactment does not operate to make the company responsible for damage done by cattle which are trespassing on the adjoining land or highway at the time they stray through a defective fence on the railway. Thus, in a case where some sheep strayed through a defective fence from a close adjoining another close, the fences of which abutted on the railway, and the last-mentioned fence being out of repair, the sheep strayed on the line and were killed by a passing train; it was held that the company were not responsible. *Ricketts v. East and West Dock and Railway Co.* 21 L. J. C. P. 201; 16 Jur. 1072.

Where cattle strayed upon a highroad adjoining a railway, and wandered upon the line through a defective fence, which the company were bound to repair, the company were held not to be responsible, on the same ground that the cattle were at the time trespassing on the adjoining land, and that the statute did not, therefore, create any duty to repair as against the owner of them. *Manchester, Sheffield, &c. Railway Co. v. Wallis*, 14 C. B. 224; 23 L. J. C. P. 85. See *Sharrod v. London and North-Western Railway Co.* 4 Ex. 580.

There is no obligation to fence a yard forming part of the company's premises from the line which it adjoins, so as to prevent cattle which may be placed in the yard from straying on the line. *Roberts v. Great-Western Railway Co.* 4 C. B. (N.S.) 506; 27 L. J. C. P. 266.

[1] When a railway crosses a turnpike-road or public carriage-road on a level, the company must, unless otherwise authorised by their special act, erect and at all times maintain good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and employ proper persons to open and shut such gates, and keep them constantly closed, across the road on both sides of the railway, except during the time when horses, cattle, carts or carriages, passing along the road, shall have to cross the railway; and the gates must be of such dimensions, and so constructed as, when closed, to fence in the railway, and to prevent the cattle or horses passing along the road from entering on the railway. 8 & 9 Vic. c. 20, s. 47. This section imposes on the railway company the duty of closing the gates against everything passing lawfully or unlawfully along the high-road. Accordingly, where some horses escaped over the fences of a field which were sufficiently sound for ordinary purposes, and after straying along a road which led to a railway, passed through a gate which the servants of the company had improperly left open, and were killed on the line by a passing train, it was held the company were liable; for they were bound by statute to keep the gates shut at all events; and as the accident occurred by reason of the gate being left open by the company's servants, no question could be raised whether the cattle were lawfully on the road or not. *Fawcett v. York and North-Midland Railway Co.* 16 Q. B. 610; 20 L. J. Q. B. 222. And where the owner of a colt, which had strayed from his field, went in pursuit of it, and was driving it along the highway, when it went through a gate carelessly left open by the company's servants, and, getting upon the line, was killed, the company were held liable; for there the highway was being lawfully used, and the immediate cause of the accident was the negligence of the defendant's servants. *Midland Railway Co. v. Daykin*, 17 C.B. 126. There is, however, no duty on the company to watch and keep close gates put up for the convenience of adjoining landed proprietors. *Ellis v. London and South-Western Railway Co.* 2 H. & N. 629; 26 L. J. Ex. 349.

[2] An action lies for an injury sustained from insufficient lights and guards at railway stations (*Martin v. Great Northern Railway Co.* 16 C. B. 180; 24 L. J. C. P. 209); or leaving doors or steps opening upon platforms more than ordinarily dangerous (*Tooney v. London and Brighton Railway Co.* 3 C. B. (N. S.) 146; 27 L. J. C. P. 39); or for injury by negligence of servants of company in endeavouring to carry its rules into effect. *Vose v. London and Yorkshire Railway Co.* 2 H. & N. 728; 27 L. J. Ex. 249. So, from insecure railway bridges, viaducts, and embankments (*Chester and Holyhead Railway Co.* 2 Ex. 251); but not embankments being injured from extraordinary flood, and no neglect or default on part of company. *Withers v. North Kent Railway Co.* 27 L. J. Ex. 417. As to fire escaping from locomotive engines, *see* vol. v. p. 10, n. [1].

[3] By the 8 & 9 Vic. c. 16, s. 124, railway companies are authorised to make bye-laws for regulating the conduct of their officers and servants; and by 8 & 9 Vic. c. 20, s. 108, they are empowered to make bye-laws for regulating the departure of trains, &c., for preventing the smoking of tobacco, and the commission of any other nuisance in or upon such carriages, or in any of the stations or premises occupied by the company; and generally for regulating the travelling upon or using and working of the railway. A penalty may be imposed for their infraction, not to exceed 5*l.* (Id. c. 16, ss. 125,

RANSOM.[1]

RAPE.

I. What constitutes the Offence, p.308.
(A) *Carnal Knowledge*, p. 309.
(B) *By Force*, p. 309.
(C) *And against the Woman's Will*, p. 309.
(D) *By Whom it may be Committed*, p. 309.
II. Statutes relating to, p. 310.
(A) *Rape*, p. 310.
(B) *Procuring Girl under Twenty-one Years to have Connexion by Fraud*, p. 310.
II. Statutes relating to (*continued*).
(C) *Carnal Knowledge of Girl under Twelve Years*, p. 310.
(D) *Carnal Knowledge of Girl under Ten Years*, p. 310.
(E) *Indecent Assault*, p. 310.
III. Of Accessories, p. 310.
IV. „ the Indictment and Evidence, p. 311.
(A) *Of the Indictment*, p. 311.
(B) „ *Evidence*, p. 311.

126; id. c. 20, s. 109). The bye-laws may be repealed or altered. (Id. c. 20, s. 109.) They must be reduced into writing, and have the common seal of the company affixed. (Id. c. 16, s. 124; id. c. 20, s. 109.)

Where the bye-laws affect the public, they must be approved by the Board of Trade (3 & 4 Vic. c. 97, s. 8), who may at any time put an end to any bye-law by signifying their disallowance. (Sect. 9.)

In order to be binding, the bye-law must be reasonable. *Chilton v. London and Croydon Railway Co.* 16 Mee. & W. 212. *Williams v. the Great Western Railway Co.* 10 Ex. 15. It must be published, where it affects others than the officers and servants of the company, in the manner directed; that is, the substance of such bye-laws shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed, and continued, on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby, and such board shall, from time to time, be renewed as often as the bye-laws thereon, or any part thereof, shall be obliterated or destroyed; and no penalty imposed by any such bye-law shall be recoverable unless the same shall have been published, and kept published, in manner aforesaid. (*See* sect. 111.)

Bye-laws may be proved by the production of an examined copy, for they are public documents, and are provable as such. *Motteram v. Eastern Counties Railway Co.* 29 L. J. M. C. 57. And the production of a written or printed copy of the bye-laws, having the common seal of the company affixed thereto, shall be sufficient evidence of such bye-laws in all cases of prosecutions under the same. 8 & 9 Vic. c. 16, s. 157. In an information against a passenger, it is sufficient proof of publication that copies were affixed at the station at which he entered, and at that at which he left the train. *Motteram, &c. supra.*

In order to justify an arrest under a bye-law, a penalty must be imposed either by the bye-law or by the statute under which it is framed. *Chilton v. London and Croydon Railway Co. supra.*

Where a through journey is charged for at a lower rate than a journey to an intermediate station, a passenger who, having a through ticket, gets out at an intermediate station, is liable for the difference; but he cannot, on refusal to pay such difference, be proceeded against under a bye-law imposing a penalty for travelling without a ticket. *Reg. v. Frere*, 4 E. & B. 598. A conviction on a void bye-law will be quashed. *Smart v. Morton*, 5 E. & B. 30.

[1] In international law, a sum paid, or agreed to be paid, for the redemption of captured property. 1 Kent. Com. 104. If part of the cargo be voluntarily, and without fraud or cowardice, delivered up to a pirate by way of composition or ransom, to induce him to spare the vessel and the residue of the goods (an event highly improbable); or if a sum of money be agreed to be paid to a pirate, or enemy, by way of ransom, all writers agree that the owner of the things ransomed must contribute to this loss also; but if the enemy, or pirate, having overpowered the ship, select for himself such parts of the cargo as best suit his purposes, and plunder the ship of them, in this case there shall be no contribution, because the value of these goods was not the price of safety to others. Moore, 297. But ransom, in the case of capture by an enemy, can hardly become the subject of general average in this country; for, by the 45 Geo. 3, c. 72, s. 16, the ransom of any ship, or merchandise on board the same, belonging to any subject of this country, and taken by "the subjects of any state at war with his majesty, or by any person committing hostilities against his majesty's subjects," was prohibited, unless in the case of extreme necessity, to be allowed by the Court of Admiralty; and all contracts for ransom contrary to the statute were made void, and the person entering into such contract subjected to a penalty of 500*l.* *Parsons v. Scott*, 2 Taunt. 363.

The property in a ransom bill secreted, and not delivered up to the recaptor, is not divested by the recapture of the vessel, with the hostage and ransom bill on board.

I. What constitutes the Offence.[1]

(A) *Carnal Knowledge.*[2]
(B) *By Force.*[3]
(C) *And against the Woman's Will.*[4]
(D) *By Whom it may be Committed.*[5]

Cornu v. Blackburne, Dougl. 641.

A purchase by the owner in a neutral country of his ship condemned as a prize by an enemy, is illegal as a ransom. *Havelock v. Rockwood*, 8 T. R. 268.

No action lies on a bill of exchange given to the plaintiff for money advanced by him for the express purpose of effecting a ransom contrary to 45 Geo. 3, c. 72. *Webb v. Brook*, 3 Taunt. 6. Independently of the statute such an action was maintainable. *Record v. Bettenham*, 3 Burr. 1734; 1 Black. 563. In the United and other States, ransom contracts are recognised.

[1] Rape is the unlawful and carnal knowledge of a woman by force, and against her will. 1 Hawk. P. C. c. 41, s. 2; 1 Hale, 627, 628; Co. Litt. 123, b; 2 Inst. 180; 3 Inst. 60; 4 Bl. Com. 210; 1 East, P. C. c. 10, s. 1, p. 434.

[2] By 24 & 25 Vic. c. 100, s. 63, "whenever, upon the trial for any offence punishable under this act, it may be necessary to prove a carnal knowledge, it shall not be necessary to prove the actual emission of the seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

Even before this act, the capital offence was complete if there were penetration, although there had been no emission, and the prisoner had been interrupted in the commission of the offence. *Rex v. Cozins*, 6 C. & P. 351. And where the jury found that there had been penetration, but no emission, held, by the fifteen judges, that the prisoner had been rightly convicted of the rape. *Rex v. Cox*, 1 Moo. C. C. 337; S. C. 5 C. & P. 297, overruling *Rex v. Russell*, 2 M. & M. 122. Though it is not necessary in order to complete the offence of rape that the hymen should be ruptured, provided it is clearly proved that there was penetration, yet where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration, so as to sustain the charge. *Rex v. M'Rue*, 8 C. & P. 641. In a case of rape since the passing of the stat. 9 Geo. 4, c. 31, s. 18 (re-enacted 24 & 25 Vic. *supra*), the only question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c., discussed before judges and juries. Therefore, though it appear from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape. *Reg. v. Allen*, 9 C. & P. 31. *Reg. v. Jordan*, id. 118.

If actual penetration be not proved, the defendant, on an indictment for rape, may be convicted of an attempt to commit rape. 14 & 15 Vic. c. 100, s. 9.

[3] If the connexion was with a woman of weak intellect, incapable of distinguishing right from wrong, and it is found by the jury that she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no resistance) the defendant had carnal knowlege of her by force, and without her consent, that is rape. *Reg. v. Fletcher*, 2 Dears. & B. 63. See *Reg. v. Ryan*, 2 Cox, C. C. 115. So, if the connexion took place when the woman was in a state of insensibility from liquor, given her by the prisoner for the purpose of exciting her, it was held to be rape. *Reg. v. Camplin*, 1 Den. C. C. 89; 1 C. & Kir. 746.

Having carnal knowledge of a woman by fraud, which induces her to suppose it is her husband, does not amount to a rape. *R. v. Jackson*, R. & R. 487. *Reg. v. Williams*, 8 C. & P. 286. *Reg. v. Saunders*, 8 id. 265. *Reg. v. Clark*, Dears. C. C. 397. But the man may be indicted for an assault. (Id.) In *Reg. v. Case*, 1 Den. C. C. 580, a medical man had connexion with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, owing solely to the *bonâ fide* belief that such was the case; this was held to be an assault, and a doubt was expressed whether it was not a rape. *See post*, 24 & 25 Vic. c. 100, s. 49.

[4] The offence of rape may be committed though the woman at last yielded to the violence, if such her consent was forced by fear of death, or by duress. 1 Hawk. P. C. c. 41, s. 6; 1 East, P. C. c. 10, s. 7; 4 Bl. Com. 213. And it will not be any excuse that she was first taken with her own consent, if she were afterwards forced against her will: nor will it be an excuse that she consented after the fact; or that she was a common prostitute: and the notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded. 1 Hale, 631; 1 Hawk. P. C. c. 41, s. 8; 1 East, P. C. c. 10, s. 7.

[5] The law presumes that an infant under the age of fourteen years is unable to commit the crime of rape; and, therefore, it seems that he cannot be guilty of it. 1 Hale, 630. *Rex v. Groombridge*, 7 C. & P. 582. This doctrine, however, proceeds upon the ground of impotency rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear, by suffi-

II. Statutes Relating to.

(A) *Rape.*[1]
(B) *Procuring Girl under Twenty-one Years to have Connexion by Fraud.*[2]
(C) *Carnal Knowledge of Girl under Twelve Years.*[3]
(D) „ „ *Ten Years.*[4]
(E) *Indecent Assault.*[5]

III. Of Accessories.[6]

cient circumstances, that he had a mischievous discretion. 1 Hale, 630.

Where the prisoner, under the age of fourteen, was charged with carnally knowing and abusing a child under ten years:—*Held*, that the same rule applied as to the case of rape, and that he could not be convicted, although proved of full puberty (*Reg. v. Jordan*, 9 C. & P. 118. *Rex v. Philips*, 8 id. 736); but he may be convicted of the assault. *Reg. v. Brimilow*, 2 Moo. C. C. 422; 9 C. & P. 366. *See infra*, 24 & 25 Vic. c. 100, ss. 50, 52.

Although a husband cannot himself be guilty of committing a rape on his wife, yet if he assists another in so doing he becomes a principal, and punishable as such. *Lord Castlehaven's case*, 1 St. Tr. 387. Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been holden that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved; but that, when the marriage was made void *ab initio* by a declaratory sentence in the Ecclesiastical Court, the offence became punishable, as if there had been no marriage. 1 Roll. 629. The forcible taking away and marrying a woman against her will was, however, made felony by the statute 3 Hen. 7, c. 2. *See* now 24 & 25 Vic. c. 100, ss. 53, 54. *See* vol. i. p. 45.

[1] By 24 & 25 Vic. c. 100, s. 48, "whosoever shall be convicted of the crime of rape shall be guilty of felony, and shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years."

[2] By sect. 49, "whosoever shall by false pretences, false representations, or other fraudulent means, procure any girl or woman under the age of twenty-one years to have illicit carnal connexion with any man, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be convicted for any term not exceeding two years, with or without hard labour."

The false pretences or representations should be negatived in the indictment, as in an indictment for obtaining money or goods under false pretences. See *Reg. v. Mears*, 2 Den. C. C. 79.

[3] By sect. 51, "whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years, and under the age of twelve years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault if the girl consents to all that is done, but is a misdemeanor. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Reg. v. Martin*, 9 C. & P. 213; 2 Moo. C. C. 123. It is not an assault, as the consent of the girl puts an end to the charge of assault. *Rex v. Meredith*, 8 C. & P. 589.

On an indictment for the statutable misdemeanor under 14 & 15 Vic. c. 100, s. 12, the defendant cannot, if the girl's age be proved to be under ten years, be convicted of a felony, and the act applies only where the indictment is proved by facts amounting to a felony. *Reg. v. Thott*, 3 C. & Kir. 206. If she did not consent it will be a rape, and the defendant may be indicted accordingly; but the fact of non-consent is no defence to an indictment under this section. *Reg. v. Neale*, 1 Den. C. C. 36; 1 C. & Kir. 591.

[4] By 24 & 25 Vic. c. 100, s. 50, "whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

[5] By sect. 52, "whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

[6] All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women; and there may be accessories before and after in this offence: for though it be made felony by a statute which speaks only of those who commit the offence, yet accessories before and after are consequently included.

Accessories before the fact may be indicted as principals. *Rex v.* ——, 1 Russ. C. & M. 562; Fitz. Cor. pl. 86. *See* Principal and Accessory, *ante*, p. 218.

IV. Of the Indictment and Evidence.

(A) *Of the Indictment.*[1] (B) *Of the Evidence.*[2]

(C) *Of the Punishment.*[3]

RATE. *See* Church-Rates, vol. iii. p. 109; Landlord and Tenant, vol. v. p. 304; Poor-Rates, *ante*, p. 174; Public Health Act, *ante*, p. 289.

RATIHABITIO mandato comparatur. D. 46, 3, 12, s. 4. *A ratification of an act previously done is co-extensive with the implied command. See ante*, p. 25.

REAL Actions.[4] *See* vol. i. p. 137.

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[1] As the absence of previous consent is a material ingredient in the offence of rape, the want of it must be averred in the indictment, which is usually expressed by stating that the fact was done "against the will" of the party. 2 Stark. *Crim. Plead.* 409; 3 Chit. *Crim. Laws*, 815. It is essential to aver that the offender did feloniously "ravish" the woman; and the omission of the word "ravish" will not be supplied by an averment that the offender "did carnally know" &c. 1 Hale, 628, 632; Br. Indict. pl. 7, citing 9 Edw. 4, c. 6. It has been considered that the words "did carnally know," are not essential, on the ground that *rapere* signifies, legally, as much as *carnaliter cognoscere* (2 Inst. 180; 2 Hawk. P. C. c. 25, s. 56; Staundf. 81; Co. Litt. 187); but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used. The omission of them would not, therefore, be prudent. 1 East, P. C. c. 10, s. 10, p. 448; 2 Stark. *Crim. Plead.* 409; 3 Chit. *Crim. Law*, 812; 1 Hale, 628, 632. The indictment usually concludes, "against the form of the statute;" but as the offence was anciently a capital felony, such a conclusion has been thought to be unnecessary. 1 East, P. C. c. 10, s. 10, p. 448; 2 Stark. *Crim. Plead.* 409.

[2] Where the charge rests on the evidence of the woman, much will depend upon whether she is of good reputation; whether she presently discovered the offence, and made search for the offender; whether the party accused fled for it. These, and the like, are concurrent circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to disclose it; if the place, where the fact was alleged to have been committed was where it was possible she might be heard, and she made no outcry; these, and the like circumstances, carry a strong, but not conclusive presumption, that her testimony is false or feigned. 4 Bl. Com. 213.

The defendant may give evidence of the woman's notoriously bad character, for want of chastity or common decency; or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. *Rex v. Hodgson*, 1 Peake, *Evid.* 190. *Rex v. Clarke*, 2 Stark. 243. So, what she herself said so recently after the fact, as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement. *Rex v. Brazier*, 1 East, P. C. 444. *Rex v. Clarke*, 2 Stark. 241. And she is not compellable to state whether she has had connexion with other men. *Rex v. Hodgson*, 1 R. & R. 211. Where the party ravished is an infant, her testimony is admissible if she comprehends the meaning of an oath. *Anon.* 1 C., M. & R. 566. *See* Child, vol. iii. p. 95.

[3] At the discretion of the court, the party to be kept in penal servitude for life, or for not less than three years, or imprisoned with or without hard labour for not more than two years. 24 & 25 Vic. c. 100, s. 48.

[4] By 3 & 4 Wm. 4, c. 27, s. 37, all real and mixed actions, except writ of right of dower, or writ of dower under *nihil habet quare impedit*, and ejectment, were abolished. By the Common-Law Procedure Act, 1860, s. 26, "no writ of right of dower, or writ of dower under *nihil habet*, and no plaint for free-bench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this act; but where any such writ, action, or plaint, would now lie either in a superior or in any other court, an action may be commenced by a writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower or for free-bench, or in *quare impedit*, as the case may be." By sect. 27, "the service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons: and the provisions of the Common-Law Procedure Act, 1852, and of the Common-Law Pro-

REAL Estate. *See* Estates, vol. iv. p. 268. *See* vol. v. p. 135.

REBUTTER. A rebutter is the defendant's answer to the plaintiff's surrejoinder. *See* vol. v. p. 135.

RECAPTION. *See* Distress, vol. iv. p. 117; Escape, vol. iv. p. 263.

RECEIPT.

I. Effect of Receipt.[1] II. Stamp on Receipt.[2]

cedure Act, 1854, shall apply to the writ, and pleadings, and proceedings thereupon."

[1] An acknowledgment in *writing* of having received money, goods, &c. It is not conclusive evidence against the person who gives it that he has actually been paid the money. *Stratton v. Rastall*, 2 T. R. 366. *Attorney-General v. Randall*, 2 Eq. Ca. Abr.; but see *Rowntree v. Jacob*, 2 Taunt. 141. *Skaife v. Jackson*, 3 B. & C. 421; 5 D. & R. 290.

A receipt in full for a debt is only evidence of payment, and must be pleaded as such, and it is then open to the plaintiff to show that no payment was, in fact, made. *Foster v. Dewber*, 6 Ex. 839. So the effect of a receipt may be destroyed by proof that it formed part of a transaction which was merely colourable, no money having, in fact, been paid (*Bowes v. Foster*, 2 H. & N. 779); or that it was otherwise fraudulently obtained. *Skaife v. Jackson*, *supra*. But see *Alner v. George*, 1 Camp. 392.

It seems to be clear that a mere receipt not under seal cannot operate as an estoppel, but is mere evidence of the fact to be submitted to a jury, and capable of being rebutted by the other circumstances of the case. In *Lampon v. Corke*, 5 B. & A. 606, in an action for goods sold and delivered, on the money counts the defendant gave in evidence a deed executed by the plaintiff, which recited that the plaintiff had given possession of certain premises and growing crops taken in execution by the plaintiff as a judgment creditor against a third person, and that the defendant had agreed to pay the plaintiff the sum of 40*l.* for such possession, and also stated that in pursuance of such agreement, and in consideration of the sum of 40*l.* being now so paid to the plaintiff as hereinbefore is mentioned, and also in consideration of the sum of 10*s.* a-piece, paid to the plaintiff and the judgment debtor, the plaintiff did generally release the defendant: there was also indorsed on the deed a receipt by the plaintiff for the sum of 40*l.*: it was clearly proved and admitted that the sum of 40*l.* had not been actually paid. And it was held, upon the construction of the deed itself, that it did not operate as a release; and that, as the receipt upon the deed was not under seal, it would not operate as an estoppel, but only as evidence; and then, as it was admitted that no money had in fact been paid, it became of no importance. A receipt in full given with a full knowledge of all the circumstances and in the absence of fraud (*Benson v. Bennet*, 1 Camp. 394, n.), seems to be almost conclusive. *Alner v. George*, id. 392. If a man by his receipt acknowledges that he has received money from an agent on account of his principal, and, accredits the agent with the principal to that amount, such receipt is, it seems, conclusive as to payment by the agent. *Dalzell v. Moire*, id. 532. The usual acknowledgment in a policy of insurance of the receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured, although not as between the underwriters and the broker. (Id.; and Marsh. Insur. 269). A receipt on the back of the bill of exchange is *primâ facie* evidence of payment by the acceptor. Peake, 25. The giving a receipt does not exclude parol evidence of payment. *Rambert v. Cohen*, 4 Esp. 214.

If one of several plaintiffs, a nominal plaintiff, suing for another person beneficially interested, fraudulently and by collusion with the defendant give him a receipt, the court will, on application, preclude the defendant from availing himself of such an acknowledgment. 1 Chit. R. 391; 1 Camp. 392.

[2] The 16 & 17 Vic. c. 59, s. 1, imposes upon every receipt or discharge given for or upon the payment of money amounting to 2*l.* or upwards, a duty of one penny. Adhesive stamps may be used. (Sects. 3–5.)

"*Exemption.*—Receipts given for money deposited in any bank, or in the hands of any banker to be accounted for, whether with interest or not, provided the same be not expressed to be received for or by the hands of any other than the person to whom the same is to be accounted for: Provided always, that this exemption shall not extend to receipts or acknowledgments for sums paid or deposited for or upon letters of allotment of shares, or in respect of calls upon any scrip or shares of or in any joint-stock or other company, or proposed or intended company, which said last-mentioned receipts or acknowledgments, by whomsoever given, shall be liable to the duty by this act charged on receipts." Sched. See *Clarke v. Chaplin*, 1 Ex. 26.

Acknowledgments of the receipt of money entered at different times on unstamped paper are not admissible as evidence of the payments made; but it has been held, that an account of debts and credits *bonâ fide* made out at one time in order to be delivered to the defendant, as showing the balance against him, may be given in evidence by the defendant to prove the payments without a receipt stamp. *Wright v.*

RECEIVER.[1]

RECEIVING Stolen Goods. *See* Larceny, vol. v. p. 321.

RECITALS. *See* Deed, vol. iv. p. 23.

RECOGNISANCE. *See* also Appeal from Justices, vol. i. p. 381; Bail, vol. ii. p. 94; Certiorari, vol. iii. p. 67.

Shawcross, 2 B. & A. 501. And a written acknowledgment at the foot of an account that it is correct does not require a receipt stamp. *Wellard v. Moss*, 1 Bing. 134.

A receipt for money paid to deputy-receivers-general requires no stamp, though it be signed by their clerk. *Edden v. Reid*, 3 Camp. 338. A receipt given on a receipt stamp is not invalidated by the addition of matter which requires an agreement stamp, where the words added do not control or qualify the terms of the receipt (*Grey v. Smith*, 1 Camp. 388); and a receipt noticing the terms or considerations of a payment does not require an agreement stamp. *Watkins v. Hewett*, 3 Moore, 11. So, a receipt for the price of a horse "warranted sound" is evidence of the warranty without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407. An instrument containing an acknowledgment of having received an acceptance, and an undertaking to provide for it, was held to require a receipt stamp. *Scholey v. Walsby*, Peake, 24. A bill of parcels subscribed, "Settled by two bills, one at nine and the other at twelve months," requires a receipt stamp. *Smith v. Kelly*, id. 25.

A paper signed by the defendant was in the following form:—"Mr. H. (the plaintiff) has advanced me 12*l.* on furniture, &c., delivered to him at Stratford:"—*Held*, that this did not require a stamp. *Huxley v. O'Connor*, 8 C. & P. 204. So, a paper containing a statement not offered in evidence as a receipt, is admissible without a receipt stamp. *Brookes v. Davis*, 2 id. 186.

An unstamped receipt in the handwriting of a witness, though not *per se* admissible in evidence, may be shown to such witness in order to refresh his memory as to the fact of the payment having been made in his presence. *Rambert v. Cohen*, 4 Esp. 213. *Jacob v. Lindsay*, 1 East, 460. *Maugham v. Hubbard*, 8 B. & C. 14. If the witness swears that he has no doubt, from the circumstance of his having made the memorandum, that the money was paid as stated therein, that will suffice, although he should add that he does not recollect the fact. *Maugham v. Hubbard*, *supra*. And a memorandum containing an acknowledgment of the receipt of money, but which is not stamped as a receipt, may be put in evidence if it be not offered as proof of the receipt of money, but for other purposes. See *Matheson v. Ross*, 2 H. L. C. 286. *Evans v. Protheroe*, 20 L. J. Ch. 448; 15 Jur. 113. So, to show the state of the balance of accounts between the parties at a particular time, a balance sheet is admissible, although it contains a receipt for the supposed balance. *Matheson v. Ross*, *supra*. So, a bill of parcels was admitted to prove that the goods were sold to a third person, and not the defendant, notwithstanding a receipt was on it, and it was not stamped. *Millen v. Dent*, 10 Q. B. 846. And it seems, that where an instrument in the form of a receipt is put in evidence for the purpose of proving money lent, it need not be stamped as a receipt if it appear that it was not given at the time the money was lent. *Taylor v. Steele*, 16 Mee. & W. 665. *Levy v. Alexander*, 4 Ex. 485; 19 L. J. Ex. 113. See *Livingston v. Whiting*, 19 L. J. Q. B. 528. But if the matter to be proved is the payment of money, and such payment is to be proved by the production of a receipt, the stamp acts apply to such document so produced, whether it be for the direct purpose of proving payment as a discharge between debtor and creditor, or for an indirect and collateral purpose, as to show some right in, or advantage belonging to, a party, in consequence of such payment. *Matheson v. Ross*, 2 H. L. C. 300. *Per Cottenham, C.*: Chit. Con. 671, 7th ed. If the receipt is an acknowledgment of money paid by way of gift and gratuity, and not in discharge of a demand, it is not within the statute. *Boyle v. Brandon*, 13 Mee. & W. 738. An agreement and receipt may be stamped as the former. *Van Dadelsyern v. Swann*, 30 L. J. Ex. 50; 5 Ex. Rep. 825. *Evans v. Protheroe*, 15 Jur. 113. Fees to counsel, with initials of payment, need not be stamped. *Re Beaven*, 23 L. J. Ch. 536. An unstamped receipt may be received to identify a prisoner. *See* 23 L. J. M. C. 29.

The 43rd Geo. 3, c. 126, s. 5, enacts, that a person who shall have paid a debt may provide himself with a stamped receipt, and require the receiver to write thereon and acknowledge thereby the receipt of the money, and also demand payment of the amount of the stamp-duty paid by the debtor; and if the creditor refuse to give a receipt, or pay the duty, he is subject to a penalty of 10*l.* This enactment is, it seems, still in force. 16 & 17 Vic. c. 59, s. 2. See *Laing v. Meader*, 1 C. & P. 257. *Richardson v. Jackson*, 8 Mee. & W. 298.

[1] An officer appointed by a court of equity to take possession of the property of a defendant, which is the subject of litigation, and to hold the same, and apply the profits or dispose of the property itself, under the direction of the court. He cannot sue in his own name to recover the effects placed under his control.

I. As Security for Payment of Money.[1]

II. To Prosecute and give Evidence.[2]

[1] At common law it appears to have been usual to acknowledge or give a bond or obligation before a judge or other officer having authority for that purpose, and to enrol it in a court of record. 2 Saund. 69. The origin of the acknowledgment of obligations as matter of record at common law was, that there might be no occasion to have the trouble and charge of proving the contract. By the custom of the city of London, the mayor and aldermen, or the mayor singly, may take recognisances.

A statute-merchant is a bond of record, acknowledged before the mayor of London, or chief warden of some city or town.

A statute-staple is also a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or one of them, pursuant to stat. 27 Edw. 3, c. 9.

Recognisances at common law are not perfect records till they are enrolled in some court of record. *Glynn v. Thorpe*, 1 B. & A. 153. It is the acknowledgment, however, that gives a recognisance its force as a record, and the enrolment is for safe custody, and notifying it to others. Therefore, though enrolment be necessary to the validity of a recognisance, yet it binds the lands at common law from the time of the caption. These securities have fallen into disuse, being superseded by warrants of attorney, judgments, &c.

[2] Recognisances to prosecute and to give evidence are generally entered into before magistrates. As soon as the justice has concluded the examination, if there appear to be probable ground to suppose that the prisoner is guilty, he should take the recognisance of the prosecutor to appear and prefer a bill of indictment, and give evidence at the next sessions of the peace or gaol delivery, as the case may require, and in case of his refusal may commit him to gaol. The party need not sign the recognisance, but the record thereof is afterwards made out on parchment, and subscribed by the justice before whom it is taken; but it is a matter of record as soon as taken and acknowledged, although not formally made out by him, and only entered in his book. Where the offence is supposed have been committed within the county of a city or town corporate, the prosecutor has the option of prosecuting within that jurisdiction, or at the sessions of oyer and terminer for the county at large; but if he prefer the latter, then he must enter into a recognisance in 40*l.* to pay the extra costs thereby occasioned, if the court should think proper. *See* Dickenson, *Quarter Sessions*, 123, 5th ed.

When it appears from the examination that a person brought before the magistrate as a witness may probably be able to give material evidence against the prisoner, he has in the cases of manslaughter and felony, by the express provision of the stat. 1 & 2 Phil. & M. c. 13, s. 5, and 2 & 3 Phil. & M. c. 10, s. 2, authority to bind such witness, by recognisance or obligation, to appear at the next general gaol delivery, to give evidence against the party indicted; and infants and married women who cannot legally bind themselves must procure others to be bound for them.

The 11 & 12 Vic. c. 42, s. 20, provides for the case of recognisances upon the commitment of a person by justices for an indictable offence, and enacts that "it shall be lawful for the justice or justices before whom any such person shall be examined as aforesaid, to bind by recognisance the prosecutor and every such witness to appear at the next court of oyer and terminer, or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognisance shall particularly specify the profession, art, mystery, or trade, of every person entering into or acknowledging the same, together with his Christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognisance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof, or a lodger therein; and the said recognisance being duly acknowledged by the person so entering into the same shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice thereof signed by the justice or justices shall at the same time be given to the person bound thereby." The justices have power to commit a witness refusing to enter into the recognisance to safe custody until the trial of the accused, or his entering into the recognisance. (Id.)

Every obligation and recognisance taken by justices of the peace must be made to our lord the king, on pain of imprisonment of any person who shall take it otherwise. Dalt. c. 168. It must also contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. Dalt. Recog. 154. And it is most commonly subject to a condition, which is either indorsed or underwritten, or contained within the body of it, upon the performance of which the recognisance shall be void. (Id. 54.) *See* 3 Geo. 4, c. 46, s. 4. *See* forms, Dickenson, 559.

In taking recognisances, magistrates ought to be left to the exercise of their discretion, without being subjected to the influence of

III. Of the Forfeiture of the Recognisance.[1]

a defendant, however respectable his character and station in life may be.

Where the defendant had interfered with the discretion of the magistrate in a manner not to be justified, and the sureties given appeared not to be sufficient, considering the nature of the crime, the Court of Queen's Bench discharged the sureties, and required the defendant to enter into a larger recognisance, with better sureties. *Rex v. Hooper*, 1 Chit. R. 491.

The justices have power, instead of detaining a person accused of an indictable offence in custody during the period of a remand, to discharge him, upon his entering into a recognisance with or without sureties, conditioned for his attendance, at the time and place appointed for the continuance of the examination. "And if such accused party shall not afterwards appear at the time and place mentioned in such recognisance, then the said justice, or any other justices of the peace who may then and there be present, upon certifying upon the back of the recognisance the non-appearance of such accused party, may transmit such recognisance to the clerk of the peace of the county, riding, division, city, borough, or place within which such recognisance shall have been taken, to be proceeded upon in like manner as other recognisances, and such certificate shall be deemed sufficient *primâ facie* evidence of such non-appearance of the said accused party." 11 & 12 Vic. c. 42, s. 21.

[1] Appearance on a recognisance in Q. B. must be in person, and not by attorney. *Anon.* 11 Mod. 233. If the party do not appear, be the cause of his absence what it may, the recognisance is forfeited. *Reg. v. Ridpath*, 10 Mod. 153. Dickenson, 967.

A recognisance conditioned to try an indictment is forfeited, though there be a trial, if the verdict be set aside for a defect in the *venire facias*. *Rex v. Tracy*, 6 Mod. 179. Procuring a wrong venue for the trial of an indictment is a forfeiture of the recognisance. *Anon.* 11 Mod. 4. On a recognisance to appear in Q. B. on the last day of term, the party has till the last moment of it to appear in. *Rex v. White*, 2 Stra. 1220.

Non-appearance is no breach of a recognisance for good behaviour. *Rex v. Ridpath*, Fort. 358. Bail entering into a recognisance that the plaintiff shall prosecute with effect imports payment of the condemnation. *Barnes v. Worlich*, Yelv. 59.

A recognisance to appear on a certain day, and in the meantime to keep the peace, was discharged, on the ground that the day had passed and that no indictment had been lodged. *Rex v. Benn*, C. T. Hardw. 98.

A recognisance made to the queen for appearance is discharged by an arrest of the conusor by the high commissioners of the queen before the day, and keeping him in prison at the day. Mod. 121.

A recognisance was discharged upon producing the prosecutor's consent verified by affidavit. *Rex v. England*, C. T. Hardw. 158. The court, on default of prosecution, can only respite, and not discharge a recognisance. *Anon.* 7 Mod. 97.

A recognisance for keeping the peace is never discharged till the end of the term, unless the attorney-general comes in and directs it. *Rex v. Foster*, 12 Mod. 478.

Sureties to keep the peace cannot be discharged until the condition of the recognisance is performed. *Rex v. Howard*, 11 Mod. 109.

A recognisance to appear cannot be discharged unless performed: but it may be respited. *Rex v. Drummond*, 11 Mod. 200.

A *nolle prosequi* on one of several informations does not discharge the recognisance. *Rex v. Ridpath, supra.*

Render in discharge of bail in an action will not discharge the bail on an indictment. *Rex v. Davison*, Salk. 105.

If by the non-appearance of the prosecutor or witness at the trial the recognisance be broken, it becomes forfeited and absolute, and being estreated, that is, taken out from among the other records, and sent up to the Exchequer, the party becomes an absolute debtor to the Crown for the sum or penalty so entered in the recognisance. As, however, the non-performance of the condition of the recognisance is frequently owing to mere inattention or ignorance, the 4 Geo. 3, c, 10, empowers the barons of the Exchequer to discharge any person on petition whom they shall think a fit subject for favour.

The stat. 38 Geo. 3, c. 52, provides for the forfeiture and estreating of recognisances where the prosecutor does not proceed, in pursuance of his notice, to try in the county at large for an offence committed in any city or town corporate.

By the 3 Geo. 4, c. 46, s. 4, it is also enacted, "that all fines, forfeited recognisances, &c. set, imposed, lost, or forfeited, before any justice, or at the quarter sessions, shall be copied on a roll by the clerk of the peace or town-clerk, and that he shall send a copy of that roll, with a writ of *distringas* and *capias*, or *fieri facias* and *capias*, to the sheriff or other officer having the execution of process, who shall levy on the goods and chattels of the persons; and if they have not sufficient goods and chattels, the parties themselves are to be lodged in the common gaol."

But by the 5th sect. of the same statute it is enacted, "that if the person shall give security to the sheriff or officer to appear at the next general or quarter sessions, to abide the decision of the court, and pay such sum and such expenses as shall be ordered, the sheriff shall discharge him out of custody; and in case he does not appear, similar writs may issue against his sureties." And by the 6th sect. it is enacted, "that the court of general or quarter sessions, before whom any person so committed to gaol, or

bound to appear, shall be brought, is hereby authorised and required to inquire into the circumstances of the case, and shall, at his discretion, be empowered to order the discharge of the whole of the forfeited recognisance, or sum of money paid or so to be paid in lieu or satisfaction thereof;" which said order shall be a discharge to such sheriff or officer; and in all cases where the party shall have been lodged in the common gaol by such sheriff, bailiff, or other officer, the justices of the peace so assembled are hereby empowered to remand such party to the custody of the sheriff, bailiff, or other officer; or upon the release of such party from the whole of such forfeited recognisance, to order such party to be discharged from custody, and such order is to be a sufficient discharge to the sheriff or other officer in passing his accounts; and it shall and may be lawful to and for the said court of general or quarter sessions to award such costs, charges, and expenses, to be paid by either party to the other as to the said court shall seem just and reasonable.

By the stat. 4 Geo. 4, c. 37, the justices are to insert in any following roll all fines, forfeited recognisances, &c., which have not been duly levied, and the sheriff shall detain the writs, which are to continue in force. That statute also provides that when a sheriff or other officer goes out of office, he shall deliver such rolls and writs to his successor, who is to execute them.

And by the 3d sect. of that statute, which repeals the 7th sect. of the stat. 3 Geo. 4, c. 46, it is enacted, that in all cases where the party incurring or subject to any fine, issue, amerciament, forfeited recognisance, sum or sums of money, to be paid in lieu or satisfaction of them, or any of them, shall reside, or shall have fled or removed from or out of the jurisdiction of the sheriff, bailiff, or any other officer, in which any such fine, issue, amerciament, forfeited recognisance, or sums of money, to be paid in lieu or satisfaction of them or any of them, shall have been incurred, imposed, or forfeited, or become due, it shall be lawful for such sheriff, bailiff, or other officer, and he is hereby authorised and required to issue his warrant, together with a copy of the writ, directed to the sheriff, bailiff, or other officer acting for the county, riding, city, borough, or place in which such person shall then reside or be, or in which any goods or chattels, or other property, shall be found, requiring such sheriff, bailiff, or other officer, to execute such writ; and every such last-mentioned sheriff, bailiff, or other officer, is hereby authorised and required to act in all respects under such warrant in the same manner as if the original writ had been delivered to him by order of the court of the general or quarter sessions of the county, riding, city, borough, or place, for which such sheriff, bailiff, or other officer shall act; and the said sheriff, bailiff, or other officer, is hereby required, within thirty days after the receipt of such warrant, to return to the sheriff, bailiff, or other officer, from whom he shall have received the same, what he shall have done in the execution of such process, and whether the party shall have given good and sufficient security to appear at the ensuing general or quarter sessions to be held for the county, riding, city, borough, or place from which the writ issued; and, in case a levy shall have been made, to pay over all monies received in pursuance of the warrant to the sheriff, bailiff, or other officer, from whom he shall have received the same. *See* 12 & 13 Vic. c. 45, s. 16.

By other sections of this statute the sheriffs and clerks of the peace are directed to make returns to the Treasury.

By the stat. 7 Geo. 4, c. 64, s. 31, in all cases of recognisance to prosecute or give evidence, in any case of felony or misdemeanor, such recognisance is not to be estreated or put in process on the mere non-appearance of the party in pursuance of it; but the officer who would otherwise estreat it is to make a list, in which he is to specify whether the person be principal or surety, the cause of his non-appearance, if known, and whether justice has been delayed or defeated by his absence; and no process is to issue on it without a written order from one of the judicial persons mentioned in the statute. And these provisions are also to apply to defendants and their sureties in cases of common assault, articles of the peace, and orders in bastardy. But this enactment does not appear to make any alteration in the practice of the sessions, as to moving to respite or discharge recognisances before they have become forfeited, as it only applies to cases of recognisances which have been forfeited; nor does it appear to affect the discretionary power given to the sessions to remit the forfeitures under the stat. 3 Geo. 4, c, 46, s. 6.

By the common law, a *levari facias* may be sued out within a year upon a recognisance against the cognizor for the money mentioned therein, to be levied of his lands and chattels.

Where a party is in custody under a process issued on an estreated recognisance, into which he alleges that he has not entered, the proper course is to come into court and traverse the recognisance. *Ex-parte Stowell*, 1 D. & L. 995; 13 L. J. Ex. 328.

Where a recognisance taken before a justice of the peace, upon the removal of an indictment into the Queen's Bench, had been returned and filed, the court permitted it to be estreated in the Exchequer, though it had not been enrolled. *Reg. v. Sydserff*, 2 D. & L. 564; 14 L. J. Q. B. 44.

The court has no jurisdiction over estreats not returned into it, but the relief is within that of the quarter sessions only, under 3 Geo. 4, c. 46, s. 2. *Rex v. Thompson*, 3 Tyr. 53. And the Exchequer has no authority to interfere where the recognisance has not been estreated. *Rex v. Hankins*, 1 M'Clel. & Y. 27.

Recognisances will only be suspended from term to term, though the party prose-

IV. Discharge of Recognisance.[1]

RECORD.

I. Of the Nature of Records.[2]
II. Nisi Prius Record; how Made Up and Delivered.[3]
III. Action upon a Record. *See* vol. v. p. 273.
IV. How Proved. *See* id.

RECOVERY. *See* Fines and Recoveries, vol. iv. p. 464.

cuting be alleged to be in America. *In re Thomas Clark*, 11 Price, 730.

The Court of Exchequer has jurisdiction to respite process issued in respect of fines, &c., imposed upon presentments, &c., when estreated, but will only do so from term to term, and not further. *In re Inhabitants of Norwich*, 11 Price, 766; S. P. *Ex-parte Bennett*, id. 770.

The court may stay proceedings on a forfeited recognisance. *In re Fredlinyton*, 9 Price, 658.

Where the conusor in *scire facias* succeeds in demurrer, and judgment is affirmed in error, he is not entitled to costs against the real prosecutor. *Hollis v. Bingham*, 1 C. & J. 379; 1 Tyr. 262.

A recognisance taken at sessions must be estreated in the superior court. *Reg. v. Justices of West Riding*, 2 Nev. & P. 457. After levy of the amount of forfeiture, and money paid to the sheriff, the sessions have no power to withdraw the amount and order the sheriff to return it to the party. *Haynes v. Hayton*, 7 B. & C. 293; 2 C. & P. 621.

[1] By 4 Geo. 4, c. 10, the Court of Exchequer is empowered to discharge upon affidavit and petition, and without a *quietus* sued out, recognisances estreated into the Exchequer, except in cases of debts due to the Crown, or of defrauding the revenue by contraband trade, or assaulting officers of the customs or excise. See *Reg. v. Thornton*, 4 Ex. 820; 19 L. J. M. C. 113.

A recognisance refused to be discharged without notice to the attorney-general, although the forfeiture accrued to the city of London. *Ex-parte Morris*, 1 Mee. & W. 510; 1 Tyr. & G. 805. And a motion to discharge a defendant from estreated recognisances under the 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the Treasury. *Ex-parte Tipton*, 3 Dowl. P. C. 177. And in order to obtain a discharge of a recognisance, there must be shown a constat of the proceedings from the clerk of the Estreats Office. *Ex-parte Dunk*, 2 Tyr. 500.

Where a defendant entered into a recognisance to appear to and try an indictment for perjury against her in Trinity term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the court would not, in Michaelmas term, discharge the recognisance, but ordered that it should not be put in suit before the last day of the term. *Rex v. Grote*, 3 Dowl. P. C. 255.

As to the forfeiture of recognisances in revenue informations, *see* 22 & 23 Vic. c. 21, s. 40.

[2] A record is an authentic testimony in writing contained in rolls of parchment, and preserved in a court of record. Britton, c. 27. In these rolls are contained the judgment of the court in each case, and all the proceedings previous, carefully registered and preserved in public repositories set apart for that purpose. The term "record" is applied to such proceedings of superior courts only, and does not extend to the rolls of inferior courts. There are three kinds of records: viz. a judicial record, as an attainder, &c.; a ministerial record on oath, being an office or inquisition found; and a record made by conveyance and consent, as formerly a fine, recovery, or a deed enrolled. 4 Rep. 50. But it has been held, that a deed enrolled or a decree in Chancery enrolled are not records, but a deed and a decree recorded; and there is a difference between a record and a thing recorded. 2 Lil. 427. *See* 3 Steph. Com. 583. Indeed, in a technical sense, records are peculiar to the common law.

[3] The *nisi prius* record is made up by the attorney.

By Reg. Gen. (Pr.) H. T. 1853, sch. "the *nisi prius* record is a copy of the issue as delivered in the action. It must be engrossed on parchment, and a more convenient shape than that heretofore in use must be adopted." "Every declaration and other pleading shall be entered on the record made up for trial, and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge." 15 & 16 Vic. c. 76, s. 54. "No entry or continuances by way of imparlance, *curia adversari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings." Reg. Gen. H. T. (Pl.) r. 31.

A record drawn up in the prescribed form is evidence of the facts stated therein.

"The record of *nisi prius* shall not be sealed or passed, but may be delivered to the proper officer of the court in which the cause is to be tried, to be by him entered as at present, and remain until disposed of." 15 & 16 Vic. c. 76, s. 102.

"Records of the superior courts of common law shall be brought to trial, and entered and disposed of in the counties palatine, in the same manner as in other causes." (Id. sect. 103.)

As to amendment of the record, *see* Amendment, vol. i. p. 335.

RECTOR. *See* Ecclesiastical Persons, vol. iv. p. 162.

RE-ENTRY. *See* Conditions, vol. iii. p. 164.

REFRESHMENT-Houses.[1]

REGISTERING Bills of Sale. *See* vol. ii. p. 499.

Deeds. *See* vol. iv. p. 20.

Judgments. *See* vol. v. p. 267.

Ships. *See post*, Ship and Shipping.

Titles to Real Estate. *See* 25 & 26 Vic. c. 53.

REGISTRATION Appeals. *See* Elections, vol. iv. p. 383.

REJOINDER. *See* also Pleading, vol. v. p. 135.

I. Time for Rejoining, and Consequence of Failure to Rejoin.[2]

II. It must not Depart from the Plea.[3]

Where different causes of action are joined, the court or a judge has power to prevent the trial of the different causes of action together, if such trial is inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had. 15 & 16 Vic. c. 76, s. 41.

[1] By the 23 Vic. c. 27, provision is made for the granting of refreshment licenses to confectioners and others, authorising the sale of wine to be consumed on the premises, or, to a limited extent, not to be consumed on the premises. The hours during which a house so licensed may be kept open are restricted in a similar way as with regard to alehouses. (Sect. 27. *See* vol. i. p. 280.) And penalties are imposed upon any keeper of such a house permitting disorderly conduct in his house, or committing any other offence against the tenor of his license, or mixing spirits with the wine, or selling spirits, or allowing gaming, or suffering disorderly persons to assemble, &c. *See* sects. 29–32. In order to convict the keeper of such refreshment-rooms, under the 32d section, of knowingly suffering prostitutes to assemble in his house, it is not necessary that there should be any indecency in the house; all that the magistrate has to determine is, whether the facts proved in evidence fairly lead to the inference that women came to the house with the defendant's knowledge, not merely to obtain refreshment, but for the purpose of meeting men as prostitutes. *Belasco v. Hannant*, 31 L. J. M. C. 225.

[2] If the defendant be not under terms to rejoin gratis (the meaning of which is, that the defendant shall rejoin within four days after the replication has been delivered, without a notice to rejoin: C. L. P. Act, 1852, s. 53. *Adkins v. Anderson*, 10 Mee. & W. 12. *Winterbottom v. Lees*, 3 Ex. 352), the plaintiff, in order to compel him to do so, must give him a four-days' notice to rejoin. If the defendant do not rejoin it is deemed an abandonment of the plea in respect of which he has failed to rejoin, and the plaintiff may, it seems, sign judgment as for want of a plea, if there be no other plea pleaded; but if there be several pleas, and the defendant neglect to rejoin only as to some of them, the plaintiff should apply to strike out the plea, which the defendant has thus abandoned. *Petrie v. Fitzroy*, 5 T. R. 152.

[3] A rejoinder is the defendant's answer to the plaintiff's replication, and is governed by the same rules as those which affect pleas, with this additional quality, that it must support and not depart from the plea; it must be single (*Warren v. Ivie*, 2 Stra. 908); it must be triable; it must be certain; it must be direct and positive, and not merely by way of recital or argument; and lastly, it must not be repugnant or insensible.

If the rejoinder substantially depart from the plea, it is said it may be the subject of general demurrer. 2 Saund. 84, f, 6th ed.; *sed qu.* Steph. Pl. 334, 6th ed.; Co. Litt. 303, b. A departure is, when the rejoinder sets up a different defence from that stated in the plea, where it contains matter not pursuant to the plea, and not supporting or fortifying it. (Id. 304, a.)

Thus, if the defendant in his plea make title to the entirety, and his rejoinder to a moiety only, it is a departure. 22 Hen. 6, 51, a. So, if the defendant in trespass entitle himself by descent, and the plaintiff reply a feoffment by the defendant himself; if the defendant rejoin that the feoffment was upon condition, and that he entered for condition broken, this is a departure. Plowd. 7, b; Co. Litt. 304, a. So, on a bond to perform covenants, and the covenant was to make a fence as soon as he should cut down the wood; the defendant pleads that he did not cut down any wood, and the plaintiff replies that he cut down two acres, and did not make a fence; to which the de-

III. Form of Rejoinder.[1]

RELEASE.[2] *See* also Receipt, *ante*, p. 312.

I. Of Debts and Causes of Actions.[3]

fendant rejoins that he made a fence; this is a departure. R. Dy. 253, b; Fortes. 341; 1 H. Black. 253. So, if in bar to an action on a bond conditioned to save the plaintiff harmless, the defendant plead that he did not save harmless, and the plaintiff in his replication show a damnification, to which the defendant rejoins that he had no notice thereof, the rejoinder is a departure. 1 Saund. 117; Lev. 194; 2 Ld. Raym. 223; 1 Wils. 313, 314; 1 Salk. 221, 222; 2 Barnard, 193. So where, in debt on bond for performance of covenants, one of which was to return certain goods, the defendant pleaded performance, the plaintiff in his replication assigned a breach in not returning the goods; to which the defendant rejoined that he had no order to do so; the rejoinder was holden clearly to be a departure. 2 Lev. 67. So, in debt on bond to perform covenants, if the defendant plead performance, and a breach being assigned in the replication for non-payment of rent, rejoin that he was expelled, the rejoinder is a departure (2 R. T. Raym. 22; 1 Sid. 77); or if he rejoin that he has paid so much for rent and so much for taxes, which make up the whole demand for rent, it is a departure. 1 Salk. 221. So, if in debt on bond conditioned to pay all charges to an attorney for such a suit, the defendant plead payment, and the plaintiff reply showing such a sum remaining unpaid, to which the defendant rejoins that he had no bill of it; this is a departure (R. Lutw. 422); or, if the defendant rejoin that the plaintiff did not name a place for the payment of it, it is a departure. R. 2 Mod. 31; 3 Lev. 241. So, in debt on bond to perform an award, if the defendant plead no such award, and the plaintiff in his replication show the award and assign a breach, and the defendant rejoin that the award is bad (2 R. T. Raym. 94; 1 Sid. 180; R. 2 Bol. 692, C. 40); or that the award was not delivered (R. 2 Saund. 184; 1 Lev. 300); or not made of all controversies (1 Lev. 127), the rejoinder is a departure. Keilw. 175, a; 39 Hen. 6, 11; Doct. Pl. 123; 3 Lev. 239, 241. But where the defendant, by way of rejoinder, set for the whole award, in which was recited the submission, and it appeared that the award was not warranted by it, on demurrer it was holden not to be a departure from the plea. 11 East, 188. So where, in trespass for taking cattle, the defendant pleaded that he took them damage feasant, and the plaintiff replied a right of common in the *locus in quo*, to which the defendant rejoined that the plaintiff had surcharged the common, the rejoinder was holden to be a departure (1 Salk. 221); because, as the defendant knew the plaintiff's right, he should have stated the surcharge as the matter of his defence in his plea. Willes, 638. *See* further, 2 Saund. 188; 1 id. 116.

But matter which fortifies the bar is not a departure, as if in debt on bond the defendant plead performance, and the plaintiff reply that the covenant was to account for all money received, and that he received such a sum; if the defendant rejoin that he was robbed of that sum, it is no departure. R. 1 Vent. 121; 2 Lev. 5; Com. Dig. Pleader, F. 11. So where, in debt on bond, conditioned that A. should not run away during his apprenticeship, the defendant pleaded that A. did not run away, the plaintiff replied that A. was bound for seven years, and ran away before the end of that time; a rejoinder that A. was bound for five years only is not a departure; it merely explains and fortifies the bar. 2 Wils. 3. So in debt on bond, conditioned to indemnify from tonnage due to A., if the defendant plead *non damnificatus*, and the plaintiff reply that A. distrained for the said tonnage; if the defendant rejoin that nothing was due for tonnage, it is no departure. Fortesc. 341; Bac. Abr. Pleas, L.; 1 H. Black. 253. A departure may be taken advantage of by general demurrer, but it is cured by pleading over.

A rejoinder, if defective, is aided by the plaintiff pleading over, or by verdict, or by the statute of jeofails. A rejoinder, like a replication and plea, if bad in part, is bad for the whole. If the replication be defective in form it may be aided by the defendant's rejoinder (*Cutler v. Southern*, 1 Lev. 195); as in debt on bond, conditioned to accept a lease on request, the defendant pleaded *non requisivit*, and the plaintiff replied that he tendered a lease, without saying of what lands, and issue was joined on the request. This was holden to aid the defect in the replication. R. Cro. Car. 560; Com. Dig. Pleader, M. 5. But if the replication be bad in substance, and show that the plaintiff has no cause of action, it is not aided by the rejoinder. 1 Lev. 195. *See* further, Pleading, *ante*, p. 135. See *Fisher v. Pimbley*, 11 East, 188. *Dudlow v. Watchhorn*, 16 id. 39.

[1] The following is the form of a rejoinder:—

In the the day of A.D. 18

B. ats. A. } The defendant takes issue upon the plaintiff's replication to the defendant's plea [*or* plea] *or*

The defendant, as to the replication to the plea, says [*stating the matter in denial, or by way of confession and avoidance*].

[2] A relinquishment or renunciation of some right or claim under seal. Shep. Touch. 320. *Harris v. Goodwyn*, 2 Man. & G. 405.

[3] Though a right of action cannot be assigned at law, it may be released. *Marks v.*

Marks, 10 Mod. 419. *See* vol. iii. p. 98. And a release of a principal debt includes the interest. *Harding v. Ambler*, 3 Mee. & W. 279.

Every release is to be limited and restrained by the particular words in the recital. *Boyer v. Bluck*, 13 C. B. 563; 22 L. J. C. P. 173. *Lanyon v. Davey*, 11 Mee. & W. 218; 12 L. J. Ex. 200. A record may be discharged by it. *Barker v. St. Quintin*, 12 Mee. & W. 441; 13 L. J. Ex. 144. No particular form is required if satisfaction be shown. 3 C. & Kir. 309.

A covenant not to sue operates as a release (*See* vol. iii. p. 487. See *Henderson v. Stobart*, 5 Ex. 99; 19 L. J. Ex. 135); but if only for a limited time it has not this effect, and is no defence. *Thimbleby v. Barron*, 3 Mee. & W. 210. A distinction between a covenant not to sue a sole obligor and one of several obligors, has been stated thus: — Where A. is bound to B., and B. covenants never to put the bond in suit against A., and afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release, but a covenant only, because he covenants only not to sue A., but does not covenant not to sue B., for the covenant is not a release in its nature, but only by construction to avoid circuity of action, for where he covenants not to sue one he still has a remedy, and then it shall be construed as a covenant and no more. *Dean v. Newhall*, 8 T. R. 168. See *Lacy v. Kinnaston*, 3 Salk. 298.

A release given by one of several *joint* co-creditors will in general release the cause of action as to all. *Wilkinson v. Lindo*, 7 Mee. & W. 81. *Nicholson v. Revill*, 4 Ad. & E. 675. If such a release is obtained by the fraud of the debtor upon the releasing creditor, it may be answered, as in the case of a release given by a single creditor, by a replication that it was obtained by fraud, *Wild v. Williams*, 6 Mee. & W. 490. *Phillips v. Clagett*, 11 id. 84. Where such a release has been executed by collusion between the releasing creditor and the debtor, in order to defraud the plaintiff, the plaintiff may apply to the summary jurisdiction of the court to strike the plea out. *Barker v. Richardson*, 1 Y. & J. 362. *Phillips v. Clagett*, *supra*. *Rawstorne v. Gandell*, *infra*.

The plaintiff, an obligee in a bond given by two obligors, executed a release to one, and having brought an action on the bond against the defendant, the co-obligor, he pleaded such release in bar; the plaintiff replied, that the release was given with an undertaking on the part of the defendant that such release should not operate in his discharge; and on demurrer held, that the plaintiff could not by a parol averment vary the instrument under seal, which, being the release of an entire demand, would operate as a release to the defendant. *Cocks v. Nash*, 9 Bing. 341; 2 M. & Scott, 434. *See* 5 Co. Rep. 26; 5 B. & A. 187.

A release of one co-debtor in general releases all the co-debtors, there being but one and the same debt, for which all are liable. *Nicholson v. Revill*, 4 Ad. & E. 675. But the original contract may expressly reserve to the creditor the right of giving a release to one without discharging the others (*Cowper v. Smith*, 4 Mee. & W. 519); and the creditor may then give such a qualified release to one, by inserting therein an express reservation of his right of action against the others. *North v. Wakefield*, 13 Q. B. 536. *Solly v. Forbes*, 2 B. & B. 38. *Thompson v. Lack*, 3 C. B. 540. *Price v. Barker*, 4 E. & B. 760.

A plea of a release to an executor of one of several joint obligors was held bad, because on the death of the one the debt survived against the others. *Ashbee v. Pidduck*, 1 Mee. & W. 564.

A covenant with one of several co-debtors not to sue him, does not operate as a release of the others. *Price v. Barker*, 4 E. & B. 460. *Willis v. De Castro*, 27 L. J. C. P. 243. *Thompson v. Lock*, 3 C. B. 540; 16 L. J. C. P. 75. *See* 16 Mee. & W. 115.

A creditor cannot release one of several joint debtors, and hold another liable by a reserve of remedies, unless the instrument of release can by reason of the contract be construed as a covenant not to sue, not pleadable in bar to an action, but giving rise only to a cross-action for damages in case of breach. *Ford v. Beech*, 11 Q. B. 871. *Willis v. De Castro*, 27 L. J. C. B. 246.

If the nominal plaintiff has fraudulently, and in collusion with the defendant, released the claim, a replication setting up that fact will be a good answer, on equitable grounds, to a plea of release. *De Pothonier v. Mattos*, 27 L. J. Q. B. 260.

Release given in breach of trust ordered after plea to be delivered up, and plea set aside. *Manning v. Fox*, 7 Moore, 617.

Where one of several plaintiffs, assignees of a bank, releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff who had given the release against costs. *Johnson v. Holdsworth*, 4 Dowl. P. C. 63.

Where the affidavits in support of the application to set aside a release, given by a co-plaintiff, do not clearly show fraud, the court will not interfere summarily to set it aside (*Crook v. Stephens*, 5 Bing. N. S. 688; S. C. 7 Scott, 848. *Phillips v. Clagett*, 11 Mee. & W. 84; 12 L. J. Ex. 275. *Rawstorne v. Gandell*, 15 Mee. & W. 304; 15 L. J. Ex. 291), nor set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied. *Wild v. Williams*, 6 Mee. & W. 490.

An executor cannot release before probate of the will. *Morris v. Philpot*, 2 Mod. 108; 3 Keb. 814.

A release of all demands given by the husband, will release a debt owing to the wife

II. Of Estates.[1]

before coverture, for the husband only can demand it; but it would be otherwise if he gave a release of all actions. Noy, 6. Cited in *Miles v. Williams*, 10 Mod. 165. A plaintiff suing *in formâ pauperis* may, if done *bonâ fide*, release the cause of action. *Jones v. Barnes*, 2 Ex. Rep. 230.

In trover against two, if there be verdict against one, and the other pleads a release and has a verdict, the plaintiff cannot have judgment against the other; for the trover being joint a release to one discharges both defendants. *Kiffin v. Willis*, 4 Mod. 380.

In all cases where two or more are to recover a personal thing, the release by one shall abate the action as to the rest; but it is otherwise when they are defendants, and are to discharge themselves from a personal liability. *Capel v. Saltonstal*, 3 id. 249.

A defendant relying upon a deed as a release, must either plead it expressly as such or must set out the words of the instrument for the court to judge whether it amounts to a release. *Wilson v. Braddyll*, 23 L. J. Ex. 227; 9 Ex. 718. But it seems not to be essential in the former case to allege that the release was by deed. *Thames Haven Dock Co. v. Brymer*, 5 Ex. 696. *Thames Ironwork Co. v. Royal Mail Co.* 31 L. J. C. P. 169. *Solvency Mutual Guarantee Co. v. Froane*, 7 H. & N. 5. *Willis v. De Castro*, 27 L. J. C. P. 243; 4 C. B. 216.

An agreement amounting in effect to a release, but not under seal, may be pleaded as a defence upon equitable grounds. *De Pothonier v. Mattos*, 27 L. J. Q. B. 260. And where an agreement made in consideration of forbearing a right under a covenant in a deed has been performed, the facts will form a good plea on equitable grounds in discharge of the covenant. *Nash v. Armstrong*, 10 C. B. 259: *per Willes, J.* A release must be specially pleaded. H. T. 4 Wm. 4. *Wilson Braddyll*, 23 L. J. Ex. 227. It was formerly admissible under the general issue. *See* Form of Plea, B. & L. Pl. 393; replication, 394; on equitable grounds, *see* Ell. Bl. & Ell. 461; 27 L. J. Q. B. 260. As to the release of part of lands from judgment, *see* 22 & 23 Vic. c. 35, s. 11.

[1] Not only estates in land, but all interests, rights, and profits arising out of, or annexed to, land may be released. It is, however, a rule of law, that no possibility, right, title, or thing in action, shall be granted or released to a stranger, for that would be the occasion of multiplying suits. Thus, Lord C. B. Gilbert says, "A release of all a man's right supposeth that he has a right, for he cannot transfer a right which he has not; but if he has nothing, nothing can pass by the conveyance, and it countenanced maintenance to transfer possibilities." Hence, a son cannot release to his father's disseisor in the lifetime of his father, because he has no right to the land; then and in such a case the son might enter on the land against his own release. All rights, titles, and actions may, however, be released to the terre-tenant for receiving his repose and quiet, and for avoiding suits. Therefore, a right or title to an estate of freehold *in præsenti et futuro* may be released in five ways:—1. To the tenant of the freehold in fact, or in law, without any privity. 2. To the person in remainder. 3. To the person entitled to the reversion without any privity. 4. To the person who has a right only in respect of privity; as, if the tenant be disseised, the lord may release his services in respect of the privity and right without any estate. 5. In respect to privity only, without right; as, if a tenant in tail makes a feoffment in fee, the donee after the feoffment has no right, yet, in respect of the privity only, the donor may release to him the rent and all services, saving fealty: but a bare authority cannot be released, nor a power collateral to the land.

Releases of land, in respect to their operation, are divided into four sorts: — 1. Releases that enure by way of *mitter l'estate*. 2. Releases that enure by way of *mitter le droit*. 3. Releases that enure by way of enlargement. 4. Releases that enure by way of extinguishment. When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or co-parceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate* (Co. Litt. 193, b; 2 Bl. Com. 324); for where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract by a release, because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Releases are said to enure by way of *mitter le droit* where a person has been disseised; releases to the disseisor or to his heir or feoffee, who, being in possession, is therefore capable of taking a release of the right; and as in cases of this kind nothing but the bare right passes, the release is said to enure by way of *mitter le droit*, that is, transferring the right. No words of limitation are necessary in a release of this kind; for, if a release of right be made to a person seised in fee for a day or an hour, it will be as strong as if it were made to the releasee and his heirs for ever. Releases enure by way of enlargement of estate when the possession and inheritance are separated for a particular time, and he who has the reversion and inheritance releases all his right and interest in the lands to the person who has the particular estate. Such releases are said to enure by way of enlargement of estate, and to amount to a grant and attornment, because they transfer the legal estate to the releasee as effectually as a feoffment with livery: but to render this kind of release good, it is necessary that there should be a privity of estate. If a person makes a lease for years, the lessee

III. Construction of.[1]

REMAINDER, Estate in.

I. Definition of Estate in Remainder.[2]

is, of course, capable of taking a release from the lessor, because there is a privity between them; but in this case the lessee must have entered on the lands before the execution of the release, for till entry he has only an *interesse termini*, which is not capable of being enlarged. If, however, a man makes a lease for life, and the first lessee dies, a release to him in remainder is good before he enters to enlarge his estate. In some cases, where the release cannot enure by way of *mitter le droit*, it will operate by way of extinguishment. Thus, if a lord releases his seigniory to the tenant, or if a person having a rent or common releases it to the terre-tenant, these releases are said to operate by way of extinguishment; because the tenant cannot have services or rent to receive of himself, nor can he take common in his own hand. If a release for years be made to commence presently, reserving rent, and before the lessee enters, the lessor releases to him all his right in the land; though this cannot enure to enlarge his estate, yet it will operate as an extinguishment of the rent. *See* Smith's *R. & P. Pro.* 635, 2nd ed.

If lands be settled to the use of A. and B. for their lives, remainder to the use of the first son of B. in tail male, remainder to the heir of A., a release made by B. of all her right and estate to A. and his heirs does not destroy the contingent remainder to the first son of B., although the release be made before such son was born. *Harris v. Belchey*, 2 Show. 92.

[1] In the construction of a release regard must be paid to all its parts, both general and particular. *Payler v. Homersham*, 4 M. & S. 423. It must be limited in its operation to matters contemplated by the parties at the time of its execution. *Lyall v. Edwards*, 6 H. & N. 337; 30 L. J. Ex. 193. A., after mentioning certain specific sums due to her from B., and that she had agreed to release him from those sums, and of and from all or any other sum or sums of money, claims, and demands, thereby secured or intended to be secured, and all other sum or sums of money, claim, and demand whatsoever, released him accordingly from those sums, and all claim on account of those sums, or for or on account of any other matter, cause, or thing whatsoever:— *Held*, that a bond of indemnity, payable after the decease, was not thereby released. *Butcher v. Butcher*, 1 N. R. 113.

General words in a release may be explained by the particular occasion of giving it. *Knight v. Cole*, 3 Lev. 273; 1 Show. 151. S. C. *Henn v. Hanson*, 1 Lev. 99. *Morris v. Philpot*, 2 Mod. 108. *Morris v. Wilford*, 2 Show. 47. Hence in a release of a legacy by an executor, and also of all actions, suits, and demands whatsoever, the general words which follow are restricted by the prior release to the legacy, and nothing else. *Cole v. Knight*, 3 Mod. 277.

If a receipt be given for 10*l.* in which there was a release of all actions, debts, duties, and demands, nothing is released but the 10*l.* 3 Mod. 277; 1 And. 64.

A release of all demands will not bar a future duty or a rent not yet due. *Trevil v. Ingram*, 2 Mod. 281; 1 Lev. 99; 2 id. 210; 1 Mod. 99, 100. *Stephens v. Snowe*, 2 Salk. 578.

Where a thing is to be done on a condition precedent, a releasing of all demands given before condition performed does not discharge it; for before that it does not lie in demand. *Thorpe v. Thorpe*, 12 Mod. 455, 460.

Obligee in trust for another releases all demands on his own account; this does not release the obligation. *Offly v. Warde*, 1 Lev. 235. A release of all actions and demands does not discharge a legacy; it must be by particular words. *Cole v. Knight*, 3 Mod. 279.

In debt upon an obligation, the defendant pleaded a release of all errors, and all actions, suits, and writs of error whatsoever; the release was held to extend only to writs of error. T. Raym. 399. See *Solomon v. Graham*, 24 L. J. Q. B. 332.

A covenant to pay money at a future day is not discharged by a release of all debts, dues, actions, causes of action, obligations, and writings obligatory, if such release be made before the day of payment. *Carthage v. Manby*, 2 Show. 90.

A release of all actions will discharge a *sci. fa.*, or an award of execution upon a *sci. fa. Obrien v. Ram*, 3 Mod. 185, 187; 8 Co. 150, b; 2 Saund. 6, a. Where one releases his right, he cannot pursue his action or remedy. Salk. 442. But if he has a right and several remedies, the discharge of one remedy discharges not the other. (Id.) Release to an administrator of all right to the personal estate will not discharge a bond given by the intestate. *Topham v. Tollier*, 2 Ld. Raym. 786; Salk. 575, S. C.

Release of goods in specie shall not be extended more largely than to the thing released. *Morris v. Wilford*, T. Jones, 104.

[2] An estate in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. 2 Bl. Com. 164. As if a man, seised of lands in fee-simple, grants them to A. for twenty years, and after the determination of that term to B., and his heirs for ever. A. is tenant for twenty years, with remainder to B. in fee. In the first place an estate for years is created or derived out of the fee, and given to A., and then the residue or remainder of the estate is given to B. Both these interests, however, are but

II. Quasi Remainder.[1]

III. Of the different Kinds of Remainders.

(A) *Contingent Remainders.*[2]

one estate; the present term for years, and the remainder after, when added together, being equal only to one estate in fee. They are different parts constituting one whole, being carved out of one and the same inheritance. They are both created, and may both subsist at the same time; the one in possession, the other in expectancy. *See* Smith's ed. of Fearne, s. 346.

[1] A *quasi* remainder, or a remainder in personal property, is an interest in chattels real or personal, limited as a legal or equitable interest by will, or as an equitable interest by deed, by way of trust, to take effect in possession or in enjoyment, or in both, immediately after the regular expiration of another interest, created together with it by the same instrument out of the same subject of property. Smith's *R. & P. Pro.* 296. It cannot be limited as a legal interest by deed at common law, on account of the liability of personal property, or of terms of years, to loss and destruction. Accordingly, if a term of years is granted to A. for life, and after his death to B., the whole term belongs to A. 1 Pres. Shep. T. 116. And a bequest of consumable articles to a person for life, or so long as such person shall remain unmarried, is a gift of the absolute interest; and a limitation over, intended to take effect as a *quasi* remainder, is void, even though such person do not marry in the testator's lifetime. *Andrew v. Andrew*, 1 Coll. 690. But farming stock and implements of husbandry do not fall within this rule, as things *quæ ipso usi consumuntur*. *Groves v. Wright*, 2 K. & J. 347.

[2] A remainder is contingent when it is limited to take effect on an event or condition which may not happen or be performed till after the determination of the preceding particular estate, in which case such remainder can never take effect. Fearn, *Con. Rem.* 3. It is not, however, the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail, expectant on an estate for life, is and must be liable, as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. Fearn, *Con. Rem.* 329; Prest. *Est.* 32, 33.

According to Mr. Fearn, there are four kinds of contingent remainders: — 1st. Where the remainder depends entirely on a contingent determination of the preceding estate itself. As if A. makes a feoffment to the use of B. till C. returns from Rome, and, after such return of C., then to remain over in fee. Here the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. 3 Rep. 20, a; but see *Arton v. Eyre*, Poph. 97. *Large's case*, 3 Leon. 182. 2d. Where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as in the case of *Doe d. Planner v. Scudamore*, 2 B. & P. 289; and in the instance put by *Lord Coke*, of a lease for life to A., B., and C.; and if B. survive C., then the remainder to B. and his heirs. Here the event of B.'s surviving C. does not affect the determination of the particular estate; nevertheless it must precede, and give effect to B.'s remainder; but as such an event is dubious, the remainder is contingent. Fearn, *Con. Rem.* 4, 5. 3rd. Where it is limited to take effect upon an event which, though it certainly must happen some time or other, yet it may not happen till after the determination of the particular estate; as, if a lease be made to T. S. for life, and after the death of J. D., the lands to remain to another in fee: now it is certain that J. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of F. S., and therefore such remainder is contingent. 3 Rep. 20, a. And, 4th. Where it is limited to a person not ascertained, or not in being at the time when such limitation is made; as, if a lease be made to one for life, remainder to the right heirs of J. S., who is living. (Id.) So, where a remainder is limited to the first son of B., who has no son then born: here B. may never have a son; or if he should, the particular estate may determine before the birth of such son: therefore the remainder is contingent. 1 Vent. 306. So, if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, because it is uncertain which of them will be the survivor. Cro. Car. 162; Fearn, *Con. Rem.* 6.

A remainder will never be taken to be contingent when it can be construed to be vested. *Ives v. Legge*, 3 T. R. 488, n. *Doe d. Camberback v. Perryn*, id. 484. *Doe d. Tanner v. Dorwell*, 5 id. 518.

With respect to the nature of the contingency upon which a remainder may be limited, it is to be observed:—1st. That it must be a legal act, for the law (says Lord Coke, 2 Rep. 51), will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for it is *potentia remotissima et rara*, which, by intendment of law, *nunquam venit in actum*. 2d. It must be *potentia propinqua;* as death, or

death without issue, or coverture. Hence it has been determined that a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected afterwards during the particular estate. 2 Rep. 51, a. So, although a lease for life, remainder to the right heirs of J. S., is good; yet if there be no such person as J. S. at the time of the limitation of the remainder, notwithstanding such a person should afterwards be born and die during the life of the tenant for life, his heir shall not take by virtue of such limitation, because the possibility on which the remainder is to take effect is too remote, for it amounts to the concurrence of two several contingencies: 1. That such a person as J. S. should be born, which is very uncertain; and 2. That he should also die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke observes is never admitted by intendment of law. *Cholmley's case*, 2 Co. 51. Upon the same ground arises the distinction between a remainder limited by a general description, as to the right heirs of J. D., who is alive, or *primogenito filio* of B., who has no son then born, which is good, and one limited by a particular name to a person not *in esse*, which is void. Fearn. *Con. Rem.* 375, 378. 3d. It must not be repugnant to any rule of law. 6 Rep. 40, b; 4 Burr. 1941. 4th. Nor contrariant in itself. *Jermin v. Arscot*, 1 Rep. 85, a. *Cholmley v. Humble*, id. 86 a. *Corbett's case*, 1 Rep. 63, b. *Mildmay's case*, 6 Rep. 40. *Foy v. Hynde*, Cro. Jac. 697. 5th. That it must not operate so as to abridge, defeat, or determine the particular estate. Plowd. 29, b; 2 Leon. 16; Plowd. 24. *Seyer v. Hardy*, Cro. Eliz. 414. *Goodtitle v. Billington*, Dougl. 753.

As to the estate necessary to support a contingent remainder; though, in the case of a vested remainder, it is sufficient if the particular estate be for years (for a lease at will is of too slender and precarious a nature to support a remainder over. 8 T. R. 75), it is a general rule that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. Fearn. *Cont. Rem.* 423. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; but if granted to A. for life, with a like remainder, it is good (1 Rep. 130); for, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere. Unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void. 2 Bl. Com. 171; Fearn. *Cont. Rem.* 423–425; 3 Rep. 20. But a contingent remainder for years does not require a preceding freehold to support it; for the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give due effect to a remainder of that sort. Fearn. *Cont. Rem.* 429, 430. In regard to the estate requisite to support a contingent remainder it is further to be observed, that the estate supporting, and the remainder supported, should both be created by one and the same deed or instrument; therefore, an estate for life given by one deed will not support a remainder given by another, nor an estate for life settled by A. on B. by deed enure to support a contingent remainder given by the will of A. Fearn. *Cont. Rem.* 646, 647. *Snow v. Cutler*, Raym. 162. *Moor v. Parker*, 4 Mod. 316. *Weade v. Lower*, Pollex. 66. *Doe v. Fonnereau*, Dougl. 486. It seems, however, that where the legal estate is in trustees, there is no necessity for any preceding particular estate of freehold to support contingent remainders, for the legal estate in the general trustees will be sufficient for the purpose; and, consequently, in such cases it is not necessary that a contingent remainder should vest at the time the preceding trust expires. Fearn. *Cont. Rem.* 449, 450. *Chapman v. Blisset*, Cas. Temp. Talb. 445. *Hopkins v. Hopkins*, Forest, 44; 1 Ves. 268; 1 Atk. 581.

It was a general rule that a contingent remainder was extinguished by the destruction of the particular estate. *Doe d. Willis v. Martin*, 4 T. R. 39. As in the case of a copyhold or customary estate, where the estate became enfranchised. *Roe d. Clemett v. Briggs*, 16 East, 406. So, contingent remainders with double aspect were destroyed by the merger of the particular estate which supported it. *Crump d. Wooley v. Benson*, 7 Taunt. 362. To obviate this it was enacted, by the 7 & 8 Vic. c. 76, s. 8, that "after the time at which this act shall come into operation, no estate in land shall be created by way of contingent remainder; but every estate which, before that time, would have taken effect as a contingent remainder, shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties as an executory devise; and contingent remainders existing under deeds, wills, or instruments executed before the time when this act shall come into operation, shall not fail or be destroyed or barred merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine." This statute was, however, repealed, as from the time of the taking effect thereof, by the 8 & 9 Vic. c. 106, s. 1; and by sect. 8 it is enacted, "that a contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all re-

(B) *Cross-Remainders.*[1] (C) *Vested Remainders.*[2]

REMANET.[3] *See post*, Trial.

Costs of Cause being made a Remanet are Costs in the Cause.[4]

REMOVAL. *See* Poor, *ante*, p. 160; *post*, Settlement, p. 380.

RENEWAL. *See* Covenant, vol. iii. p. 477.

RENT. *See* also Covenant, vol. iii. p. 476; Distress, vol. iv. p. 88; Lease, vol. v. p. 348.

I. Of the different Kinds of Rent; out of What, and to Whom it may be Reserved, p. 326.

II. When and Where must be Paid, p. 327.

III. Effect of Acceptance of Rent, p. 328.

IV. Apportionment of Rent, p. 328.

V. Grant of Rent, p. 329.

VI. Limitation of Action for Rent, p. 330.

VII. Remedies for Rent. *See* Action, vol. i. p. 132; Covenant, vol. iii. p. 443; Distress, vol. iv. p. 78; Ejectment, id. p. 169; Lease, vol. v. p. 338.

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spects as if such determination had not happened.

[1] To constitute a cross-remainder no technical words are necessary. *Doe d. Watts v. Wainewright*, 5 T. R. 427. But in the case of a deed cross-remainders can never be implied. *Doe d. Tanner v. Dorvell*, id. 518.

Lands were limited by deed to the use of the child or children of B., in tail as tenants in common, and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of A., and the heirs of his, her, or their bodies issuing, and so *toties quoties* as any of the said children shall die without issue, till there should be only one child left; and in case all the said children should die without issue, then, &c.: —*Held*, that cross-remainders were created as well between the children as between the surviving children, and the heirs of those deceased. *Doe d. Watts v. Wainewright, supra.*

One devised his lands to his grand-daughters C. and E., to be equally divided between them and the heirs of their bodies respectively; and, for default of such issue, to his other grand-daughter, A. C. dies, leaving a son; E. dies without issue:—*Held*, that A., and not the son of C., took by way of cross-remainder to E.'s moiety. *Comber v. Hill*, C. T. Hardw. 22.

[2] Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As, if A. be tenant for years, remainder to B. in fee; hereby B.'s remainder is vested, which nothing can defeat or set aside. 2 Bl. Com. 167. The person entitled to a vested remainder has an immediate fixed right of future enjoyment; that is, an estate *in præsenti*, though it is only to take effect in possession at a future period. And such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession. 2 Cru. Dig. 260; Prest. Est. 33. See *Wright d. Burrill v. Kemp*, 3 T. R. 470.

[3] The postponement of a trial to a subsequent sitting.

[4] Costs occasioned by the cause being made a remanet are costs in the cause, and go to the party who ultimately succeeds. *Bentley v. Carver*, 2 C. B. 817. *Gibbons v. Phillips*, 8 B. & C. 437. Accordingly, where a cause had been made a remanet from want of time to try it, and when it was about to come on at the following sittings the plaintiff withdrew the record, and the defendant obtained a rule for the costs of the day; it was held, that the defendant was not entitled to the costs of the first sittings, but of the second sittings only: for it was no fault of the plaintiff that the cause was not called on at the first sittings. And where the first sittings lasted until the second sittings commenced, and the plaintiff in a cause which had been made a remanet from the first sittings was obliged to withdraw the record, as it had not been resealed, the defendant was held entitled to the costs of the sittings at which the record was withdrawn, but not of the previous sittings. It was contended that the sittings ought to be considered as one, but the court said that the fact of one sitting running into another made no difference; and that if the cause had been made a remanet from one assize to another in consequence of the court not being able to try all the causes entered, there would have been no reason for saying that the plaintiff would have been liable to the defendant's costs at the first assizes. The reason is, that the delay is not the delay of the plaintiff, but the delay of the court. *Brett v. Stone*, 1 D. & L. 140. So, where a new trial is granted on payment of the costs of the previous trial, the costs of the cause having been made a remanet before the trial are not included in the costs of the trial within the rule, but follow the event as costs in the cause. *Gibbons v. Phillips, supra. Bentley v. Carver, supra;* overruling *Robinson v. Day*, 5 B. & Adol. 814.

I. Of the different Kinds of Rent; out of What, and to Whom it may be Reserved.[1]

[1] A rent, according to the common law, consists in a right to the periodical receipt of money or money's worth in respect of lands which are held in possession, reversion, or remainder, by him from whom the payment is due: all other rights to periodical payments are mere annuities; and, although they may be descendible to the heirs of the grantee, and then are rightly styled hereditaments, yet they are not tenements, and, therefore, not included in the statute *De donis*, and they may be disposed by will as personal estate. A rent, then, in general, is to be considered as a fixed tribute which issues out of land as a part of its actual or possible profits.

A debt due for rent upon a lease (whether parol or by indenture) and a debt upon bond are equal in degree. *Gage v. Acton*, Com. 673; Salk. 325; Carth. 511; *Anon.* Nels. 191.

Although every species of rent is comprised in the undermentioned divisions, yet there are some rents which are known by particular names. Thus, the certain established rents of the freeholders and ancient copyholders of manors are called rents of assize. Those of the freeholders are also frequently called chief rents, *redditus capitales*, and both rents are indifferently denominated quit rents, *quieti redditus*, because thereby the tenant goes quit and free of all other services.

Rent-service was the only kind of rent originally known to the common law; a right of distress was inseparably incident to it, as long as it was payable to the lord, who was entitled to the fealty; and it was called a rent-service because it was given as a compensation for the military or other services to which the land was originally liable. Where a rent was granted out of lands by deed, the grantee had no power to distrain for it, because there was no fealty annexed to such a grant. To remedy this inconvenience, an express power of distress was inserted in grants of this kind, and it was then called a rent-charge, because the lands were charged with a distress. A rent-charge granted for equality of partition between coparceners is called a rent-charge of common right, because the coparcener has given a valuable consideration for it. A rent granted to a widow out of lands, of which she was dowable, in lieu and satisfaction of dower, may be distrained for the same principle. So of a rent-charge granted in lieu of lands upon an exchange. Gilb. 19.

A fee-farm rent is a perpetual rent reserved on a conveyance of lands in fee-simple; and Lord Coke says, if a rent be to the whole value of the land, or to the fourth part of its value, it is called a fee-farm. But Mr. Hargrave has observed on this passage, that the true meaning of a fee-farm is a perpetual farm or rent; the name being founded on the perpetuity of the rent or service, and not the *quantum;* that the sometimes confining the term, "fee-farm for rents of a certain value," probably arose partly from the Statute of Gloucester, which gives the *cessavit* only where the rent amounts to one-fourth of the value of the land, and partly from its being most usual on grants in fee-farm not to reserve less than a third or fourth of such value.

After the statute *Quia emptores*, granting in fee-farm except by the king became impracticable, because the grantor parting with the fee is, by the operation of that statute, without any reversion, and without a reversion there cannot be rent-service. A perpetual rent may, however, be reserved on a conveyance of lands in fee-simple; and if a power of distress and entry be given to the grantor, his heirs and assigns, the rent will be good as a rent-charge, but not as a fee-farm rent.

A rent-seck, or barren rent, is in effect nothing more than a rent for the recovery, of which no power of distress is given, either by the rules of common law or the agreement of the parties. 3 Cru. Dig. 308, 309. Under these three kinds, namely, rent-service, rent-charge, and rent-seck, every species of rent is comprised.

A rent must in general issue out of lands or tenements of a corporeal nature whereto the grantee may have recourse to distrain. *Baynton v. Bobbet*, 2 Vent. 67. It could not, therefore, be formerly reserved out of an advowson in gross, tithes, or other incorporeal hereditaments, because, says Lord C. B. Gilbert, every incorporeal right, till by age it was formed into a prescription, did originally arise by grant from the Crown; and such grant seems to have been made for particular purposes: as, the grant of a fair to be under the protection of the lord; the grant of a common for the benefit of the beasts of all the tenants. Therefore, to let such incorporeal inheritances for rent was esteemed contrary to the design and purpose of such grants.

So it is held, that rent cannot be reserved out of rent. 2 Roll. Abr. 446, pl. 7; Bro. Abr. Assize, pl. 2; Keilw. 161. Neither can rent issue out of a term of years; and, therefore, the lessee having assigned cannot distrain (—— *v. Cooper*, 2 Wils. 375); but he must bring his action on the contract. *Smith v. Mapleback*, 1 T. R. 441. If a lease be made of an incorporeal inheritance reserving rent, such reservation is good to bind the lessee by way of contract, for the non-performance of which the lessor shall have an action of debt. *Dean of Windsor v. Glover*, 2 Saund. 302. The stat. 5 Geo. 3, c. 17, authorises ecclesiastical persons, as well as some lay corporations, to make leases of tithes, and other incorporeal hereditaments, for one, two, or three lives, or any term not exceeding twenty-one years; and enacts that the rents reserved in such leases may be recovered by action of debt. *See* Lease, vol. v. p. 338.

A reservation of rent *secundum ratam* upon

II. When and Where must be Paid.[1]

a demise at will is not good, because no time is limited when it shall be paid. *Parker v. Harris*, 4 Mod. 79; Carth. 234; S. C. Skin. 307. Lessee for life makes a lease for years; lessee for years surrenders to the reversioner, rendering rent: this was held to be a good reservation, it being a duty by way of contract. *Winton v. Prinkney*, T. Raym.

With respect to the conveyances upon which a rent can be reserved, it may be laid down as a general rule, that a rent may be reserved upon every conveyance which either passes or enlarges an estate; for rent being a return for something given, it follows, that whenever an estate passes there may be a return. Rents are most usually reserved on leases, but a rent may also be reserved on a release, a bargain and sale, covenant to stand seised, and lease and release.

The rent must be certain, or which may be reduced to a certainty; for, *Id certum est, quod certum reddi potest, continetur charto reddendo inde annuatim ad tales terminas vel faciendo inde talia servitia vel tales consuetudines, quæ omnia debent esse certa et in charta expressa.* And the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, peppercorn, wheat, or other profits, that lieth in render, office, attendance, and such-like, as in payment of money. But a man, upon his feoffment or conveyance, cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture on herbage of the land, or the like, for that should be repugnant to the grant; *non debet enim esse reservatio de proficuis ipsis, quia, ea conceduntur, sed de redditu novo extra proficua.*

With respect to the persons to whom a rent may be reserved upon any feoffment, gift, or lease, it is confined to the feoffor, donor, or lessor, or to their heirs. The reason of this rule is, because the rent is payable as a return for the possession of the land, and can, therefore, be only made to the person from whom the land passes. As there can be no reservation of rent-service to a stranger during the life of the lessor, so a rent-service cannot be reserved, after the death of the lessor, to any person but the reversioner; for to him the land would belong, if it were not demised. Gilb. 61.

A mortgagee, after giving notice of the mortgage to the tenant in possession, is entitled to the rent in arrear. *Moss v. Gallimore*, Dougl. 279. *See* vol. iv. p. 95; vol. v. p. 498.

A rent to a man and his heirs issuing out of gavelkind of land shall go according to the customary descent of the land, and not according to the course of the common law. *Randall v. Jenkins*, 1 Mod. 97.

Trustees under a composition-deed, who take as assignment of the premises, are liable for the rent, though the debtor occupies. *Holmes v. Love*, 3 B. & C. 242; 5 D. & R. 56. So an executor who enters after the death of his testator *de bonis propriis*, until he ends the tenancy. *Buckworth v. Simpson*, 1 C., M. & R. 834; 5 Tyr. 344. See *Hornidge v. Wilson*, 11 Ad. & E. 645; 3 Per. & D. 641.

[1] Rent is regularly due and payable upon the land out of which it issues, if no particular place be mentioned in the reservation. Hob. 207. With regard to the time when it is due it is held that, although rent must be demanded or tendered before sunset, to take advantage of a condition of re-entry, or to save a forfeiture, yet it is not due until midnight, and, therefore, if the lessor in the case of leases made by tenant in fee under a power dies after sunset and before midnight, just before and at sunset is the time appointed by law to make a proper demand of rent to take advantage of a condition of re-entry. The demand should be made at such time before sunset as to allow sufficient time to count the money; and the person making the demand or tender must remain on the land till the sun has set, and the demand must be actually or constructively continued till that time. Woodf. by Cole, p. 340. *Acocks v. Phillips*, 5 H. & N. 183. But this, which is a rule of the common law, applies principally to forfeitures and conditions: a covenant for the payment of rent without mention of any place, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money. *Haldane v. Johnson*, 8 Ex. 689.

The assignee need not demand the rent at the day to enable him to distrain; a man who has a rent-seck payable yearly at the feast of Easter, and has once seisin of the rent, and the feast passes, and tender or demand made of the rent, may after the day come to the land and demand it; and although the tenant be not there, if none be ready to pay the rent he shall have an assize. *Maund's case*, 7 Co. 28, b. Otherwise if tenant were on the land at the instant of the feast, ready to pay the rent; for in such case he ought to demand the rent of the person of the tenant of the land; and if he cannot be found there, he should make the demand on the land at the next feast of Easter. Upon a lease for years from the 24th of June, rendering rent at Michaelmas, St. Thomas, Lady-day, and Midsummer, or within twenty days after, a demand of a year's rent, as due on the 25th of December, is bad. *Thomkins v. Pincent*, 7 Mod. 97; 1 Salk. 141; 2 Ld. Raym. 819, S. C. Rent-seck is only demandable on the land. T. Jones, 120.

If a rent-seck be granted out of Dale, payable at Sale, a demand thereof at Dale is good. Cro. Car. 508.

Another usual mode of enforcing the payment of rent reserved in a lease, or at least of preventing the accumulation of arrears, is afforded by the insertion of a condition or

III. Effect of Acceptance of Rent.[1]

IV. Apportionment of Rent.[2]

proviso enabling the lessor to re-enter, or (if the lease be for years) making the term to cease without entry, on the payment being delayed beyond a fixed period.

Rent may be made payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter. *Lee v. Smith*, 9 Ex. 665.

If the first quarter be payable in advance, the inference is that the subsequent rent is to be paid in the same way. *Hopkins v. Helmere*, 3 Nev. & P. 452.

If, by a written agreement, A. agrees to let, and B. to take a messuage from a day past, for a term of ten years, "at and under the rent of 80*l.*," this is an agreement by B. to pay a rent of 80*l.*; and, therefore, if there be a power of re-entry in case of a breach of any of the agreements therein contained, A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent. *Doe d. Rains v. Kneller*, 4 C. & P. 3.

The landlord's agent having received a bill of exchange for rent in arrear indorsed it over, paid the amount to the landlord, and credited the tenant as if he had received money. The bill was dishonoured, and the landlord distrained. It was held to be a question for the jury whether the nature of the transaction was a discount of the bill by the agent for the tenant, or a mere advance of rent by the agent to the landlord, in which latter case he was entitled to distrain. *Parrot v. Anderson*, 7 Ex. 93. *Griffiths v. Chichester*, id. 95.

[1] Where a lessor suffers a tenant to continue in possession after the expiration of the tenancy, and receives rent, it creates a new holding (*Roe d. Jordan v. Ward*, 1 H. Black. 99) on the former terms. *Digby v. Atkinson*, 4 Camp. 275.

A notice by the assignees of a mortgage to the tenant in possession of the transfer of the mortgage to them, and requiring him to pay them the future rents, operates as a demise from year to year, and the assignees cannot enter upon such tenant without giving him a regular notice to quit. *Brown v. Storey*, 1 Man. & G. 116; S. C. 1 Scott, 419. *See* Attornment, vol. ii. p. 63.

[2] The lessee's liability to pay rent according to his covenant or agreement may be destroyed, abridged, or altered, either by act of the parties or by act of law; first, where the reversion of the lessor becomes severed by alienation or death, and so passes to different persons; secondly, where the tenant's interest in part of the estate is destroyed, and the rent is payable only in respect of the residue; thirdly, where the interest of the lessee expires before his rent becomes due; and, fourthly, where the lessor dies before the rent becomes due, but the lessee's interest does not thereby expire.

As the rent is incident to the reversion, whenever the reversion is severed, either by act of the parties or by act of law, the rent shall be apportioned. Thus, where the lessor grants part of his reversion to a stranger, the rent shall be apportioned (Co. Litt. 148); and so where a man leases for years freehold, and also copyhold lands, the reversion of the freehold lands to a stranger, the rent shall be apportioned as issuing out of the entire land, copyhold as well as freehold. But since the rent will, in the case of alienation, be apportionable solely because it is incident to the reversion, it follows only upon alienation by the lessor; for although the lessee alien the whole or part of his estates, he will still remain liable for the whole of the rent.

Rent is apportionable where the lessee's interest in part of the thing demised is extinguished by the act of the parties, by act of law, or by act of God. Thus, if the tenant surrender a portion of the estate to the lessor, the rent shall be apportioned and payable only in respect of the residue.

If the lessor enter upon a part of the tenant's land for a forfeiture, or recover part of the lands in an action of waste, the rent shall be apportioned *pro tanto;* but if the lord enter wrongfully upon part of the land, and evict the tenants, the rent is suspended for the whole, and no apportionment shall be made. Co. Litt. 148, b. It seems that where part of the land is lost to the lessee by the act of God, he may insist that the rent be apportioned; as, if the sea break in and overflow a part of the land, the rent shall be apportioned, for though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there: for which reason a distinction is made between the sea and fresh water; because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and consequently the rent shall not be apportioned. 1 Roll. Abr. 236. Rent being thus apportionable in respect of the land out of which it springs, the next question is, whether it be apportionable in respect of time? In considering which it is to be observed, that though the rent is demandable at sunset of the day upon which it is reserved (Co. Litt. 202); or may be voluntarily paid by the tenant at any time during that day (10 Rep. 127, b), yet as, in strictness, the tenant has all the day to pay it, it is not due and recoverable till midnight. 1 Saund. 287. If, therefore, one lease lands for years, reserving rent yearly, and at the end of three quarters be evicted, the lessor shall not have rent, for the rent shall not be apportioned in respect of time, *annua nec debitum, judex non separat.*

Where the lessor, being tenant in fee or in tail, dies after the rent has become due, it will be payable to his executor; if he died

V. Grant of.[1]

before it became due, it went to the heir or remainderman; but by 11 Geo. 2, c. 19, s. 15, any executors of a tenant for life were entitled to a proportionate part of the rent of the current quarter in which their testator died. And by 4 & 5 Wm. 4, c, 22, s. 1, the benefit of the enactment was extended to other instances where the landlord's interest determined by his death, although he was not strictly tenant for life. And by sect. 2 of the last-mentioned act it is provided, that "all rents-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner, that on the death of any person interested in any such rents, &c., or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, &c. being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, &c., when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted so for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity." By sect. 3 these provisions shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description. See *Re Chilow's Estates*, 3 K. & J. 689.

By sect. 86 of the Tithe-Commutation Act (6 & 7 Wm. 4, c. 71) these provisions are extended to rent-charges under that act; and by sect. 50 of the Copyhold Enfranchisement Act (4 & 5 Vic. c. 35), to rent-charges under that act.

The Inclosure Commissioners are empowered to apportion rents of every kind, on the application of any person interested in the lands and in the rent. 17 & 18 Vic. c. 97, ss. 10–14.

Rent-service being incident to the reversion, always follows such reversion, which gave rise to the rent being sometimes lost when the reversion was destroyed. See *Webb v. Russell*, 3 T. R 393. To obviate this inconvenience, the 8 & 9 Vic. c. 106, s. 9, enacts, that when the reversion expectant on a lease, made either before or after the passing of the act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merge the estate, which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease. And by 22 & 23 Vic. c. 35, s. 10, the release from a rent-charge of part of the hereditaments charged therewith, shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release.

With regard to the manner of apportionment, this is properly the business of a jury, who, upon the evidence offered, are to judge of the real value of the land remaining in the tenant's hands, and not with regard to the quantity of it. *Bliss v. Collins*, 4 B. & A. 876. This may be done upon a plea of never indebted, pleaded by the tenant, or the tenant may in his pleading set forth the value of the land purchased by the lessor, &c., and that the rent ought to be apportionably abated. Vent. 276. If the lessor in such case distrain for a portion of the rent, according to the quantity of the land, and the jury apportion the rent at a less sum, yet he shall recover what in justice he ought to have, without being put to the expense of a fresh suit. 2 Inst. 503; Roll. Abr. 237; 5 T. R. 248.

[1] A rent may be granted without the reversion. *Goodman v. Packer*, T. Jones, 1.

VI. Limitation of Action for Rent.[1]

REPAIR. *See* Covenant, vol. iii. p. 478; Landlord and Tenant, vol. v. p. 305 ; Lease, id. p. 348.

REPLEADER. *See* also *Non obstante Veredicto*, vol. v. p. 543.

I. When Granted.[2] II. Costs of.[3]

A rent may be granted to one for life ; remainder in tail, with remainder over. *Smith v. Farmby*, Carter, 52, 53. A rent, properly so called, may be reserved on a lease derived out of a power. T. Jones, 25. A rent in fee-simple may be granted by way of charge upon a use to commence at a future time. *Gilbertson v. Richards*, 28 L. J. Ex. 158; in error, 24 Jur. 672.

[1] By the Statute of Limitations (3 & 4 Wm. 4, c. 27, s. 42) "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment thereof in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." By the interpretation clause, "rent" is to extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions) belonging to a spiritual or eleemosynary corporation sole. (Sect. 1.) *See* Limitations, Statute of, vol. v. p. 392.

[2] When issue is joined upon an immaterial point which does not determine the right in litigation, the court cannot give judgment. A repleader is then awarded ; that is, the court may order the parties to plead *de novo*, for the purpose of obtaining an apt and decisive issue (Steph. Pl. 109), beginning at the first fault which occasioned the immaterial issue. Bac. Abr. Pleas, M. 1 ; Carth. 371; 2 Mod. 137; Cro. Eliz. 883; 2 Lev. 32; Bac. Abr. Pleas, M. 2. It arises where a material allegation in the pleadings is not traversed, but an issue is taken on some averment that will not determine the merits of the cause, and the court is at a loss for which of the parties it ought to give judgment (Gilb. H. C. P. 127 ; 1 Lev. 32); as where, in debt on bond conditioned for the payment of 105*l*., the defendant pleaded payment of 100*l*. according to the form and effect of the condition : the plaintiff replied that he did not pay 105*l*. ; and there was a verdict that he did not pay the 105*l*. This was holden to be an immaterial issue, not aided by the verdict, for the plaintiff did not traverse the same payment that was alleged in the defendant's plea. Cro. Jac. 585. *See* 1 Roll. Rep. 86. So, in debt on bond against an executor, the issue joined was, whether the defendant had assets on the 30th of November, the day on which he had notice of the plaintiff's writs ; and it was found for the defendant that he had then no assets ; but this being deemed an immaterial issue (for though he had no assets then, yet if he had any afterwards, he was liable to the plaintiff's action), a repleader was awarded. 2 Mod. 139 ; 1 Lev. 164.

A repleader cannot be awarded after a default at *nisi prius*, or after a demurrer or writ of error, but only after issue joined (*Staples v. Heydon*, 6 Mod. 1. *Witts v. Polehampton*, 3 Salk. 306), and after trial (2 Saund. 319, b); nor where the court can give judgment on the whole record. *Parnham v. Pacey*, Willes, 532. A repleader will not, therefore, be granted, but judgment *non obstante veredicto* given, if one of several issues be immaterial ; and be found for the defendant if the others are material and decisive of the whole cause of action, and are found for the plaintiff, although there is no confession or proof of the plaintiff's cause of action. *Negelen v. Mitchell*, 7 Mee. & W. 612. And a repleader will not be granted in favour of the party who made the first fault in pleading, where the immaterial issue is found against such party. *Gordon v. Ellis*, 2 D. & L. 308. *Webster v. Bannister*, Dougl. 396. *Kempe v. Crews*, 1 Ld. Raym. 170. *Taylor v. Whitehead*, Dougl. 747. But see *Goodburne v. Bowman*, 9 Bing. 532. *Tryon v. Carter*, 2 Stra. 994. A court of error may award a repleader. Reg. Gen. (Pl.) H. T. 1853, r. 24.

If a plea be defective, and the defendant succeed at the trial thereon, the question whether the plaintiff can have judgment *non obstante veredicto*, or whether there ought to be a repleader, depends on whether the plea contains a confession of the plaintiff's cause of action. If the plaintiff's cause of action is confessed by the plea, and the matter pleaded in avoidance is insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the cause of action is not confessed, there must be a repleader. *Atkinson v. Davies*, 11 Mee. & W. 236 ; 7 Dowl. N. S. 778. *Plumer v. Lee*, 2 Mee. & W. 495. *Michael v. Ellis*, 13 L. J. C. P. 179. *Lambert v. Taylor*, 4 B. & C. 152.

The denial of a repleader where it ought to be granted, or the granting of a repleader where it ought to be denied, is error. *Staples v. Heydon*, 6 Mod. 1 ; 2 Salk. 579.

[3] No costs are allowed to either party upon a repleader, because it is a judgment of the court upon the pleading, and both parties were in fault to suffer an immaterial or insufficient issue to be joined ; and, therefore, neither of them can have any claim to receive costs from the other. Hull. L. of C. 348. It has been held that the rule of H. T. 2 Wm. 4, r. 74, providing that the costs

REPLEVIN.[1]

I. What may be Replevied, p. 331.

II. Of the Proceedings in Replevin, p. 331.

(A) *Proceedings in the County Court, and of the Replevin Bond. See* County Courts, vol. iii. p. 410.

(B) *Removal of Replevin by Certiorari. See* id. p. 413.

(C) *Proceedings in the Superior Court*, p. 331.

(*a*) *Where Replevin commenced in Superior Court*, p. 331.

III. Of the Proceedings, &c. (*continued.*)

(*b*) *After Removal from County Court*, p. 331.

(1) *Rule to Appear*, p. 331.
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I. What may be Replevied.[2]

II. Of the Proceedings in Replevin.

(C) *Proceedings in the Superior Court.*

(*a*) *Where Replevin commenced in Superior Court.*[3]

(*b*) *After Removal from County Court.*

(1) *Rule to Appear.*[4] (2) *The Declaration.*[5] (3) *Pleadings.*[6]

of issues found for the defendant should be deducted from the plaintiff's costs, did not affect the practice as to costs upon a repleader, and there does not appear to be anything in the language of the Common-Law Procedure Act, 1852, or the present rule of court, providing that the costs of issues shall follow the finding, which would have any further operation in this respect than the former rule of court. Marshall on Costs, 178. See *Plummer v. Lee*, 2 Mee. & W. 495. *Anon.* 2 Vent. 196. *Noble v. Lancaster*, Barnes, 125.

[1] *See* Gilbert on Replevin; Wilkinson, id.; Bradby on Distresses; Bullen, id.

[2] A replevy is a delivery to the owner by the sheriff of his cattle or goods distrained upon for any cause, upon security that he will pursue the action against the party that took them. Bac. Abr. Replevin, A. In practice this remedy is principally confined to cases of distress for rent, but replevin lies generally when goods have been unlawfully taken, though not as a distress. *Mellor v. Leather*, 1 E. & B. 619. *Allen v. Sharp*, 2 Ex. 352. But it seems that no replevy can be made where the seizure is for a duty due to the Crown (*Rex v. Oliver*, Bunb. 14); or where goods are taken in execution on a judgment of one of the superior courts (Gilb. Replevin, 138); or of an inferior court; or by virtue of a magistrate's warrant issued under the authority of a statute (*Rex v. Monkhouse*, 2 Stra. 1184. *Wilson v. Weller*, 1 B. & B. 57), though it lies for goods taken under a warrant for poor-rates (*Gay v. Mathews*, 32 L. J. M. C. 58), or where the seizure is made out of the jurisdiction of the local court (*Milward v. Caffin*, 2 W. Black. 1330); or the magistrate acts without jurisdiction. *Pritchard v. Stephens*, 6 T. R. 522. *See* also *Jones v. Johnson*, 5 Ex. 862.

[3] By 19 & 20 Vic. c. 108, s. 65, an action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court he shall, at the time of replevying, give security to be approved of by the registrar [of the county court] conditioned to commence an action of replevin against the distrainor, in such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect. *See*, as to the form and condition of the bond, County Courts, vol. iii. p. 411.

[4] If the plaint be removed by the plaintiff (who in the action of replevin is always the owner of the goods), he must serve the defendant, whether it be in term or vacation, with a four-day rule to appear. Reg. Gen. (Pr.) H. T. 1853, r. 115.

[5] If the plaint be removed by the defendant, the plaintiff must, on the return of the *certiorari*, declare within the ordinary time thereafter required by the course of the court's for a declaration after appearance. If removed by the plaintiff, he must declare within the ordinary time after the appearance is entered.

The venue is local, and no other cause of action can be joined with replevin. C. L. P. Act, 1852, s. 41. In such an action against a constable there is no necessity for a notice of action or demand of warrant. 7 L. T. (N. S.) 504.

[6] The defendant may plead the general issue, *non cepit*, or confessing the taking; he may justify that it was lawful as a distress, or otherwise. If the distress so alleged was made in his own right, it is called an avowry; if as the servant of another, it is called a cognisance.

The date when the rent became due must be stated truly in the avowry. *Roskenge v. Caddy*, 7 Ex. 840. The plaintiff pleads in bar to the avowry or recognisance. He

cannot, it would appear, put all the facts in issue by a general traverse.

In *Trent v. Hunt* (9 Ex. 14) the plaintiff pleaded to a cognisance of a distress for rent, that he denied the allegations therein contained. *Baron Alderson*, delivering the judgment of the court, said, that "had an application been made to a judge under the Common-Law Procedure Act, he most probably would have compelled the plaintiff to traverse separately, the tenancy and the rent being in arrear, and would not have allowed him to mix the denial of these allegations with that of the authority to distrain in one general traverse."

By the C. L. P. Act, 1860, s. 23, the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions." By sect. 24, "such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond."

Previous to the above enactment, if the defendant avowed or made cognisance for rent, the plaintiff might obtain an order for staying proceedings, on payment of the rent admitted to be due, and costs. 2 Chit. Arch. by Prentice, 1081.

The defendant replies to the plea. The pleadings are thus thrown into a reversed order from that in which they stand in an ordinary action. The practice generally with respect to the proceedings in ordinary actions applies to the action of replevin; the issue is made up, and the cause taken down to trial in the usual way.

[1] Judgment for the plaintiff in replevin is for damages and costs; for the defendant, the judgment at common law, either upon a *non pros.* or upon a verdict on an avowry or cognisance (*Butcher v. Porter*, 1 Show. 400), was for a return of the goods and chattels distrained, and this the defendant may still take, and issue thereupon a writ of *retorno habendo*. Where the judgment is for the defendant on an issue traversing the taking of the goods, the judgment is for a return irreplevisable, and for damages and costs. (2 Lill. Reg. 457.)

By the 17 Car. 2, c. 7, s. 2, where there is judgment of nonsuit before issue joined in a cause where the distress is for rent, the defendant may make a suggestion in the nature of an avowry or cognisance for such rent, and the court, upon his prayer, will award a writ to the sheriff of the county where the distress was taken to inquire by a a jury touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained, fifteen days' notice being given to the plaintiff, or his attorney, of the setting of such inquiry. Upon the return of the inquisition, the defendant has judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value; and in case they do not, then so much as the value of the goods and cattle so distrained shall amount unto, together with his full costs of suit, and shall have execution thereupon by *fi. fa.* or *elegit*, or otherwise, as the law shall require. The expression, "full costs," does not include the costs of the distress, and it does not entitle the defendant to more than costs as between party and party. *Jamieson v. Trevelyan*, 24 L. J. Ex. 74. Besides the Statute of Charles, the 21 Hen. 8, c. 19, s. 3, gives to the defendant avowing or making cognisance for "rents, customs, services, or for damage feasant or other rent or rents," his damages and costs, in case the plaintiff shall be nonsuit or otherwise barred. And the defendant in such case is entitled to a writ of inquiry to assess the damages. *See* 4 Jac. 1, c. 3; 8 & 9 Wm. 3, c. 11; 3 & 4 Wm. 4, c. 43, s. 34.

Where a writ of inquiry has been executed under the statute of Charles, and the value of the distress is not found to be the full value of the arrears distrained for, "the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the said arrears." 17 Car. 2, c. 7, s. 4.

[2] After judgment of *non pros.*, nonsuit, or other judgment for default, the defendant, if he wish again to replevy, can do so only by "a writ of second deliverance," upon which the proceedings commence *de novo*. And this he can do only once. 13 Edw. 1, c. 2. This writ stays the execution of the writ *de retorno habendo*, sued out by the defendant in replevin, after judgment in his favour, but not the writ of inquiry to ascertain his damages sued out under the statute 21 Hen. 8, c. 19. *Pratt v. Rutledge*, 1 Salk. 95. It does not at all apply where the distress is for rent, and the defendant proceeds under the statute of Charles.

[3] As in ordinary cases where a plaintiff has judgment for damages and costs, the execution is by *fi. fa.*, *ca. sa.*, or *elegit*. If the defendant has judgment under the 17 Car. 2, c. 7, to recover the arrears of rent or value of the distress, he has execution by *fi. fa.*, *ca. sa.*, or *elegit*. But when he has judgment at common law, he has execution by a writ *de retorno habendo* for a return of the goods, and also a *fi. fa.*, or *ca. sa.* for his costs, and if under the stat. 21 Hen. 8, c. 19, for his damages as well as costs; and in such case, the writ *de retorno habendo* and the *fi. fa.* or *ca. sa.* may, it seems, be included in one writ.

The sheriff is not bound to execute a writ *de retorno habendo* unless some person attend for the defendant to point out the goods. 2 Saund. 74, b, c. If the goods be conveyed to places unknown, so that he cannot execute the writ, the sheriff returns that the goods are "eloigned." The defendant

III. Replevin Bonds.[1]

IV. Proceedings against the Registrar for taking Insufficient Sureties.[2]

REPLICATION.

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VI. Replication on Equitable Grounds. *See* Equitable Pleas and Replications, vol. iv. p. 242.

I. Time for Replying, and Notice to Reply.[3]

may, upon this return, sue out a *capias in withernam*, requiring the sheriff to take the goods of the plaintiff, to the value of the goods eloigned, to be delivered to the defendant, and kept by him until the plaintiff shall deliver to him the goods originally replevied. *Anon.* 2 Leon. 174.

[1] The bonds now required are of two kinds. The one, under s. 65, 19 & 20 Vic. c. 108, conditioned to bring the action of replevin in one of the superior courts; the other, under s. 66, conditioned to bring the action in the county court. Also, by s. 67, a bond is to be given by a defendant upon removal of an action of replevin from a county court by *certiorari*, conditioned to defend the action, which is to be approved of by the master of the court. *See* form, vol. iii. p. 411.

By sect. 70, all such bonds are given to the other party in the action or proceeding. When the sheriff granted replevin, the bond was given to the sheriff, and not to the party; and if it became necessary to put the bonds in suit, the sheriff assigned the bond to the other party to the replevin, under the stat. 11 Geo. 2, c. 19, s. 23. The registrar of the county court is now no party to the bond, and no assignment is necessary. It may be put in suit by the one party against the other.

By sect. 70 of the act, the court in which any action on the bond shall be brought may, by rule or order, give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond.

The defendant in an action on the bond may plead *non est factum*, or traverse the breaches assigned (*Axford v. Perrell*, 4 Bing. 586. *Perreau v. Bevan*, 5 B. & C. 284); or that the defendant was ready to prosecute his action of replevin with effect and without delay, but was prevented by the plaintiff not appearing (*Harrison v. Wardle*, 5 B. & Adol. 146); or that the replevin suit is still pending and undetermined. *Brackenbury v. Pell*, 12 East, 585. *Ridez v. Edwards*, 3 Man. & G. 202. A replication traversing the latter plea must show how the suit is determined (*Brackenbury v. Pell, supra*); and in an action against a surety to the bond, it may be pleaded that the judgment in the replevin suit was obtained collusively between the plaintiff and the tenant, in fraud of the defendant. *Moore v. Bowmaker*, 7 Taunt. 97. The 8 & 9 Wm. 3, c. 2, s. 8, as to assigning breaches, does not extend to replevin bonds. *Middleton v. Brien*, 3 M. & S. 155.

[2] Before the 19 & 20 Vic. c. 108, the bond, we have seen, was taken by the sheriff, and it was his duty to approve of the sureties. An action was maintainable against him for a defect in the performance of this duty, where the sureties approved of by him were insufficient, and would have been rejected if he had used reasonable means for ascertaining their responsibility, and the defendant was damnified thereby. *Jeffery v. Bastard*, 4 Ad. & E. 823. *Plumer v. Briscoe*, 11 Q. B. 46; 17 L. J. Q. B. 158. *Scott v. Waithman*, 3 Stark. 168. The measure of damages in the action on the bond were the actual damage sustained, not exceeding the amount for which the sureties were responsible. *Evans v. Brander*, 2 H. Bl. 547. *Paul v. Goodluck*, 2 Bing. N. S. 220. *Baker v. Garratt*, 3 Bing. 59. *Jeffery v. Bastard, supra. Edmonds v. Challis*, 7 C. B. 413. *Plumer v. Briscoe, supra.* These duties being now transferred to the registrar of the county court, a similar action would, it seems, be maintainable against him for a like default or neglect. *See* 2 Chit. Arch. by Prentice, 1092. *Young v. Brompton, &c. Waterworks Co.* 31 L. J. Q. B. 14.

[3] There is no time limited for replying, rejoining, &c.; but if a year has elapsed since the last proceeding, a calendar month's notice of the intention to proceed must be given before replying, &c.

If either party, after plea, desires to urge his opponent to proceed in the cause, a notice to reply, rejoin, &c. within four days, otherwise judgment, may be delivered separately, or indorsed on any pleading to which the opposite party is required to reply, rejoin, &c. C. L. P. Act, 1852, s. 53. Time to reply may be obtained on summons in the same manner as further time to plead; the plaintiff is seldom put under terms of replying issuably. *Crutchley v. London and Birmingham Railway Co.* 2 D. & L. 102. If the plaintiff do not reply within the time mentioned in the notice, or specified in the order for time, the defendant may sign judgment of *non pros.* If, however, the replication be delivered before judgment is actually signed, although after the limited period, judgment cannot be signed. *See ante*, Pleas, p. 143.

II. The Plaintiff may by Leave Reply several Matters, or Reply and Demur.[1]

III. Form of Replication.[2]

(A) *The Replication must not depart from the Declaration.*[3]

[1] By C. L. P. Act, 1852, s. 81, the plaintiff in any action may, by leave of the court or a judge, plead in answer to the plea, or the subsequent pleading of the defendant, as many several matters as he shall think necessary to sustain his action, upon an affidavit of the party making such application, or his attorney, if required by the court or judge, to the effect that he is advised, and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact.

By sect. 82, either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact; and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law; and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of. *See* further Pleas, *ante*, p. 143.

A plaintiff was allowed to plead a special replication, together with a general traverse of the plea, though it did not raise a distinct defence, but enabled the defendant to raise the question in dispute by demurrer to the special replication. *Williams v. African Steam Co.* 1 H. & N. 19.

[2] The replication may either, first, conclude the defendant by matter of estoppel; or, secondly, may deny the truth of the matter alleged in the plea, either in whole or in part; or, thirdly, may confess and avoid the plea; or, fourthly, in the case of an evasive plea, may new assign the cause of action.

The qualities of a replication in a great measure resemble those of a plea; and are, first, that it must answer so much of the plea as it professes to answer, and that if bad in part it is bad for the whole; secondly, that it must be conformable to, and not depart from, the count; thirdly, that, like a plea, it should be certain, direct, and positive, and not argumentative, and also that it be triable; and, fourthly, that it must be single, unless the plaintiff has obtained leave to reply several matters. *See supra.*

The plaintiff may reply that he joins issue on the defendant's plea or pleas, specifying what or what part of them, and such form of joinder of issue is deemed a denial of the substance of the plea, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant. 15 & 16 Vic. c. 76, s. 79.

A plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations. (Id. sect. 77.)

The following forms of replication are prescribed by the Common-Law Procedure Act (Schedule) :—

Joinder of Issue.

The plaintiff takes issue upon the defendant's first, second, &c. pleas.

Replication containing New Matter.

The plaintiff, as to the second plea, says [*here state the answer to the plea, as in the following forms.*]

To Plea of Release.—That the alleged release was procured by the fraud of the defendant.

To Plea of Set-off.—That the alleged set-off did not accrue within six years before this suit.

To Self-defence.—That the plaintiff was possessed of land, whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do; and thereupon the plaintiff gently laid his hands on the defendant in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff.

To Right of Way.—That the occupiers of the said land did not, for twenty years next before this suit, enjoy as of right, without interruption, the alleged way.

The plaintiff was formerly, in some cases, at liberty to reply to a plea justifying or excusing the tort complained of, that the defendant committed the injury of his own wrong, and without any such cause as the defendant had alleged; this was called a replication *de injuriâ*, and put the whole matter of the plea in issue. (8 Co. 67.) In cases where that form of replication was applicable, the same object may now be attained by taking issue on the plea.

The issue, under the general form of traverse introduced by the Common-Law Procedure Act, does not include any matters which could not have been separately traversed before; it enables the party to put in issue collectively all the matters, any one of which he could previously have traversed separately. *Glover v. Dixon*, 9 Ex. 159. As to confession of plea, *see ante*, Puis darrein Continuance, Plea, p. 293.

[3] It is a fixed principle that the replication must not depart from the allegation in

IV. Delivery of.[1]

V. Of a New Assignment.[2] *See* vol. v. p. 536.

(A) *Form of.*[3]

REPUTED Ownership. *See* Bankruptcy, vol. ii. p. 223; Bill of Sale, id. 499, n.

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the declaration in any material matter, and that it must be conformable to the count; therefore, in a trespass for a wrongful taking and detaining in prison, if the defendant justify by process, &c., and the plaintiff reply that a *supersedeas* afterwards issued, after which the defendant detained him, it will be bad; for by his replication he does not maintain the wrongful taking, but the detention only. R. Cro. Eliz. 404; Com. Dig. Pleader, F. 6; Lutw. 1402.

A departure may be either in the substance of the action or defence, or the law on which it is founded (Co. Litt. 304; 2 Saund. 34, a); as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom or act of parliament. 4 T. R. 564; 2 Saund. 84, b.

Thus, where in *assumpsit* by an executor on several promises, which were all said to have been made to the testator, to which the defendant pleaded the Statute of Limitations, and the plaintiff replied a subsequent promise to himself, the replication was held to be a departure, and therefore bad. 2 Saund. 63, g; 84, c.; Willes, 29; 1 Salk. 28; 6 Mod. 309; 2 Stra. 890; 3 East, 409. *See* 4 T. R. 504; Willes, 27; Hardw. 41. But matter which maintains and fortifies the count is not a departure; as, if the plaintiff declared on a lease generally, or the defendant plead *nil habet in tenementis*, if the plaintiff reply that the lease was by indenture, it is no departure. 1 Leon. 156; 3 id. 203. So, if the plaintiff in his declaration show a charter for discharge of toll, and the plaintiff plead a resumption of all the liberties by statute, the plaintiff may reply that they are revived by a subsequent statute, and it will be no departure. R. Cro. Car. 257; Yelv. 13; *see* Cro. Car. 256; 1 Salk. 21.

A replication upon equitable grounds that a stipulation in a deed declared upon, the performance of which was traversed in the plea, was waived by parol, was held bad, as being a departure from the declaration. *Thames Iron-Works Co. v. Royal Mail Steam-Packet Co.* 31 L. J. C. P. 169.

[1] The mere joinder or taking of issue need not be delivered separately, but may be made and delivered as part of the issue. A replication containing new matter should be engrossed on plain paper, and delivered, like other pleadings, before seven in the evening. If the plaintiff has been ruled to reply he must deliver the replication separately, although it may be only the joinder of issue; otherwise the defendant may sign judgment of *non pros.* *Hollis v. Buckingham*, 3 D. & R. 1.

[2] By the C. L. P. Act, 1852, s. 87, one new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars delivered in the action (if any), and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both. By sect. 88, no plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits.

If the plaintiff has two causes of action, as to one of which the defendant has an answer, and the defendant treat the cause of action declared upon as the one to which he has such answer, the plaintiff should, in general, new assign. And if the defendant plead a justification, and the plaintiff rely upon excess, he should either new assign solely, or deny the justification, and also new assign.

A new assignment is as necessary since the Common-Law Procedure Act as it was before that statute.

Where to a declaration for a trespass the defendant pleaded a justification under a prescriptive right to enter a close and dig sand, alleging that the trespass was committed in exercise of that right, and the plaintiff joined issue upon the plea, it was held that the plea was proved by evidence of the exercise of the right, although at the time of the trespass the defendant did not exercise it, and that the plaintiff ought to have new assigned. *Glover v. Dixon*, 9 Ex. 158.

[3] *Form of New Assignment.*

[Prescribed 15 & 16 Vic. c. 76, sch.]

[*To pleas of right of way and right of common.*] The plaintiff, as to the and pleas, says, that he sues not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also on other parts of the said land, and on other occasions and for other purposes than those referred to in the said pleas.

[*If the plaintiff replies and new assigns, the new assignment may be as follows:*—]

And the plaintiff, as to the and pleas, further says, that he sues not only for the trespasses in those pleas admitted, but also for, &c.

REQUESTS, Courts of.[1]

RES accessoria sequitur rem principalem. *The accessory follows the principal.* *See* vol. i. p. 82.

RES inter alios acta alteri nocere non debet. Wing. 327. *A transaction between other parties ought not to operate disadvantageously to a third.* *See* Estoppel, vol. iv. p. 280. Best on Ev. 378.

RES judicate pro veritate accipitur. D. 50, 17, 207. *An adjudication is accepted for truth.* A maxim qualified by the doctrine which in general restricts the binding effect of judgments to the parties to the suit and their privies; and further, even as between them, to matters immediately in contest in the suit. *See* Estoppel, vol. iv. p. 283. *See* Best on Ev. 41, s. 44.

RESCUE of Goods taken as a Distress. *See* Distress, vol. iv. p. 117.

of Prisoner. *See* Escape, id. p. 263.

RESIDENCE. *See* Address, vol. i. p. 161; County Courts, vol. iii. p. 355, n.

RESIGNATION Bond.[2]

RESPONDEAT Ouster. *See* Abatement, vol. i. p. 40.

Superior. 4 Inst. 414. *Let the principal answer.* *See* Master and Servant, vol. v. p. 465; Negligence, id. p. 518.

[*If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows:*—]

And the plaintiff, as to the and pleas, further says, that he sues not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses in the pleas [*the pleas replied to*] admitted, and also for, &c.

A new assignment is in the nature of a new declaration, and notice to plead to it should be given in the same manner as to the original declaration.

[1] Courts of requests were small-debt courts of local jurisdiction, established in different places by act of parliament, but which are now superseded by the county courts. See 9 & 10 Vic. c. 95, s. 5. *Reg. v. Dyer*, 13 Q. B. 851.

[2] With respect to general resignation bonds, or bonds conditioned to resign at the request of the patron, without expressing the object for which such resignation is intended, it may be observed, that a long train of decisions had established that such bonds were legal, because it was possible that they might have been taken with an honest intent; as for the purpose of providing for a son, or enforcing residence, or good behaviour—conditions which might rather argue care in the patron than any corruption of simony. Whilst, however, the courts of common law held these bonds to be valid, the courts of equity took care that an improper use should not be made of them; and whenever the patron put such bond in suit for an illegal purpose, to discharge himself from a claim of tithe, or the like purpose, injunctions were granted to stay proceedings in the action of the bond.

Notwithstanding the long series of decisions, the question as to the validity of a general resignation bond was, in the year 1781, again agitated, in the case of *Ffytche v. Bishop of London;* and although the Courts of Common Pleas and King's Bench (1 East, 487), as the case came respectively before them, considered themselves as bound by the current of authorities, decided in favour of the bond; yet, upon a writ of error being brought in parliament, their judgment was reversed, contrary to the opinions of all the judges, except Eyre, C. B. *See* also *Fletcher v. Sondes*, 3 Bing. 598; 1 Bligh, 144. Two acts of parliament, however, have been passed legalising certain bonds of this description, namely, 7 & 8 Geo. 4, c. 25, and 9 Geo. 4, c. 94; by the latter of which, the patron of an advowson, which is his private property, is empowered to present any clerk under a previous agreement with him for his resignation in favour of any one person named, or in favour of one of two persons, each of them being by blood or marriage an uncle, son, grandson, brother, nephew, or grandnephew, of the patron, or one of the patrons beneficially entitled. (Sect. 4.) *See* Advowson, vol. i. p. 224.

RESPONDENTIA.[1]

RESTITUTION of Distress. *See* Replevin, *ante*, p. 331.

of Stolen Property. *See* Larceny, vol. v. p. 334.

RETAINER. Of Attorney, *see* vol. ii. p. 36; of Counsel, *see* id. p. 378.

RETRAXIT.[2]

REVENUE. *See* also Conviction, vol. iii. p. 217; Customs and Excise, id. p. 542; Income-Tax, vol. v. p. 103; *post*, Smuggling; Stamps; Succession Duty; Taxes.

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I. Jurisdiction of Court of Exchequer in Revenue Matters.[3]

II. Proceedings in Suits and Informations relating to the Revenue.[4]

(A) *The Information.*[5]

[1] *Respondentia*, or, as it is more commonly called, "a bottomry bond," is the instrument by which the master of a ship hypothecates the ship, freight, or cargo, in consideration of money advanced for the necessities of the ship. *See post*, Ship and Shipping.

[2] A *retraxit* is very similar to a *nolle prosequi* to the whole declaration, excepting that the former is a bar to any future action for the same cause; the latter is not. The former is also made in person in open court, when the trial is called on; the latter is made by a mere entry on the roll out of court. It is now obsolete.

[3] The Court of Exchequer has a peculiar jurisdiction in suits relating to the revenue of the Crown. If such an action be brought in the Queen's Bench or the Common Pleas, the Court of Exchequer, upon the motion of the attorney-general, without affidavit, will remove the cause into that court. *Adams v. Fremantle*, 2 Ex. 453. *Smith v. Cameron*, 9 Jur. 405.

The equity jurisdiction of the Court of Exchequer, as a court of revenue, is not taken away by 5 Vic. c. 5. *Attorney-General v. Halling*, 15 Mee. & W. 687; 16 L. J. Ex. 303. *Att.-Gen. v. Evans*, 5 L. T. (N. S.) 760. The court is always sitting to hear revenue matters, and a motion on the revenue side may therefore be made in the vacation sittings. *Reg. v. Morse*, 3 Ex. 223; 6 D. & L. 224.

[4] The proceedings in suits and informations, and other matters on the revenue side of the Court of Exchequer, are now regulated by the stat. 22 & 23 Vic. c. 21, intituled "An Act to Regulate the Office of Queen's Remembrancer, and to Amend the Practice and Procedure on the Revenue Side of the Court of Exchequer;" and by certain rules and orders (Reg. Gen. Ex. 24 Vic. *See* 6 H. & N. 1), made pursuant thereto.

[5] By Reg. Gen. 24 Vic. (Exchequer revenue side, 6 H. & N. 1), r. 40, "in all cases the information, when filed, is to be on parchment, and (if not filed before) is to be filed when judgment is signed; and on the information is to be indorsed the day the process issued, applicable to such information, by the solicitor of the department, or by the attorney filing the same; but in any case, if judgment be entered for the defendant, and the information be not filed, the copy delivered to the defendant may be filed in lieu of the original information."

By rule 41, "all informations shall be delivered or filed, as the case may be, within twelve calendar months after the service or execution of the process for the purpose for which the same issued, and if not, the Crown

(B) *Pleadings.*[1]

(C) *Statement of, and Proceedings upon Special Case.*[2]

(D) *Power of Amendment.*[3]

shall, unless otherwise ordered by the court or a judge, be deemed out of court; but in any case where a defendant shall be in custody, either on *capias* or attachment, for not appearing, the information, if not before filed, shall be filed, and service thereof made within six weeks after the defendant shall have been arrested, otherwise defendant shall be at liberty to apply to a judge for his discharge, but notice of such application must be given to the solicitor of the department issuing the writ.

It has been questioned whether it is necessary to state the value in an information for offering a country bank-note to an excise officer by way of bribe. *Reg. v. Gamble*, 16 Mee. & W. 384; 16 L. J. M. C. 149.

An information under the Customs Acts charged, in the first three counts, four defendants, with several offences on several days; in the fourth, fifth, sixth, and seventh counts, it charged four of those defendants, together with four others, with similar offences on other days. A verdict having been found for the Crown against different defendants on different counts, the attorney-general entered a *nolle prosequi* as to all the counts, except the fourth, upon which six of the defendants were convicted and two acquitted, and judgment was entered up for the penalty and costs against each defendant accordingly; it was held, upon writ of error, that the judgment was not erroneous. *Ruck and others v. Att.-Gen.* 3 H. & N. 208.

An information in the disjunctive is bad. *Rex v. Morley*, 1 Y. & J. 221. It must be certain in describing the act committed or omitted to be done. *Attorney-General v. Dyer*, 2 C. & M. 664.

Goods prohibited from being imported by reason of the place from which they are brought, are properly described as uncustomed goods. *Attorney-General v. Greaves*, 2 C., M. & R. 669; 1 Tyr. & G. 48.

In an information under 21 Geo. 3, c. 37, the number of articles seized is material. *Attorney-General v. Jefferys*, 1 M'Clell. 270.

It is no variance on an information for offering bribes, that the custom-house officer's name was misstated, it being the name he was usually called by. *Attorney-General v. Hawkes*, 1 C. & J. 121; 1 Tyr. 3.

By Reg. Gen. 26 Nov. 1861, no common information of seizure or writ of delivery need be signed by a judge.

[1] No pleadings on the revenue side of the Court of Exchequer shall be deemed insufficient for any imperfection, omission, defect in or lack of form, or formal commencement and conclusion, or for the want or omission of an averment of any matter unnecessary to be proved. 22 & 23 Vic. c. 21, s. 22.

A demurrer to a plea to an information is not within the rule requiring matters of law to be stated in the margin, but it must be signed by the attorney-general before it is delivered. *Rex v. Woollet*, 3 Dowl. 694. An application must be made to the attorney-general to reply before a rule will be granted for that purpose. *Rex v. Slee*, 1 M. & Y. 361.

[2] By 22 & 23 Vic. c. 21, s. 10, "in any suit or proceeding on the revenue side of the Court of Exchequer the parties may, at any time before judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the court, without pleadings, and upon judgment thereon error may be brought as on a judgment on a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the court of error shall, as nearly as may be, be the same as in the case of a special verdict, and the court of error shall either affirm the judgment or give the same judgment as ought to have been given in the court in which it was originally decided, the said court of error being required to draw any inference of fact from the facts stated in such special case which the court below ought to have drawn."

By sect. 11, "in case no agreement shall be entered into as to the costs of such special case and proceedings, the costs shall follow the event, and be recovered by the successful party. Four days' notice of appeal must be given to the opposition party or attorney, and the proper officer of the court. (Sect. 14.)

By sect. 15, "in any proceeding in the Court of Exchequer, by writ of summons under the Succession-Duty Act, 1853, or by rule under any of the Legacy-Duty Acts, the court may refer the matter to the proper officer to report thereon, and may, if they deem it expedient, order the facts contained in such report to be stated in the form of a special case for the opinion of the court, and may give such directions as to the mode of settling the case and the matters to be contained therein, and for the production of such documents, and may direct any issue or issues of fact to be tried by a jury, as they may think proper, and the court may proceed to give judgment on such case, and for amount of duty the court are of opinion may be due to the Crown, and for costs, in like manner as on a verdict on information; and on such judgment error may be brought, and judgment given, as on a special case stated by consent."

[3] By 22 & 23 Vic. c. 21, s. 9, it is enacted, that "section 222 of the Common-Law Procedure Act, 1852, 'for the Amendment of Defects and Errors in any Proceeding in Civil Causes, and Concerning the Costs and Terms of such Amendment,' shall extend to all suits and proceedings on the revenue side of the Court of Exchequer." *See* Amendment, vol. i. p. 324.

(E) *Examination of Witnesses upon Interrogatories, &c.*[1]

(F) *Of the Trial.*[2]

(G) *Trial of Information.*[3] (H) *Error.*[4]

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[1] By 22 & 23 Vic. c. 21, s. 16, all the powers, authorities, and provisions contained in an act (1 Wm. 4, c. 22, intituled "An Act to enable Courts of Law to Order the Examination of Witnesses upon Interrogatories," and of the Act 13 Geo. 3, recited therein, as to the examination of witnesses within and out of the jurisdiction of the superior courts of common law at Westminster, and as to the attendance of witnesses, production of documents, costs thereof, and other matters relating to such examinations, and all the powers, authorities, and provisions contained in the 46th, 47th, 48th, and 49th sects. of the Common-Law Procedure Act, 1854, are hereby extended to all suits and proceedings on the revenue side of the Court of Exchequer; and if upon any examination under this enactment, any person wilfully and corruptly give any false evidence, he shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county where such evidence is given, or in the county of Middlesex if the evidence be given out of England. *See* 15 Mee. & W. 60; 15 L. J. Ex. 155; 2 D. & L. 690.

[2] By 22 & 23 Vic. c. 21, s. 17, "from and after the passing of this act it shall be lawful for all justices of assize, and they are hereby authorised and empowered, on their respective circuits, to try suits and proceedings pending on the revenue side of the Court of Exchequer, and to proceed thereon in like manner as they can or may do in respect of causes pending on the plea side of the said court, and it shall not thereafter be necessary to issue any commission from the revenue side of the said court for that purpose."

[3] The postponement of the trial of an information on proper grounds is not to be considered as a matter of favour. *Attorney-General v. Gatcliffe*, 12 Price, 367. Affidavit to postpone trial of information on ground of absence of a material witness must state where he is. *Same v. Phillips*, 1 M'Clell. 251; 13 Price, 522.

Where notice of trial was given in Trinity Term, 1838, but afterwards countermanded, the court discharged a rule obtained by the defendants in Hilary Term, 1842, to set down the cause for trial after Easter Term. *Reg. v. Ray*, 9 Mee. & W. 760.

Either party may tender a bill of exceptions on the trial of any issues arising on the revenue side of the court, and the like proceedings may be had and taken thereon as in such cases between subject and subject. 22 & 23 Vic. c. 21, s. 20.

The rule of public policy which prevents a witness being asked such questions as will disclose the informer, if he be a third person, applies equally to questions which will disclose whether or not the witness himself was the informer. *Attorney-General v. Briant*, 15 Mee. & W. 169; 15 L. J. Ex. 265.

It seems that the defendant is not rendered a competent witness by the 14 & 15 Vic. c. 99. *Attorney-General v. Radlop*, 10 Ex. 84; 23 L. J. Ex. 240; 18 Jur. 555.

Under 6 Geo. 4, c. 108, merely hiring the ship does not make such party liable. *Attorney-General v. Kennifeck*, 2 Mee. & W. 715. A defendant, by allowing a particular course to be pursued in his factory as to duties to be paid, may be estopped from disputing such mode. *Attorney-General v. Pemberton*, 1 M'Clell. 634. Goods being seised in the possession of a master of a vessel employed by the defendant, is sufficient evidence of the master's agency to make the defendant liable. *Attorney-General v. Tomsett*, 2 C., M. & R. 170; 5 Tyr. 514.

The officer of the queen's remembrancer is bound to produce an affidavit filed in the office. *Attorney-General v. Bond*, 9 C. & P. 189. Harbouring goods is not shown by the mere receipt of goods which, from the quantities in which they were packed and unpacked, were expressly prohibited. *Attorney-General v. Key*, 1 C. & J. 159; in error, 2 id. 2. *Same v. Bell*, 1 Tyr. 52.

Where the penalty is to be double the sum for which the party is deficient, the finding of the jury is to be taken as the single amount. *Attorney-General v. Hatton*, 1 M'Clell. 214.

[4] By 22 & 23 Vic. c. 21, s. 18, "no judgment in any cause on the revenue side of the Exchequer shall be reversed or avoided for any error or defect therein, unless error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record: Provided that, if the party entitled to bring error be at the time of such title accrued within the age of twenty one years, *feme covert*, *non compos mentis*, or beyond the seas, the court or a judge may allow error to be brought at any other time."

By sect. 19, "a writ of error shall not be necessary or used in any suit or proceedings in error on the revenue side of the Court of Exchequer, and the proceedings in error shall be a step in the cause, and shall be taken in manner, and subject to such terms and conditions as to giving bail or security, as may be directed by any rule or order made by the barons under this or any other act of parliament authorising the same: Provided that nothing herein contained shall invalidate any proceedings already taken or to be taken, by reason of any writ of error issued before the commencement of this act, or before such rules and orders came into effect."

(I) *Costs.*

(*a*) *In Proceedings on Revenue Side of Court of Exchequer.*[1]
(*b*) *In Informations relating to the Revenue.*[2]
(*c*) „ „ *Customs.*[3]

(K) *Side-Bar Rules and Motions.*[4]

(L) *Enforcing Judgment.*[5]

[1] By 22 & 23 Vic. c. 21, s. 21, "the costs of all suits, informations, and of other proceedings, and of any interlocutory matter or proceeding on the revenue side of the Court of Exchequer, whether in law or equity, may be adjudged, decreed, or ordered by the court or a judge, between the Crown and the subject, on the same principles as such costs are now allowed between subject and subject, so far as such principles may be applicable, subject to such rules and orders, as to the allowance of such costs, as may be made by the barons under this or any other act of parliament authorising the same; and it shall be lawful for the Commissioners of her majesty's Treasury, and they are hereby required, to pay costs directed to be paid by the Crown out of any monies which may hereafter be voted by parliament for that purpose."

[2] By 18 & 19 Vic. c. 90, s. 1, "in all informations, actions, suits, and other legal proceedings to be hereinafter instituted before any court or tribunal whatever in the United Kingdom of Great Britain and Ireland, by or on behalf of the Crown, against any corporation, or person or persons, in respect of any lands, tenements or hereditaments, or of any goods or chattels belonging or accruing to the Crown, the proceeds whereof, or the rents and profits of which said lands, tenements and hereditaments, by any act now in force, or hereafter to be passed, are to be carried to the Consolidated Fund of Great Britain and Ireland, or in respect of any sum or sums of money due and owing to her majesty by virtue of any vote of parliament for the service of the Crown, or of any act of parliament relating to the revenue, her majesty's attorney-general, or in Scotland the lord advocate, shall be entitled to recover costs for and on behalf of her majesty where judgment shall be given for the Crown, in the same manner and under the same rules, regulations, and provisions, as are or may be in force touching the payment or receipt of costs in proceedings between subject and subject, and such costs shall be paid into the Exchequer, and become part of the Consolidated Fund." And by sec. 2 it is enacted, that "if in any such information, action, suit, or other proceeding, judgment shall be given against the Crown, the defendant or defendants shall be entitled to recover costs in like manner, and subject to the same rules and provisions, as though such proceeding had been between subject and subject; and it shall be lawful for the Commissioners of her majesty's Treasury, and they are hereby required, to pay such costs out of any money which may be hereafter voted by parliament for that purpose."

Before this statute the Crown neither paid nor received costs. Marsh. on Costs, 560, *ante*, vol. iii. p. 528, n.[1]. The statute extends only to cases in which the attorney-general or lord advocate is a party. *Reg. v. Beadle*, 7 E. & B. 49. In this respect it is less extensive than the act relating to the Customs, *infra*.

[3] By 16 & 17 Vic. c. 127 (Customs Consolidation Act, 1853, s. 263), "in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under this act, or any act relating to the Customs, the parties thereto shall be entitled to recover costs against each other in the same manner as if such suits and proceedings were conducted and had between subject and subject."

There is in this act no restriction to cases in which the attorney-general is a party, as in the 18 & 19 Vic. c. 90.

An information for penalties for an offence against the Customs' law filed after the passing of the 16 & 17 Vic. c. 107, laid the acts to have been done by R. and E. "jointly and severally." At the trial it was agreed by counsel that the verdict should be entered against the defendants, as regards R. for a penalty of 1000*l.*, and against E. for a penalty of 200*l.*; but judgment was entered generally on the *postea* for a penalty of 1200*l.* against both defendants. The bill of costs for the Crown was made out against both defendants jointly. The remembrancer was held to have rightly taxed the costs generally against both defendants. *Att.-Gen. v. Roberts & another*, 19 Jur. 1024; 4 W. R. 7.

Where one count of an information charges several penalties, the Crown is entitled to the costs of proving one penalty, although it fail in proving the others. *Attorney-General v. Shillibeer*, 4 Ex. 606; 19 L. J. Ex. 115.

[4] By Reg. Gen. Nov. 25, 1861, all rules at side-bar and motions of course are to bear date on the day they are drawn up.

[5] By 22 & 23 Vic. c. 21, s. 23, "unless stayed by order of the Court of Exchequer, or a baron thereof, or by warrant of the Commissioners of her majesty's Treasury, process for duly levying and enforcing payment of all fines, issues, amerciaments, penalties, and forfeited recognisances estreated into the Court of Exchequer, and not lawfully vacated and discharged, may be issued by her majesty's remembrancer at any time or times, without reference to any seal day, and so from time to time until the same shall be fully paid and levied, vacated or discharged."

By sect. 24, "for the recovery of any debt

REVERSAL of Outlawry. *See* Outlawry, *ante*, p. 30.

REVERSION. *See* also Landlord and Tenant, vol. v. p. 296; Lease, id. p. 338; Negligence, vol. v. p. 517; Nuisance, *ante*, p. 1.

I. Nature and Quality of Estates in Reversion.[1]

II. Incidents to.[2]

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which, by record in her majesty's Court of Exchequer in England, has become or shall become due to her majesty in any case where the person of the debtor, or the estate or effects of such debtor, may be within the jurisdiction of the Court of Exchequer in Scotland or Ireland, a copy of the record of such debt may be exemplified and transmitted, under the Great Seal of the said Court of Exchequer in England, to such other of her majesty's Courts of Exchequer having jurisdiction in the place where the person liable to the payment of such debt happens to reside, or where his estate or effects may be, and the court to which such exemplified copy is transmitted shall cause such copy to be forthwith enrolled in the rolls of the said court; and upon the same being so enrolled, the said court shall cause execution or other process to issue for recovery or levying the said debt so due to her majesty according to the rules and practice of such court, in like manner in all respects as if such record had been originally entered or filed in such court, or the said debt had originally accrued within the jurisdiction thereof; and the proceeds of such debt when so recovered shall be accounted for and paid over, in the same manner as if the same had been recovered within the jurisdiction of the court in which such debt originally accrued."

[1] The idea of a reversion is founded on the principle that, where a person has not parted with his whole estate and interest, all that which he has not given away remains in him; and the possession of it reverts or returns to him upon the determination of the preceding estates. If, therefore, a person who is seised in fee conveys an estate for life to A., remainder for life to B., remainder over to twenty other persons for life, he still retains the fee-simple of the lands in himself, because he has not departed with it; but as such fee-simple can only return or fall into possession upon the determination of the preceding estates, it is only an estate in reversion. So, where a person having only a particular estate in lands grants a smaller estate than his own, he has a reversion left in himself. 2 Cru. Dig. 454–456; 2 Bl. Com. 175; 1 Steph. Com. 290. The revised statutes of New York have defined a reversion to be the "residue of an estate left by the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted." Perhaps the truest definition is—"A *returio* of an estate to the original or general owner or his heirs, after a limited or less estate carved out of it, and conveyed by him, has been determined." *See* 4 Kent's *Com.* 354. The possession of the lands is said to return to the grantor on the determination of the grant for a present interest, though, taking effect *in futuro*, remains even during the existence of the grant in the person making it; and this interest is what is called his reversion, or, more properly, his right of reverter. Watk. *Convey.* 59; 2 Bl. Com. 175; Plowd. 151.

Before the statute *De donis conditionalibus* no reversion remained in the grantor or donor after he had created a conditional fee; because the grantee of such an estate was considered as having the absolute property of it, and the grantor had only a possibility of reverter. But, as soon as the statute *De donis* was made, the judges determined that an estate given to a man and the heirs of his body was only a particular estate; and, therefore, that there remained an estate in reversion in the grantor.

Reversions are vested interests; for a man entitled to an estate in reversion has an immediate fixed right of future enjoyment, that is, an estate vested *in præsenti*, though it is only to take effect in possession and profit *in futuro;* and which may be aliened and charged much in the same manner as an estate in possession. 2 Bl. Com. 175. And the law is as careful of the rights of the reversioners as of those of the tenant in possession; and will, therefore, allow an action to be brought by the reversioner as well as by the tenant in possession for an injury done to the inheritance (*Jesser v. Gifford*, 4 Burr. 2143; 2 Cru. Dig. 458); and, in order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealment of their death, it is enacted by stat. 6 Anne, c. 18, that all persons on whose lives any lands or tenements are holden shall, upon application to the Court of Chancery, and order made upon once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living. 2 Bl. Com. 177.

[2] Reversions after estates for years are present assets; and the heir cannot plead a term of years raised by his ancestor in delay of execution, but should confess assets. *Smith v. Angell*, 1 Salk. 354; 2 Ld. Raym. 783; 7 Mod. 40. *Osberston v. Stanhope*, 2 Mod. 30. *Villiers v. Handley*, 2 Wils. 49. A reversion after an estate for life is *quasi* assets, and ought to be pleaded specially by the heir; and, in such case, the

(A) *Merger of.*[1]

III. For what Injuries Reversioner may Sue.[2] *See* also *ante*, p. 8, n. [c].

plaintiff may take judgment of it, *quando accederit* (Carth. 129; Dyer, 373, b. *Rook v. Clealand*, 1 Ld. Raym. 53; Lutw. 195); and though it is laid down as a general rule, that a reversion after an estate tail is not assets, because it is in the power of the tenant in tail to bar it at his pleasure (1 Roll. Abr. 269. *Midmay's case*, 6 Co. 42. *Brediman's case*); yet when a reversion of this kind vests in possession, it then becomes assets (*Kellow v. Rowden*, 3 Mod. 253); and in such case it will be assets; for payment of debts, though it shall be devised away, for such a devise was, by stat. 3 Wm. & M. c. 14, fraudulent and void against creditors. *Kinaston v. Clarke*, 2 Atk. 204. *See* the provisions of this act, extended by 1 Wm. 4, c. 47; and 3 & 4 id. c. 104. It seems, notwithstanding the case of *Smith v. Parker*, 2 Bl. Rep. 1230, to the contrary, a reversion is not assets for payment of the specialty-debts of any person, but the ancestor from whom the lands immediately descend. 2 Saund. 8 f. n. b; 2 Cru. Dig. 462. *Doe v. Hutton*, 3 B. & P. 643, 648, 651. But a reversion is, when it vests in possession, liable to the judgments, statutes, or recognisances of all those who were at any time entitled to it, because such securities attach on all the estates of the debtor (*Giffard v. Barber*, 4 Vin. Abr. 452; S. C. cited in *Cunningham v. Moody*, 1 Ves. 174); and the same principle extends to leases for years. *Symonds v. Cudmore*, 4 Mod. 1. *Shelburne v. Biddulph*, 6 Bro. P. C. 356.

[1] All particular estates merge in the reversion whenever the same person becomes entitled to both, except an estate tail (2 Rep. 61; 8 id. 74; 2 Bl. Com. 177, 178); and even that estate, when the right of the issue under the entail ceases, or is defeated, or suspended, may become merged, and consequently let the reversioner into possession. 3 Prest. Conv. 263. *See* vol. iv. p. 268; vol. v. p. 358.

[2] A reversioner may sue for an injury depreciating the value of the inheritance; as for the obstruction of ancient lights by a building. *Jesser v. Gifford*, 4 Burr. 2141. *Shadwell v. Hutchinson*, 1 M. & M. 350. And a wooden hoarding may cause permanent injury to the property by such an obstruction (*Metropolitan Association v. Petch*, 5 C. B. (N. S.) 504; 27 L. J. C. P. 332), for if persisted in it would, in the course of time, become evidence of a right.

Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that if the landlord or reversioner was to sell it it would fetch less money in the market, there is a damage to the reversionary estate, in respect of which the reversioner may maintain an action. See *Alston v. Scales*, 9 Bing. 4. And in the case of permanent injuries to buildings, from trespasses or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property. *Hosking v. Phillips*, 3 Ex. 168.

The action will be maintainable if the injurious act is of a permanent character, notwithstanding it admits of being remedied before the reversion comes into possession, as, for example, opening a new door in a house. *Young v. Spencer*, 10 B. & C. 145. So, the reversioner may sue for an obstruction to the exercise of a private right of way appurtenant to lands or tenements; for if allowed to continue unopposed, it would be evidence against the enjoyment of the right, and therefore an injury to the reversion. *Battishill v. Reed*, 18 C. B. 696. *Kidgill v. Moor*, 9 C. B. 378. But a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way, such an act, during the existence of the tenancy, not being necessarily injurious to the reversion. Nor can he maintain an action for the obstruction of a public way leading to his property, unless he can show either that the obstruction is of a permanent character, or that it would afford evidence against the existence of the right, if it was allowed to continue unopposed. But if it professes, either by notice affixed, or in any other way, to deny the public right, and so lead to an opinion that no road is there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which an action might be maintained by the reversioner. *Dobson v. Blackmore*, 9 Q. B. 1004. *Hopwood v. Schofield*, 2 M. & Rob. 34. *Kidgill v. Moor*, 9 C. B. 379.

The action will not lie for an act which is not, in fact, injurious to the reversion merely in respect of its being done with intent to establish an easement upon the land by prescription, as the exercise of a right of way (*Baxter v. Taylor*, 4 B. & Adol. 72), or to discharge rain water. *Tucker v. Newman*, 11 Ad. & E. 40. Such act would not be evidence against the reversioner, since, by the Prescription Act, he has three years for resisting such claim after his estate has come into possession, notwithstanding the full period of prescription may have previously elapsed. *See* 2 & 3 Wm. 4, c. 71, s. 8. *Bright v. Walker*, 1 C., M. & R. 220. So, the annoyance arising to a tenant from the erection of a steam-engine and furnace near the premises emitting smoke and producing noise, does not entitle the reversioner to sue, the nuisance not being of a permanent nature. *Mumford v. the Oxford, Worcester, and Wolverhampton Railway Co.* 1 H. & N. 35. *Simpson v. Savage*, 1 C. B. (N. S.) 347; 26 L. J. C. P. 50. But the erection on the defendant's house of eaves, and a pipe overhanging and conducting water on land in

REVIEW of Taxation. *See* Costs, vol. iii. p. 327.

REVISING Barrister.[1]

REVIVOR. *See* Judgment, vol. v. p. 262.

I. When Necessary, p. 343.
(A) *By Lapse of Time*, p. 343.
(B) „ *Death of Parties*, p. 344.
(C) „ *Marriage of Female Plaintiff or Defendant*, p. 344.
I. When Necessary (*continued*).
(D) *By Bankruptcy of Party*, p. 344.
II. Mode of Reviving Judgment, p. 344.
(A) *Form of Rule or Summons*, p. 345.
(B) „ *Suggestion*, p. 345.
(C) „ *Writ of Revivor*, p. 346.

I. When Necessary.

(A) *By Lapse of Time.*[2]

the occupation of a tenant, is a permanent injury, which gives a right of action to the reversioner. *Tucker v. Newman*, 11 Ad. & E. 40; 3 Per. & D. 14.

Where the plaintiff had demised cottages, without any exception of mines, and the defendant, by excavating mines under the premises, had injured the water: — *Held*, that the plaintiff was entitled to maintain case for the injury to his reversionary interest. *Raine v. Alderson*, 4 Bing. N. S. 702; 6 Scott, 691. *See* 1 Mee. & W. 452. So, the reversioner is entitled to sustain a second action for the injury to his reversion by continuing an obstruction, &c., upon an issue of its being "the same identical grievance;" the continuance of the injury for a subsequent period negatives that issue. *Shadwell v. Hutchinson*, 4 C. & P. 333.

In case by a reversioner for an injury to the reversion by pulling down certain parts of a building, upon the question, whether the plaintiff's reversionary interest was sufficiently established by mere parol proof of the occupier holding the premises as tenant to the plaintiff, without producing the written agreement under which he held, the court was equally divided. *Strother v. Barr*, 5 Bing. 136; S. C. 2 M. & P. 207.

The owner of a future or reversionary interest in personal chattels cannot, in general, sue for a conversion of or for trespass to them; but he may maintain an action for the damage to his reversionary interest. *Tuncred v. Allgood*, 4 H. & N. 438; 28 L. J. Ex. 362. *Mears v. London and S.-W. Railway Co.* 31 L. J. C. P. 220. *Lancashire Wagg. Co. v. Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231.

[1] Their appointment and duties are regulated by 2 & 3 Wm. 4, c. 45; and 6 Vic. c. 18. As to appeals from decision, *see ante*, vol. i. p. 383.

[2] Before the 15 and 16 Vic. c. 76 (1852), when a year and a day had elapsed after judgment signed, without execution being sued out upon it, the law presumed that the judgment had been satisfied, or that the plaintiff had released the execution; and therefore it was that a *scire facias* was returned in such a case, in order to give an opportunity to the defendant to show that the judgment had been already satisfied, or other cause, if he could, why execution should not issue against him. But by sect. 128, "During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue, within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment." C. L. P. Act, 1852, s. 128. This provision applies to all judgments less than six years old at the time the act came into operation. *Boodle v. Davis*, 8 Ex. 351; 22 L. J. Ex. 69. Though, however, the judgment is more than six years old, it is not necessary to revive it, if it was a judgment for the queen (*Anon.* 2 Salk. 603. *Burr v. Attwood*, 1 Ld. Raym. 328); nor if the defendant has agreed to dispense with revivor (*Tripp v. Stanley*, 5 D. & L. 262. *Harmer v. Johnson*, 14 Mee. & W. 336; 3 D. & L. 38. *Cooper v. Norton*, 16 L. J. Q. B. 364), even by parol (*Morgan v. Burgess*, 1 Dowl. N. S. 850); nor if the plaintiff has been prevented by proceedings in error (*Winter v. Lightbound*, 1 Stra. 301. *Booth v. Booth*, 6 Mod. 288. *Adams v. Savage*, 3 Salk. 321); or by injunction (Id. *Michel v. Cue*, 2 Burr. 660); or by an agreement to that effect (Id. *Hiscock v. Kemp*, 5 Nev. & M. 113; 3 Ad. & E. 676. *Morris v. Jones*, 2 B. & C. 242. *Dillon v. Brown*, 6 Mod. 14); nor if the judgment was signed on a warrant of attorney given by an insolvent, pursuant to 1 & 2 Vic c. 110, s. 17; nor, it seems, if the execution is on a rule of court under id. sect. 18. *Spooner v. Payne*, 17 L. J. Q. B. 68.

If the writ of execution is sued out during the six years, revivor is not necessary, though it be executed after the six years (*Franklin v. Hodgkinson*, 3 D. & L. 554); and it is no objection to reviving the judgment that a writ of *fi. fa.* already issued might have been renewed. *Holmes v. Newlands*, 5 Q. B. 634. Should execution be sued out after the six years without reviving the judgment, application may be made to the court or a judge to set it aside (*Poland v. Neuman*, 6 M. & S. 179. Such execution is not void, but voidable only. *Blanchenay v. Burt*, 4 Q. B. 707. *Shirley v. Wright*, 1 Salk. 273. *Reynolds v. Newton*, 1 Gale & D. 157. The omission to revive may be alleged for error. (Id.) *Mortimer v. Piggott*, 4 Ad. & E. 363, n. 2 Dowl. 615.

(B) *By Death of Parties.*[1]

(C) *By Marriage of Female Plaintiff or Defendant.*[2]

(D) „ *By Bankruptcy of Party.*[3]

II. Mode of Reviving Judgment.[4]

The judgment cannot be revived after twenty years from the time when there was some person capable of giving a discharge (3 & 4 Wm. 4, c. 27, s. 40), unless part of the principal or interest has, in the meantime, been paid or acknowledged. *Thomas v. Williams*, 3 Dowl. 655.

[1] Where the plaintiff or defendant dies after final judgment, it must be revived by or against their personal representatives before execution can issue. 1 Saund. 219, e, f; 2 id. 6, 72, o; Bac. Abr. Sci. Fa. c. 5; 2 Saund. 9, a, n. 9. An administrator *de bonis non* must revive the original judgment. *Treviban v. Lawrence*, 2 Ld. Raym. 1049. *Clerk v. Withers*, id. 1072; 1 Salk. 323. An executor, on coming of age, must revive the judgment obtained by the administrator *durante minori ætate*. *Beamond v. Long*, Cro. Car. 227. *Hatton v. Mascall*, 1 Lev. 181; Roll. Abr. The writ of execution, if sued out during life, may, however, be executed by the sheriff after the death of either party (*Cleeve v. Veer*, Cro. Car. 459. *Harrison v. Bowden*, 1 Sid. 29. *Clerk v. Withers*, 1 Salk. 322), and the proceeds paid either to the executor or administrator, or into court. *Clerk v. Withers*, 2 Ld. Raym. 1073. Where, after the judgment is revived, the defendant dies before execution, in order to entitle the plaintiff to have execution the judgment must be revived against the defendant's executors. *Hardisty v. Barny*, 2 Salk. 598. The writ of revivor must be in the names of all the executors of the plaintiff. *Scott v. Briant*, 6 Nev. & M. 381; 2 H. & W. 54. If the representative is a *feme covert*, the writ of revivor must be in the joint names of the wife and husband. If the deceased has left lands, then the judgments may be recovered against the heir or terre-tenants, in the event of the execution against the personal representatives proving fruitless. 2 Saund. 9, a. *Braithwaite v. Skinner*, 5 Mee. & W. 313.

Where the plaintiff or defendant dies between verdict and judgment, or between interlocutory and final judgment, or where one of several plaintiffs or defendants dies after judgment, *see* Abatement, vol. i. p. 8.

[2] By the C. L. P. Act, 1852, s. 141, "the marriage of a woman, plaintiff or defendant, shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment, and such judgment may be executed against the wife alone, or by suggestion or writ of revivor: pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion; and if, in any such action, the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court."

If the marriage has taken place after judgment obtained by the *feme*, in order to entitle the husband to issue execution upon it, he must sue out a *scire facias* (C. L. P. Act, 1852, s. 132), or revive the judgment by suing out a writ of revivor, or entering a suggestion. (Id. sect. 29.) If after so reviving the judgment and issuing execution the wife die, the husband may take all further proceedings in his own name (*Woodier v. Gresham*, 3 Salk. 110; Skin. 682); but he must first take out letters of administration. *Betts v. Kimpton*, 2 B. & Ad. 273.

If the judgment is against a *feme sole*, and she then marries, a *ca. sa.* may, nevertheless, issue against her personally. *Thorpe v. Ayles*, 1 D. & L. 831. But before the husband can be subject to execution, the judgment must be revived against him. Bac. Abr. Sci. Fa. 6.

[3] If a party obtaining interlocutory judgment become bankrupt before final judgment, the assignees may revive the judgment. *Bibbins v. Mantell*, 2 Wils. 358, 372. *Winter v. Kretchman*, 2 T. R. 45. *Ouchterlony v. Gibson*, 6 Scott, N. R. 577. The title of the assignees need only be stated generally in the writ of revivor.

[4] By C. L. P. Act, 1852, s. 129, "in cases where it shall become necessary to revive a judgment by reason either of lapse of time or of a change by death, or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the form hereinafter mentioned, or apply to the court or a judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment, and to issue execution thereupon; such leave to be granted by the court or a judge upon a rule to show cause, or a summons to be served according to the present practice, or in such other manner as such court or judge may direct, and which rule or summons may be in the form contained in the schedule (A) to the act annexed marked No. 7, or to the like effect."

"Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the court or a judge shall allow such suggestion as aforesaid to be entered in the form contained in the schedule (A) to this act annexed, marked No. 8, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same; and in case it does not manifestly so appear, the court or a judge shall discharge the rule or

(A) *Form of Rule or Summons.*[1] (B) *Form of Suggestion.*[2]

dismiss the summons with or without costs; Provided, nevertheless, that, in such last-mentioned case, the party making such application shall be at liberty to proceed by writ of revivor or action upon the judgment." (Id. sect. 130.)

"The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing, and after reciting the reason why such writ has become necessary, it shall call upon the party to whom it is directed to appear within eight days after service thereof in the court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed; and it shall give notice that, in default of appearance, the party issuing such writ may proceed to execution; and such writ may be in the form contained in the schedule (A) to this act annexed, marked No. 9, or to the like effect, and may be served in any county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons, and the venue in a declaration upon such writ may be laid in any county, and the pleading and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action." (Sect. 131.)

"A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order; if more than ten years old, not without a rule of court or a judge's order; nor if more than fifteen, without a rule to show cause." (S. 134.)

The affidavit in support of the application ought to state that the judgment is unsatisfied, and that the defendant is living, or as the case may be. See *Hardisty v. Barny*, 2 Salk. 598. *Lowe v. Robins*, 1 B. & B. 381; 3 Moore, 757. *Duke of Norfolk v. Leicester*, 1 Mee. & W. 204; 4 Dowl. 746. *Smith v. Mee*, 1 D. & L. 907; 7 Scott, N. R. 799.

Where the rule is directed to executors, it should be served on all. *Thomas v. Williams*, 3 Dowl. 654.

Where the defendant was abroad, the rule was allowed to be stuck up in the office, and served on his tenants in this country. *Macdonald v. Maclarren*, 11 Mee. & W. 465. The judgment cannot be impeached on showing cause, but a distinct motion must be made to set it aside. *Thomas v. Williams*, *supra*.

The writ of revivor issues out of the court in which the judgment stands (2 Saund. 72, n.), and is sued out, like a writ of summons, by taking a *præcipe* to the office. It may issue before the return of a *fi. fa.* issued on the judgment. *Holmes v. Newlands*, 5 Q. B. 367.

"Notice in writing to the plaintiff, his attorney, or agent, shall be sufficient appearance to a writ of revivor." C. L. P. Act, 1852, s. 133.

"A plaintiff shall not be allowed to quash his own writ of *scire facias* or revivor after the defendant has appeared, except on payment of costs." Rule (Pr.) 78, H. T. 1853.

The defendant cannot plead to a writ of revivor matter which ought to have been pleaded to the original action. *Bradley v. Eyre*, 11 Mee. & W. 432. *Bradley v. Urquhart*, id. 456; 2 Dowl. N. S. 1042. *Philipson v. Earl Egremont*, 6 Q. B. 587. Where judgment had been revived for lapse of time, the defendant was held entitled to plead a seizure under a *fi. fa.* issued on the judgment, though the *fi. fa.* had not been returned, nor the judgment satisfied. *Holmes v. Newlands*, 5 Q. B. 371, 634. The plaintiff may be nonsuited at the trial as in other cases. *O'Mealy v. Wilson*, 1 Camp. 484. Damages cannot be given for any delay in execution. *Henriques v. Dutch East India Company*, 2 Ld. Raym. 1532; 2 Stra. 807. *Knox v. Costello*, 3 Burr. 1791. Before signing judgment the plaintiffs should, if executors, obtain probate. *Vogel v. Thompson*, 1 Ex. 60. The execution must pursue the judgment of revivor. *Davis v. Norton*, 1 Bing. 133.

In case a second revivor becomes necessary, the writ should recite the previous writ, and the judgment obtained thereon. *Walker v. Thelluson*, 1 Dowl. N. S. 578.

[1] *Form of Rule or Summons where a Judgment Creditor applies for Execution against a Judgment Debtor.* C. L. P. Act, 1852, sched. A, No. 7.

[*Formal parts as at present.*]—C. D. show cause why A. B. [*or as the case may be*] should not be at liberty to enter a suggestion upon the roll in an action wherein the said A. B. was plaintiff, and the said C. D. was defendant, and wherein the said A. B. obtained judgment for £ against the said C. D. on the day of that it manifestly appears to the court that the said A. B. is entitled to have execution of the said judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. the costs of this application to be taxed.

Note.—The above form may be modified so as to meet the case of an application by or against the representative of a party to the judgment.

[2] *Form of Suggestion that the Judgment-Creditor is entitled to Execution against the Judgment-Debtor.* (Schedule A. No. 8.)

And now, on the day of it is suggested, and manifestly appears to the court, that the said A. B. [*or* C. D., as executor of the last will and testament of the said A. B. deceased, *or as the case may be*] is entitled to have execution of the judgment aforesaid against the said E. F. [*or* against G. H., as executor of the last will and testament of the said E. F., *or, as the case may be*]: Therefore it is considered by the court that the said A. B. [*or*, C. D., as such executor as aforesaid, *or as the case may be*] ought to have execution of the said

(C) *Form of Writ of Revivor.*[1]

REVOCATION. *See ante*, Powers, p. 196; *post*, Will.

REWARD,[2] **Action for Recovery of.**[3]

REX non potest peccare. 2 Roll. R. 304. *The king can do no wrong.* Broom's *Max.* 40. *See* 1 Bl. Com. 246; 3 id. 254; Chit. *Prer. Crown*, 5; 1 Hale, P. C 43; 2 Steph. Com. 500. *Howard v. Gossett*, 14 L. J. Q. B. 377. *Gledstanes v. Earl of Sandwich*, 5 Scott, N. R. 719. *R. v. Kempe*, 1 Ld. Raym. 49. *Viscount Canterbury v. the Attorney-General*, 1 Phil. 306.

REX nunquam moritur. Broom, 38. *The king never dies.* Immediately upon the decease of the sovereign, the kingly dignity and the prerogatives and political capacities of the supreme magistrate, by act of law, without any interregnum, vest at once in his successor, who is *eo instante* king to all intents and purposes. 1 Bl. Com. 249; Chit. *Prer. Crown*, 5; 1 Plowd. 177.

RIGHT, Petition of. *See* Petition of Right, *ante*, p. 128.

Writ of.[4]

RIOTS and Routs.

I. What Constitutes.[5]

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judgment against the said E. F. [*or* against G. H., as such executor as aforesaid, *or as the case may be*].

[1] *Form of Writ of Revivor.*

(Schedule A. No. 9.)

Victoria, by the grace of God, &c., to E. F., of greeting:

We command you, that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of to show cause why A. B. [*or* C. D., as executor of the last will and testament of the said A. B., deceased, *or as the case may be*] should not have execution against you [*if against a representative, here insert*, as executor of the last will and testament of deceased, *or as the case may be*] of a judgment, whereby the said A. B. [*or as the case may be*] on the day of in the said court recovered against you [*or as the case may be*] £ And take notice, that in default of your so doing the said A. B. [*or as the case may be*] may proceed to execution.

Witness, &c.

[2] To persons active in apprehension of persons charged with certain crimes by judge (7 Geo. 4, c. 64, s. 29; 19 & 20 Vic. c. 16, s. 13), or quarter sessions. 14 & 15 Vic. c. 55, s. 8. See *R. v. Barnes*, 17 C. & P. 444. *R. v. Jones*, id. 167. Takers under pretence to helping to stolen property, *see* 24 & 25 Vic. c. 96, ss. 101, 102, 119. *See* Arch. C. Pl. 727, 15th ed.

[3] An action lies to recover a reward offered by an association or private individual on the apprehension, &c., of a felon or other offender. See *Smith v. Moore*, 1 C. B. 438. *Thatcher v. England*, 3 C. B. 254. *Williams v. Carwardine*, 4 B. & Adol. 621); or discovering a lost child. *Fallick v. Barber*, 1 M. & S. 108.

In an action for a reward offered to "whomsoever should give information whereby the property taken on a robbery might be traced, on conviction of the parties:"—*Held*, that the party entitled was he who first gave such information, although not communicated immediately to the party robbed, but to a party authorised to receive it, and act in the apprehension as a constable. *Lancaster v. Walsh*, 4 Mee. & W. 16.

A police constable discovering a felon will be entitled to the reward for his apprehension, notwithstanding he did no more than his duty enjoined. *England v. Davidson*, 11 Ad. & E. 856; 3 Per. & D. 594. *Neville v. Kelly*, 32 L. J. C. P. 118. And the motives of the person giving the information are immaterial. *Williams v. Carwardine*, 1 Nev. & M. 418.

[4] The writ of right was the highest remedy given by the law for the recovery of lands. Co. Litt. 138, b.; F. N. B. 1, a. It was abolished, with several other real actions, by 3 & 4 Wm. 4, c. 27, s. 37.

[5] A riot is a tumultuous meeting of persons upon some purpose which they actually execute with violence. A rout is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a motion to execute. 1 Hawk. c. 65, ss. 8, 9.

To constitute a riot, three persons, at least, must be engaged in the act. *Rex v. Scott*, 1 Black. 291; 3 Burr. 1262. And it must also appear that these assembled together, and that their assembling was accompanied with some other circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror: such as being armed, using threatening speeches, turbulent gestures, or the like. 1 Hawk. c. 65, s. 5.

If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. Lamb. 178;

Dalt. C. 137. See *R. v. Hughes*, 4 Car. & P. 373. *R. v. Cox*, id. 538.

If persons meet at a fair, or a wake, or any other lawful and innocent occasion, and, on a sudden quarrel, they fight together, this is no riot, but an affray merely. But if, upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot: for, in this latter case, the design to break the peace is as premeditated as if they had originally met for that purpose. 1 Hawk. c. 65, s. 3. *See* also Affray, vol. i. p. 267. *R. v. Hunt*, 3 B. & A. 566.

Women are punishable as rioters, but infants under the age of discretion are not. 1 Hawk. P. C. c. 65, p. 314.

Persons aiding and abetting are principals in the second degree under the Riot Act. *Rex v. Royce*, 4 Burr. 2073.

By some books, the nature of a rout is confined to such assemblies only as are occasioned by some grievance common to all the company; as the inclosure of land, in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact, it generally agrees in all the particulars of a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise. 1 Hawk. P. C. c. 65, s. 8. And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a rout, inasmuch as they move and proceed in rout and number. 19 Vin. Abr. Riots, P. 2, referring to 18 Edw. 3, c. 1; 13 Hen. 4, c. ult.; and 2 Hen. 5, c. 8.

[1] The common law, and also several ancient statutes, authorise proceedings for the restraining and suppression of riots. By the common law, the sheriff, under-sheriff, constable, or any other peace-officer, may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons to assist them; and by the common law also, any private person may lawfully endeavour to appease such disturbances, by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. 1 Hawk. P. C. c. 65, s. 11. It has been holden also, that private persons may arm themselves, in order to suppress a riot (*Case of Arms*, Pop. 121; Kel. 76); from whence it seems clearly to follow, that they may also make use of arms in suppressing it, if there be a necessity.

The stats. 34 Edw. 3, c. 1, and 13 Hen. 4, c. 7, empower justices of the peace to restrain and arrest rioters; and if they fail in their duty they may be indicted. *R. v. Pinney*, 3 B. & Adol. 947.

The 1 Geo. 1, stat. 2, c. 5, s. 1, provides that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, and being required or commanded by one or more justice or justices of the peace, or by the mayor, &c., by proclamation in the king's name, in a form given in the act, to disperse themselves, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy. By sect. 5, opposing the reading of the proclamation is made felony. The 7 Wm. 4, & 1 Vic. c. 91, s. 1, reduces the punishment to transportation or imprisonment. A prosecution under the above act must be commenced within twelve calendar months. 1 Geo. 1, st. 1, c. 5, s. 8. As to the form of the proclamation, see *R. v. Child*, 4 Car. & P. 442.

[2] An indictment for a riot must show the object for which the rioters assembled (*Reg. v. Gulston*, 2 Ld. Raym. 1210), and state that it was an unlawful assembly. *Reg. v. Soley*, 2 Salk. 593. And it ought not to be confined to the persons indicted, but it should be alleged that they, with divers other disturbers of the peace, had committed the riot, otherwise, unless more than two are convicted, the indictment will fail. *Rex v. Sudbury*, 1 Ld. Raym. 484; 2 Salk. 593; *see* 3 Salk. 317; 6 Mod. 212.

[3] To support the charge of a riot, it must be proved that three or more persons assembled together and committed the assault and battery: for, where persons assemble together for the purpose of doing an act, and the assembly is such as is above described, if they do not proceed to execute their purpose it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assemble, but do not execute it, it is termed a riot: but if they not only so assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 Hawk. c. 66, s. 1; Dalt. c. 136.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror is equally punishable, whether it be lawful or otherwise (1 Hawk. c. 65); yet, where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been holden, that if a number of persons assemble for the

V. Punishment.[1]

RIPARIAN Proprietors. *See* Easement, vol. iv. p. 150; *post*, Water and Watercourse.

RIVERS and Canals. *See* also Banks of Rivers, vol. ii. p. 371; Harbours, vol. v. p. 16; Nuisance, *ante*, p. 1; *post*, Sea-Walls, p. 364; Watercourse.

I. Rivers.

(A) *Definition:*[2] *Rights and Incidents.*[3] (B) *Obstructions to.*[4]

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purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot (Dalt. c. 137); unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used.

[1] The punishment for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence (3 Salk. 317. *Reg. v. Middlemore*, 6 Mod. 212); and formerly, in cases of great enormity, it appears that the offenders were sometimes punished with the pillory (1 Hawk. P. C. c. 65, s. 12); but such punishment is now taken away. By 3 Geo. 4, c. 114, such offenders may be put to hard labour.

[2] A body of running water confined between two opposite sides or banks [*ripæ*]. A running stream pent in on either side with walls and banks. Callis on Sewers, 77, 95; Woolrych, id. 51. A watercourse of the larger kind. A river consists of water, bed, and banks. *See* 3 Rob. *Adm. R.* 341. Banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water. 2 Hill on Torts, 106, n.

[3] Every owner of land on the banks of a river has *primâ facie* an equal right to the use of the water, and one cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from all the other proprietors, or twenty years' uninterrupted enjoyment. 2 & 3 Wm. 4, c. 71.

It is not a legal presumption that the owners on each side of a navigable river are entitled to the soil of the bed of the river to the centre (4 Burr. 2163. *Rex v. Smith*, 2 Dougl. 441), because a right to corporeal property cannot be prescribed for, or be appendant or appurtenant, though it may be so in a river not navigable. *Carter v. Murcot*, 4 Burr. 2163.

In a tidal river the rights of the public, so far as the tide flows, are the same as in the sea itself. Davis, *Rep.* 55. The Crown has no power of limiting or abridging the public right. Schultz on Aquatic Rights, ed. 1811, pp. 4, 5; Chit. *Prer. Crown*, 143. Such a river is a public highway for vessels, at all times and states of the tide, and the right to pass and repass is not destroyed or abridged by the circumstance that at particular states of the tide a vessel cannot pass along without grounding, and thereby injuring oyster beds therein. *Colchester (Mayor, &c.) v. Brooke*, 7 Q. B. 339; 9 Jur. 1090; 15 L. J. Q. B. 59. The rights of the Crown are subject to this public right of passage, and the Crown, therefore, cannot, irrespectively of any ownership in the adjoining lands, make a grant inconsistent with it. As to changing the course of a river, see *Ford v. Lacy*, 7 H. & N. 151.

[4] The erection of any building in a port or navigable river, which of itself is such a hindrance to the navigation thereof as to amount to a nuisance, is an indictable misdemeanor, although such building is productive of collateral benefit sufficient, in the opinion of the jury, to counterbalance the injury done to the navigation. *Rex v. Ward*, 6 Nev. & M. 38. See *Reg. v. Randall*, Car. & M. 496.

If property (as oysters) be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing, for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public; and therefore the fact that such property was a nuisance is no excuse for running upon it negligently. *Colchester (Mayor, &c.) v. Brooke, supra. Petley v. Dimas*, 19 L. J. Q. B. 440; 15 Q. B. 276. *See* vol. i. p. 5, n.

The declaration stated that the plaintiff was possessed of a public-house abutting upon a navigable river, and that the defendant wrongfully and maliciously placed upon the river, and kept there for a long space of time, timbers, so as to drift opposite to the plaintiff's house, whereby the access thereto was obstructed, and persons who would otherwise have come to the house and taken refreshments there were prevented from so doing. *Plea*, not guilty: — *Held*, upon motion for a new trial for misdirection, that it was not a question for the jury whether the plaintiff had sustained any special damage. *Rose v. Groves*, 5 Man. & G. 613; 6 Scott, N. R. 645; 1 D. & L. 61; 7 Jur. 951; 12 L. J. C. P. 251. *See* other cases, *ante*, p. 9.

II. Canals.[1]

A count stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have free use and navigation of the river for the purpose of passing in boats, and conveying goods to the messuage, and convenient access to the messuage from the river, but that defendant fixed barges, planks, and logs of wood in that part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and plaintiff was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently showing a particular injury to the individual. *Dobson v. Blackmore*, 9 Q. B. 991; 11 Jur. 556; 16 L. J. Q. B. 233. But if the jury negative actual damage, the plaintiff cannot have judgment. (Id.)

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it. *Brown v. Mallett*, 5 C. B. 599; 12 Jur. 204; 17 L. J. C. P. 227.

[1] Canals are artificial rivers, provided with locks and sluices, and sustained by banks and mounds, and are generally dug for commercial purposes, to expedite the inland navigation of goods from one place to another.

The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to them by traction by horses. *Case v. Midland Railway Co.* 27 Beav. 247; 5 Jur. N. S. 1017; 28 L. J. Ch. 727.

A right of action against a canal company for negligently keeping their sluices, by reason whereof the canal overflowed, is not ousted by provisions in the Canal Act for compensation to parties affected by the works, and especially by the overflowing of the water over the sluices, those provisions relating to the due and proper management of the works, not to their negligent management. *Cockburn v. Erewash Canal Co.* 11 W. R. 34, Q. B.

Towing-Paths.—Where it appears that for making and maintaining the towing-path of a canal the ownership of the soil is not necessary for the purpose, a mere easement, and not the soil, is acquired by the company. *Badger v. South-Yorkshire Railway and River Dun Co.* El. & El. 347, Ex. Ch.; 28 L. J. Q. B. 118; 5 Jur. N. S. 459. In this case a local act gave a company power to clear, straighten, and deepen a river, and to dig and cut its banks, and to make new cuts through the land adjacent, and to build or make, in or on the river and adjacent lands, bridges, sluices, locks, wharfs, and warehouses, and to make ways and other conveniences for the carrying to and from the river, and to pull down any obstructing mills or weirs in or upon the river, and to appoint and set out towing-paths, and to do all other matters and things necessary or convenient for making and continuing the navigation, the company doing as little damage as might be, but first giving satisfaction to the owners of the mills, weirs, lands, tenements, and hereditaments. The act appointed commissioners to settle differences between the company and the owners of lands, and to determine (by consent) what satisfaction any owner should have for such part of his land as should be made use of or damaged, and what proportion of such purchase-money or satisfaction any person having a particular estate should have for his interest or damage; and in case of dispute a jury was to be impannelled, who should assess such damages or recompense as they should think just to the owners of any mills, lands, tenements, or hereditaments which should be used, damnified, or demolished by or for the making such locks, or doing any other act or thing for making the river navigable, or for making such towing-paths, ways, or bridges; and on payment of the sums assessed or agreed on, the company might pull down or use the mills, lands, tenements and hereditaments, and might have, use, and enjoy the same, for their own proper use and benefit. In ejectment to recover land used as a towing path, the defendants, who claimed under the company, derived their title from proceedings under the action, which had been lost, but which it was admitted had taken place. The *locus in quo* had been used for many years as a towing-path, the company paying to the plaintiff, or to those under whom he claimed, an annual sum of money as compensation:—*Held*, that as the language of the act was as applicable to the acquisition of an easement as to the acquisition of the soil, and the acquisition of the soil was not necessary for the purpose of making towing-paths, the act conferred no power on the company to purchase the soil over which towing-paths were set on.

Rights of Fishery.—A canal act provided that the lord of every manor through which the canal and reservoirs thereto belonging should be made, should be entitled to the right of fishery in so much of the canal and reservoirs as should be made in, over, or through the common waste lands within his manor, and that the owners of any other lands through which the canal should be made should also have the like right of fishery of and in so much of the canal as should be made in, over, or through their lands, wherein they had the right of fishery before the act:—*Held*, that the right reserved to the lord of the manor was confined

(A) *Statutes relating to.*[1]

III. Compensation to be Paid to Proprietors of Land.[2]

to common or waste lands where the lord was owner of the soil, and therefore did not extend to open lammas lands, the soil of which was in various owners, the occupiers intercommoning for a certain part of the year. *Grand Union Canal Co. v. Ashby*, 6 H. & N. 394; 30 L. J. Ex. 203.

Right of Support — Working Mines under Canal.—By a canal act, no owner of any mine should work the same under any works of the canal company, except as thereinafter mentioned, without the consent of the company. When the owner of any mine lying under the canal works should be desirous of working the same, such owner should give notice in writing of such his intention to the clerk of the company before beginning to work any mine so lying under the canal works; upon the receipt of such notice the company might inspect such mines, in order to determine what coal might be thereout gotten: upon failure or neglect by the company, after the receipt of such notice, as to inspect, the owner might work and get the part of such mine lying under the canal works; and if, upon such such inspection, the company should refuse to permit the owner to work such part of the mine, the company should, within three calendar months after such refusal, purchase the same. It was also enacted, that nothing therein contained should be construed to extend to prejudice the right of any lord of any manor or waste, or any owner of any ground through which the canal cuts, watercourses, and other convenience should be made by the company, to the mines under such ground, and that the mines were thereby reserved to such lord or owner, who was thereby empowered (subject to the conditions and restrictions therein contained) to work such mines, provided that in working the same no injury were done to the navigation:—*Held*, that this proviso was not to be construed as rendering nugatory the previous provisions of the act, and therefore, where notice had been given by the owner of mines, the surface soil of which had been sold by him to the company, of his intention to work the mines under the works of the company, and the latter had neglected to act on such notice, and to purchase his rights, that the mine-owner was entitled to work the mine under the works in a reasonable and proper manner, and the works having been damaged by reason of such working, no action was maintainable by the company against him for such damage. *Stourbridge Navigation Co. v. Dudley* (*Earl*), 9 W. R. 158; 3 L. T. (N. S.) 449, Ex. Ch.

[1] The 3 & 4 Vic. c. 50, provides for keeping the peace on canals and navigable rivers. 8 & 9 Vic. c. 28, empowers canal companies and commissioners of navigable rivers to vary their toll-rates and charges on different parts of their navigation. 8 & 9 Vic. c. 4, enables canal companies to become carriers of goods upon their canals; and 10 & 11 Vic. c. 94, amended the latter act to enable these companies to borrow money on their property. The 17 & 18 Vic. c. 31, regulates the traffic and tolls on canals. The 24 & 25 Vic. c. 97, s. 30, provides for breaking down banks, dams, sluices, &c.; sect. 4 for setting fire to buildings belonging to canals.

As nearly all the cases connected with canals depend upon special local acts, to give them in detail would be of no practical utility. It will serve to cite some of the principal:—*Fenton v. Trent & Mersey Canal Co.* 9 Mee. & W. 205. *Doe v. York* (*Archbishop*), 14 Q. B. 81. *Abraham v. Great Northern Canal Co.* 16 id. 586. *Doe v. Duke of Beaufort*, 6 Ex. 498.

Where commissioners are empowered to determine the sum to be paid for lands to be used for a canal, with authority to the owners of land to distrain for non-payment of the amount, the latter may distrain for an annual sum decreed to be paid by the commissioners. *Leominster Canal Navigation Co. v. Norris*, 7 T. R. 500. And where a canal company were authorised to make all such works as they might deem necessary for "effecting, completing, maintaining, improving, and using the canal and other works," they were holden entitled to construct new works in *bonâ fide* furtherance of the purposes of the old line of navigation. *Rex v. Glamorganshire Canal Co.* 12 East, 156. But where an act for making a river navigable provided that no bank, cut, towing-path, &c. was to be used until a full agreement and satisfaction was made to the landowners:—*Held*, 1st, that the proprietors of the navigation did not thereby necessarily acquire such an interest in the soil of a bank, which had been formed out of the excavation of a new channel, as to maintain trespass for cutting bushes, &c. growing thereon; 2dly, that the act containing nothing denoting purchase or sale, and as its object might be accomplished without, the jury were improperly directed to presume a purchase of the soil to have been originally made, and that evidence of acts of ownership by the proprietors on other parts of the banks was improperly received, it not being previously established that the places to which those acts were applied were part of one entire district. *Hollis v. Goldfinch*, 1 B. & C. 205; 2 D. & R. 316. So if a canal company, who might have stopped the working of mines contiguous to the canal, by the special provisions of an act of parliament, refrain from doing so, they cannot afterwards complain of their canal being undermined. *Wyrley & Essington Canal Navigation Co. v. Bradley & others*, 7 East, 368.

[2] Some of the canal acts direct the amount of compensation to be paid for cutting through lands to be settled by commissioners appointed for the purpose, who are to ascertain, either by annual rent or a sum in gross, the value of the lands set out for

IV. Shares[1] in Canals, and Calls upon Members. *See* vol. v. p. 249.

V. Tolls Payable, and Exemption. *See post*, Tolls.

VI. Rateability of Tolls to Relief of Poor. *See ante*, vol. v. p. 182.

VII. Notice of Action to Parties under Canal Acts. *See* Notice of Action, vol. v. p. 547.

VIII. Traffic Regulations. *See* vol. iii. p. 41.

IX. Negligently Keeping and Managing.[2] *See* vol. v. p. 526; and *ante*, p. 4.

ROBBERY. *See* Larceny, vol. v. pp. 329–332.

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making the canal, as also the recompense for damages sustained; and if the parties are dissatisfied with their determination, the commissioners are to issue a warrant to the sheriff of the county where the lands lie to summon a jury to assess such value or recompense. According to most of these acts, on payment or tender of such sum as the commissioners ascertain or the jury assess, the company may take possession of the lands; and upon further recording the determination of the commissioners, or the verdict of the jury at the sessions, the land will vest in the company; but until such sum is paid or tendered, the company will not have power to enter. *See* the Stainforth and Keadby Canal Act, 35 Geo. 3, c. 117; 1 M. & S. 32, n.

If the funds represented to parliament as adequate for the completion of the undertaking be insufficient, the persons authorised to cut the canal will be directed by a court of equity, on the previous application of the owner of the lands through which they are cut, to desist from further proceeding. *Agar v. The Regent's Canal Co.* cited 1 Swanst. 250, n.; Cooper, C. C. 77, 193. But persons so authorised to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, cannot be restrained from cutting through their own lands at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for further powers to levy money. *Mayor, &c. of King's Lynn v. Pemberton*, 1 Swanst. 244. And though the court will not in general restrain an action of trespass by a party through whose estate a canal is being cut for deviating from the line, because he has laid by and rested upon his legal right; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not in a disputed case do so without a trial by jury, and directing an issue at law. *Agar v. Regent's Canal Co.* Cooper, 77.

[1] Shares in canals are personal property. *Bradley v. Holdsworth*, 3 Mee. & W. 422. *Hebblewhite r. Macmorine*, 6 id. 200. *Humble v. Mitchell*, 11 Ad. & E. 205. *Robinson v. Addison*, 2 Beav. 515.

[2] Every canal company, so long as it keeps its canal open for the public use of all who may choose to navigate it, is bound to take reasonable care that they may navigate it without danger to their lives or property. *Lanc. Canal Co. v. Parnaby*, 11 Ad. & E. 243. *Gibbs v. Trustees of Liv. Dock*, 27 L. J. Ex. 321; 3 H. & N. 164. All such companies are bound also to take all reasonable and proper precautions for the protection of the public where the canal intersects public thoroughfares. In such cases there is a common-law obligation on the company to make and maintain sufficient bridges, with proper rails and lights, such as all persons passing along the highway can safely use. When the high-road traverses the canal by a swing-bridge, and the bridge is opened for the passage of boats and vessels, the company is bound to provide sufficient lights, or persons to watch and warn passengers, or to have some apparatus attached to the bridge itself to protect passengers when the bridge is open, and prevent them from falling into the water. *Manley v. St. Helen's Canal and Railway Co.* 2 H. & N. 840; 27 L. J. Ex. 164. But if the canal has been demised to a lessee who is in the actual possession and occupation of it, and who receives the toll for the use of it, it is not then the duty of the proprietors of the canal to maintain and repair the canal, unless the particular statute under which they are incorporated expressly imposes that duty upon them. *Walker v. Goe*, 4 Ex. 350; 27 L. J. Ex. 427.

Where an act of parliament authorised navigation commissioners to lease the works, and the act put the duty of repairing upon the lessees, and, in case they did not repair, authorised and required the commissioners to give them notice to repair, and, in case they neglected to finish the repairs in such period as the commissioners pointed out, authorised the commissioners to take possession of the tolls, and cause the repairs to be done themselves, an action does not lie against the commissioners for that the commissioners had neglected to give the notice, whereby a lock in the line of the navigation fell in, and the plaintiff's barge was delayed in the canal, so as to cause him to lose the use of it; the alleged injury not being the natural, necessary, and proximate result of the not giving notice. *Walker v. Goe*, 4 H. & N. 350; 5 Jur. N. S. 737; 28 L. J. Ex. 184, Ex. Ch.

RULES. *See* Summons and Judge's Orders, vol. v. p. 258.

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I. How Obtained.[1]

(A) *On Motion Paper signed by Counsel.*[2]

(B) *Without Motion.*[3]

II. Of Rules Nisi.

(A) *How Obtained, and what they must Show.*[4]

[1] The summary jurisdiction of the superior courts is exercised chiefly through the means of motions and rules. Common rules are granted by the master without any intervention of counsel: special rules require the aid of counsel. Some of the latter kind of rules are obtained without any formal application to the court, it being sufficient for that purpose that a motion paper be signed by counsel, when the rule is granted as a matter of course; or the counsel may hand the motion paper to the officer of the court, without any statement; or the rule may be obtained on a naked application to the court, but without stating any grounds in detail; or, lastly, such grounds in detail may require to be stated to the court before the court will grant the rule.

[2] When the rule can be obtained by a motion paper signed by counsel, it is sufficient to take the motion paper so signed to the master's office, when the rule will be drawn up and handed out. A copy is then served on the opposite attorney. Some rules require a judge's fiat before they can be obtained; in such cases the judge's fiat must be taken, along with the *præcipe*, to the master's office. Sometimes also a motion paper signed by counsel is required, as well as a judge's fiat; in which case both these documents must be taken with the *præcipe*.

[3] Common and side-bar rules are obtained by taking a *præcipe* or memorandum to the master's office, when the rule will be drawn up. "Side-bar rules may be obtained on the last as well as other days in term." Rule (Pr.) 150, H. T. 1853.

[4] Special rules, obtained by the intervention of counsel, are either absolute in the first instance, or *nisi* only. Sometimes a preliminary notice of the intended motion for a rule *nisi* is necessary: thus, "rules to show cause shall be no stay of proceedings, unless two days' notice of the motion shall have been served on the opposite party, except in the cases of rules for new trials, or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, to set aside an award or annuity deed, or to enter a suggestion by a special direction of the court." Rule (Pr.) 160, H. T. 1853. This notice must be given, notwithstanding a judge's order has already stayed proceedings. *Belcher v. Goodered*, 4 C. B. 472.

The facts necessary to inform the court and induce them to grant the application must, in general, be set forth on affidavit. *Classey v. Drayton*, 6 Mee. & W. 17. *Green v. Rohan*, 4 Dowl. 659. If a previous application has been made to a judge at chambers, this fact can only be stated by affidavit. *Goren v. Tute*, 7 Mee. & W. 142. On a motion to set aside a judge's order, it has been held sufficient to state the substance of the order without annexing it (*Shirley v. Jacobs*, 3 Dowl. 101. *Bland v. Dax*, 8 Q. B. 126); and where a rule purported to be drawn up on reading the judge's order, further proof of the latter was dispensed with. *Atwell v. Baker*, 5 Dowl. 462. Where a judge's order or rule of court is sought to be set aside or rescinded, the grounds on which it was founded should be set forth in the affidavit. *Needham v. Bristowe*, 4 Man. & G. 262; 4 Scott, N. R. 773. The affidavit must be sworn before the rule is moved for, and must be produced in court (Rule (Pr.) 146, H. T. 1853), though, in very special circumstances, the court may allow the affidavit to be made afterwards. *Bury v. Clench*, 1 Dowl. N. S. 848. *Davis v. Sherlock*, 7 Dowl. 592. *Perrin v. Kymer*, 4 Nev. & M. 477. If the affidavit is defective, the court will sometimes allow the rule to be drawn up on reading a supplemental affidavit, or allow the motion to be renewed on amended affidavits; but it will not do so unless there are merits. *Ilderton v. Burt*, 6 C. B. 432.

(B) *Service of.*[1]

For the purpose of making the motion, the motion-paper and affidavit are given to counsel, who either applies to the court stating the grounds, or he gives in the papers to the master after signing the motion-paper. The attorney then calls at the master's office during the evening, when the rule will be drawn up, and a copy is then served on the opposite attorney. On the last day of term certain motions cannot be made as a motion for an attachment, except for non-payment of costs (5 Burr. 686), or against the sheriff for not returning a writ of *capias*, or bringing in the body (*R. v. York*, 5 Burr. 2686; Rule (Pr.) 168, H. T. 1853. *Ashmore v. Rypley*, 2 Scott, N. R. 203); to stay proceedings (*Bailey v. Jones*, 1 Chitt. Rep. 744. *Anon.* 2 Price, 143); to answer matters charged in affidavit (Id. *Anon.* 2 Dowl. 227. *Re Turner*, 3 Dowl. 557); nor, generally, where some matter of law will require to be discussed. *Turner v. Mayor of Kendal*, 2 D. & L. 197. *Drury v. Hounsfield*, 11 Ad. & E. 105, n. *Doe d. Stevens v. Lord*, 6 Dowl. 256. The court will sometimes, under pressing circumstances, grant a rule *nisi* returnable at chambers; but this is seldom done without the consent of the parties. *Casse v. Wright*, 14 C. B. 562. *Drew v. Woolcock*, 24 L. J. Q. B. 22. The form of the rule ought to include, when necessary, a direction as to the mode of serving the rule; as by leaving a copy at a particular place with an agent or representative of the party. *Neilson v. Shee*, 8 Dowl. 32. *Wright v. Gardiner*, 3 id. 657. This direction as to service must be specified in each rule, for the court have no means of directing that all rules in the cause may be served in the same way. *Davis v. Jenner*, 2 Scott, N. R. 202; 9 Dowl. 45. *Layton v. Mason*, 6 Dowl. 275. *Martin v. Colvill*, 2 id. 694.

The grounds on which the rule is obtained sometimes require to be stated therein, as in rules for a new trial. And where a rule to show cause is obtained to set aside an award or annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute, shall be stated in the rule to show cause. Rule (Pr.) 169, H. T. 1853. If the rule is to set aside proceedings for irregularity, the grounds of the rule need not be specified (*Rennie v. Bruce*, 2 D. & L. 946); though, if a summons be taken out at chambers for that purpose, the grounds must be specified. Rule (Pr.) 136, H. T. 1853. The rule *nisi* is drawn up on reading all the affidavits and other documents relied on for the application, and should call on every party who is be affected by the rule to show cause against it, otherwise such party will not be bound to show cause. *Cheslyn v. Pearce*, 4 Dowl. 693. *Norton v. Curtis*, 3 Dowl. 245. The party himself, and not his attorney, should be called upon to show cause, unless the rule be grounded on some matter personal to the latter. *Baber v. Harris*, 7 Dowl. 589. *Eagler v. Twisden*, 4 Bing. N. C. 714. The rule *nisi* appoints a day certain in term on which cause must be shown, which day is, generally, in a town cause, three days from the date of the rule *nisi*, and in a country cause, six days. *Arthur v. Marshall*, 2 D. & L. 376; 13 Mee. & W. 465. When the rule *nisi* is obtained on the last day but one of term, the court often appoints cause to be shown on the last day of term, but the court will not allow cause to be shown at chambers (Id. *Fall v. Fall*, 2 Dowl. 88), unless under special circumstances, or in the case of a prisoner or interpleader. *Poweller v. Lock*, 4 Nev. & M. 852. *Harley v. Disney*, 2 Scott, 183. *Beames v. Cross*, 4 Dowl. 122.

Every rule of court shall be dated the day of the week, month, and year on which the same is drawn up, without reference to any other time or date (Rule (Pr.) 149, H. T. 1853), and properly entitled in the name of the cause. "B. (deceased) *v.* C." is bad, there being no such cause as B. deceased. *Blond v. Dod*, 8 Q. B. 126; 15 L. J. Q. B. 1.

The party obtaining the rule *nisi* is not bound to draw it up. *Gingall v. Bean*, 1 Scott, N. R. 390. *Doe d. Harcourt v. Roe*, 4 Taunt. 883.

[1] A copy of the rule must be served on the party called upon to show cause, otherwise it has no effect. Service of the original rule may suffice. *Leaf v. Jones*, 3 Dowl. 315. The service must be effected a reasonable time before cause is to be shown. *Farrell v. Dale*, 2 id. 15. If the rule is served too late, the proper course is to get it enlarged. If, from the pressure of business in the office, the rule cannot be drawn up immediately, it is sometimes expedient to give notice that the rule has been obtained, in order to stay proceedings. *Tiling v. Hodgson*, 13 Mee. & W. 638; 2 D. & L. 655.

Where the party has appeared in the cause by attorney, all rules must be served on that attorney, and not on the party in person (*Tashbourn v. Havelock*, Barnes, 306. *Margetson v. Rush*, 8 Dowl. 388. *Pattrick v. Richards*, 15 L. J. Q. B. 204. See *Collins v. Arnold*, 1 B. C. Rep. 217), unless where the rule is for an attachment. Every attorney is bound to enter his address in a book in the master's office. Rule (Pr.) 165, H. T. 1853. In all cases where a party sues or defends in person, he shall, upon issuing any writ of summons or other proceeding, or entering an appearance, enter in a book, to be kept for that purpose at the master's office, an address within three miles from the General Post-office, at which all pleadings, notices, summonses, orders, rules, or other proceedings, not requiring personal service, shall be left, and if such address shall be more than three miles from the General Post-office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, or other proceedings in the master's

(C) *How Enlarged.*[1]

(D) *Showing Cause against.*[2]

office, without the necessity of any further service. Rule (Pr.) 166, H. T. 1853. If, however, such party suing or defending in person give notice in writing by an attorney, that such attorney is authorised by some to act as such, all further notices, rules, &c., must be served on such attorney. (R. 167.)

Service must be made before seven P.M., and if made after that hour, the service shall be deemed as made on the following day. (Rule 164.) If made on Saturdays, it must be before two o'clock P.M., otherwise it will be deemed to be made on the Monday following. Rule (Pr.) E. T. 1856. Service on the attorney consists in leaving a copy of the proceeding at his place of business with any person resident at or belonging to such place. Rule (Pr.) 165, H. T. 1853. Leaving the copy with the laundress, unless she is a servant (*Kent v. Jones*, 3 Dowl. 210, 211. *Brown v. Whitfall*, 1 Scott, N. R. 159; 8 Dowl. 592. *Robinson v. Gompertz*, 4 Ad. & E. 82), or putting it under the door, or through the letter-box, unless it can be sworn that he received it, is not sufficient. *Burdett v. Lewis*, 7 C. B. (N. S.) 791. *Strutton v. Hawkes*, 3 Dowl. 25. *Braham v. Sawyer*, 1 D. & L. 466. *Warren v. Thompson*, 2 Dowl. N. S. 224.

Where service is on a party who appears in person, the copy must be left with some one who may be presumed to have authority to receive such papers, as a sister, mother, &c. *Lewis v. Blurton*, 7 C. B. 102. *Archer v. Evans*, 1 Dowl. N. S. 861. *Brandon v. Edmonds*, 2 id. 225. *Lawes v. Scales*, id. 342. Delivery to the housekeeper at defendant's residence (*Lewis v. Blurton*, 7 C. B. 102), or to his landlord (*Griffin v. Gilbert*, id. 701), are not good services. Service by sending a copy of the rule by post is insufficient, though it may suffice if the party so served expressly acknowledge its receipt. *Smith v. Campbell*, 6 Dowl. 728. The copy served must be delivered open, or in an open envelope. It shall not be necessary to the regular service of a rule or order that the original rule or order should be shown, unless sight thereof be demanded, except in cases of attachment. Rule (Pr.) 163, H. T. 1853. Service on a wife, without alleging that it came to the knowledge of the husband, is insufficient. *Mason v. Muggeridge*, 18 C. B. 642. Where the residence of a defendant is unknown, rules, notices, and other proceedings may be stuck up in the office, but not without the previous leave of the court or a judge. Rule (Pr.) 162, H. T. 1853. See *Thompson v. Vijande*, 27 L. T. (N. S.) 110. If the attorney has neglected to enter his address in the master's book, or if a party proceeding in person has so neglected (Rules (Pr.) 165, 166, H. T. 1853), then, the fixing up of any or the copy of any pleadings, notice, summons, order, rule, or other proceeding for such attorney, &c. in the master's office, shall be deemed a sufficient notice.

An irregularity in serving the rule is waived by the opposite party enlarging it (*Cartwright v. Blackworth*, 1 Dowl. 489), or showing cause (*Levy v. Duncomb*, 3 id. 447), though an irregularity in the copy of the rule would not be so waived. *Wood v. Critchfield*, 1 id. 587. *Clothier v. Ess*, 2 id. 731.

[1] Either party may, if he require time, and the opposite party will not consent, move to enlarge the rule to a future day, provided he can show sufficient grounds to the court for doing so. The application will be granted where the party applies who obtained the rule, if the effect is only to delay himself, and not his opponent; but the application will be refused after the rule is returnable, and the party applies *ex-parte*. *Price v. Thomas*, 11 C. B. 543. *Abrahams v. Davison*, 6 id. 622. Where the opposite party has not been served with the rule in sufficient time he has a right to require the rule to be enlarged (*Anon.* 1 Smith, 199. *R. v. Anderson*, 9 Dowl. 1041); but in other cases the court will generally impose terms on granting the application. A rule may be enlarged, if the court think fit, without notice (Rule (Pr.) 151, H. T. 1853); and "all enlarged rules shall be drawn up for the first day in the ensuing term, unless otherwise ordered by the court." (R. 152.) It is not necessary that the enlarged rule should be served in the Queen's Bench or Exchequer, but the party moving for the enlargement, or enlarging it by consent, must in the Common Pleas draw up and serve the enlarged rule. *Batty v. Marriott*, 5 C. B. 420. The sanction of the court is required to every enlargement, and which will not be given after the day on which it is returnable. *Abrahams v. Davison*, 6 C. B. 622. Enlarged rules come on for argument as if they had been originally drawn up for that day.

[2] On the day appointed by the rule the party called upon should show cause, unless the rule has been enlarged or postponed by consent. *Smith v. Collier*, 3 Dowl. 100. The party called upon by the rule only can show cause; others, though served with a copy, will not be allowed their costs of showing cause. *Johnson v. Marriott*, 2 Dowl. 343. *Clarke v. Lord*, id. 55. But creditors' assignees subsequently appointed have been allowed to show cause for the official assignee. *Ibbotson v. Chandler*, 9 id. 250. *Kirk v. Clark*, 4 id. 363.

The party, before he show cause, must obtain an office copy of the rule and of the affidavits used on the original application (*Walker v. Needham*, 1 Dowl. N. S. 220; 4 Scott, N. R. 222. *Brown v. Probert*, 1 Dowl. 659. *R. v. Carter*, 15 Jur. 176, B. C.), though not necessarily of the exhibits annexed thereto. *Hawkyard v. Stocks*, 2 D. & L. 936. The court may allow time to obtain these copies. *Re Rogers*, 9 Dowl. 926. *Walker v. Needham*, *supra*. Affidavits used on showing cause ought to be sworn before the day named in the rule for show-

(E) *Showing Cause in first Instance.*[1]

ing cause. *Kibblewhite v. Jeffreys*, 1 Chit. R. 142. If made, however, before cause is actually shown, they may be read. *Graham v. Beaumont*, 5 Dowl. 49. *Pim v. Grazebrook*, 3 Man. & G. 863; 4 Scott, N. R. 567. *Braine v. Hunt*, 2 Dowl. 391. Where no affidavits were used on moving for the rule, none are allowed to be used on showing cause. *Atkins v. Meredith*, 4 id. 658. *Doe v. Baytun*, 1 H. & W. 270. It is unnecessary to file the affidavits before using them on showing cause, unless where the rule is enlarged or requires them to be so filed; in which case, if not filed beforehand, they cannot be used except by leave of the court or a judge. Rule (Pr.) 145, H. T. 1853. A rule *nisi* for such leave should be applied for. *Hoare v. Hill*, 1 Chit. R. 27. *Re Mackay*, 1 D. & L. 206. *Pryor v. Swaine*, 2 id. 37. Where the rule is enlarged from one term to another, the affidavits to be used on showing cause must be filed a week previous. *Gilson v. Carr*, 4 Dowl. 618. *Johnson v. Marriott*, *ante*. *Barker v. Richardson*, 1 Y. & J. 362. When filed, the opposite party has a right to office copies of the affidavits, and he is entitled to use them for his own purposes (*Price v. Hayman*, 4 Mee. & W. 8); but he is not bound to take office copies before he is heard to support his rule. *Pitt v. Coombs*, 1 H. & W. 13; 4 Nev. & M. 535. Affidavits used on one rule and material thereto, may be used in showing cause against another rule. *Quelly v. Boucher*, 3 Dowl. 407. *R. v. Mizen*, 1 Dowl. N. S. 865. *Langston v. Wetherell*, 14 Mee. & W. 104.

"Upon motions founded upon affidavits, it shall be lawful for either party, with leave of the court or a judge, to make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits." C. L. P. Act, 1854, s. 45. It is not, it would seem, necessary to apply for leave to make affidavits in answer before the rule comes on to be argued. *Wood v. Cox*, 16 C. B. 494. *Hayne v. Robertson*, 24 L. J. C. P. 155. This course has not been always adopted. "Upon the hearing of any motion or summons it shall be lawful for the court or a judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *viva voce*, either before such court or judge, or before the master, and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just." C. L. P. Act, 1854, s. 46. See *Cockerell v. Van Diemen's Land Co.* 16 C. B. 256. "The court or judge may, by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein for the purposes of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the court under an act, 1 Wm. 4, c. 22, intituled, 'An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories or otherwise;' and it shall be lawful for the court, or judge, or master, to adjourn the examination from time to time as occasion may require, and the proceedings upon such examination shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *viva voce* examination of witnesses under the last-mentioned act." C. L. P. Act, 1854, s. 47. A person refusing to make an affidavit may be compelled by order of a judge to attend for the purpose of being examined. (Id. s. 48.)

For the purpose of showing cause counsel must be provided with office copies of the rules and of the affidavits, if any. Affidavits to be used on his own side are generally shown, as a matter of courtesy, to the opposite counsel a reasonable time before the day for showing cause, and it seems the clients may be allowed to see them. *Wigley v. Clarke*, 26 L. T. 261. *Wood v. Cox*, 24 L. J. C. P. 155; 17 C. B. 495. *R. v. Hudson*, 9 Jur. 345. Any number of counsel may be heard on showing cause, and the counsel who obtained the rule is then heard in reply in support of the rule. The rule must be supported on the grounds on which it was obtained. *Smith v. Clark*, 2 Dowl. 218. *Doe d. Fish v. Macdonnall*, 8 id. 488. The court, however, occasionally moulds the rule to meet the facts and justice of the case. *Doe d. Stevens v. Lord*, 6 id. 256. *Higgins v. Nicholls*, 7 id. 551. *Bate v. Kinsey*, 1 C., M. & R. 38.

The rule after it is disposed of must be drawn up and served by the successful party, otherwise it will be treated as abandoned. *Gingell v. Bean*, 1 Man. & G. 50; 1 Scott, N. R. 153. *Sawyer v. Thompson*, 9 Mee. & W. 248. *Nathan v. Storey*, 18 L. J. Q. B. 25. The officer of the court, if he discover any defect in the affidavits, or a defect in other documents, such as the want of a necessary stamp, may refuse to draw up the rule, though the court, in point of form, had made it absolute. *Hill v. Slocombe*, 9 Dowl. 339.

[1] The opposite party may be allowed, in the discretion of the court, to show cause in the first instance (*Anon.* 4 Taunt. 690. *Doe v. Smith*, 8 Ad. & E. 259. *Quin v. King*, 4 Dowl. 736); but if he do so he cannot have costs, although the rule is refused (*Read v. Speer*, 5 id. 330. *Fitch v. Green*, 2 id. 439. *Casel v. Pariente*, 8 Scott, N. R. 240), unless the rule would have operated as a stay of proceedings. *Rennie v. Beresford*, 3 D. & L. 464. *Blackburn v. Edwards*, 10 Ad. &

(F) *Making Absolute where no Cause shown.*[1]

III. When Rule will be Reopened.[2] V. Costs of Rules.[3]

E. 21; 2 Per. & D. 237. The party applying for the rule has his right of reply, as in other cases. *Anon.* 4 Taunt. 690.

[1] Where the rule has been duly served, and no notice is given that cause will be shown, the course is for counsel to move to make rule absolute on an affidavit of service. In some instances the rule makes itself absolute, if no cause be shown within a given time. See *Scott v. Marshall*, 2 C. & J. 60. The affidavit should state distinctly upon whom and where the copy of the rule *nisi* was served; and if such person was a servant, sister, wife, &c., of the party, it should state that such person resided at the party's house, and that in the deponent's belief the copy of the rule came to the hands of the party. *Abraham v. Davison*, 6 C. B. 622. *Holland v. Wright*, 9 Jur. 405. *Sidney v. Magill*, id. 666; *see* 28 L. J. Ex. 35. The affidavit should refer to a "copy of the rule hereunto annexed," and not to the "rule in this cause." *Fidlett v. Bolton*, 4 Dowl. 282. An affidavit stating that the rule was served on a party "who acts as attorney or agent of the defendant in this cause" was held sufficient. *Patrick v. Richards*, 15 L. J. Q. B. 204; 3 D. & L. 573. And so, where it stated that it was served "on the day of the date hereof," there being no date but the jurat (*Holmes v. London and South-Western Railway Co.* 13 Q. B. 211; 6 D. & L. 536. *Craig v. Lloyd*, 3 Ex. 232; 6 D. & L. 487), that the original rule was served, and not a copy. *Leaf v. Jones*, 3 Dowl. 315. Where the rule was drawn up for cause to be shown peremptorily on a certain day, counsel may move to make the rule absolute after the bar is gone through, that time being considered the rising of the court. *Lace v. Adamson*, 12 Mee. & W. 807. In other cases it is not usual to make the rule absolute till two or three days after the rule is returnable; and if, by mistake, the rule has been made absolute, though counsel was instructed in time to show cause, it is usual to open the rule by obtaining back the brief instead of allowing the opposite counsel to apply to the court to have the rule opened. When the rule is made absolute it is drawn up at the master's office, and a copy is served on the opposite attorney. Where, after the rule was made absolute on the last day of term, the master refused to draw it up for a defect in the affidavit, the court allowed the motion to be renewed on an amended affidavit in the sittings after term. *Dow v. Bell*, 18 L. J. 391; 4 Ex. 259.

[2] A rule *nisi*, after being made absolute, cannot be reopened on the ground of false affidavits (*Davis v. Cottle*, 3 T. R. 405. *Rossell v. Hartley*, 7 Ad. & E. 522, n.; 1 H. & W. 581. *Beckley v. Fill*, 6 Scott, N. R. 706), or an omission of counsel to refer to a statute (*Dillamore v. Capon*, 1 Bing. 398; 8 Moore, 462), or an erroneous report of the master (*Gingell v. Bean*, 1 Scott, N. R. 390; 1 Man. & G. 555), or an understanding between the parties that no rule was to be applied for. *Richardson v. Peto*, 9 Dowl. 73. The court may, however, open the rule if the other party were taken by surprise. *Sanson v. Price*, 17 L. J. Ex. 205; 2 Ex. 338. A fresh application is not, in general, allowed on an amended affidavit. *Levy v. Coyle*, 2 Dowl. N. S. 932. *Joynes v. Collinson*, 13 Mee. & W. 558; 2 D. & L. 449. *Hawkins v. Akrill*, 1 L., M. & P. 242); but if the state of facts has changed since the former application, this may be allowed (*Re Butler*, 13 Q. B. 341. *Peterson v. Davis*, 17 L. J. C. P. 290. *Dodgson v. Scott*, 2 Ex. 457. *Pocock v. Pickering*, 21 L. J. Q. B. 365. *Dixon v. Oliphant*, 15 Mee. & W. 152. *Orchard v. Moxhay*, 2 E. & B. 206), or where the first application was made on behalf of a wrong party (*Tilt v. Dixon*, 4 C. B. 736. See *Legge v. Young*, 17 id. 549), or where the defect in the affidavit was merely technical. *R. v. Great Western Railway Co.* 5 Q. B. 597; 1 D. & L. 874. *Doe d. Hill v. Tollett*, id. 121. *Shaw v. Perkin*, 1 Dowl. N. S. 306.

Where no step has been taken to carry out the rule, the party is sometimes, though seldom, allowed to obtain a new rule. *Jeves v. Hay*, 1 Man. & G. 390. *Dodyson v. Scott*, 2 Ex. 457. *Rowbottom v. Ralphs*, 6 Dowl. 291.

[3] There is no invariable rule with regard to the allowance or disallowance of costs upon motions in the courts of law. Costs on such occasions are often arbitrary, and rest entirely in the discretion of the court, upon weighing all the circumstances, not only as to the *quantum*, but whether there shall be any costs at all.

If the rule *nisi* do not ask for costs, and no cause is shown, no costs are ordered. *Jeves v. Hay*, 1 Scott, N. R. 339. *In re Darrell*, 22 Jur. 417. *Gleddon v. Trebble*, 9 C. B. 367. If nothing is said by the court about costs no costs are impliedly given, nor can the party subsequently apply for them. *Holmes v. Edwards*, 6 Dowl. 51. *Shelton v. Braithwaite*, 8 Mee. & W. 252. *Anon.* 1 Chit. R. 398.

Where the rule expressly asks for costs, and no cause is shown, costs are given as a matter of course; but if, after cause shown, the rule is discharged, nothing being said as to costs, it seems costs are not thereby given. *Drinker v. Pascoe*, 4 Dowl. 566. The moving party, if successful, is generally allowed his costs (*Casel v. Pariente*, 8 Scott, N. R. 240), but not if he succeeds only in part. *Newton v. Harland*, 3 id. 232. *Aliven v. Furnival*, 2 Dowl. 49. *Wilson v. Knapp*, 8 Dowl. 426. And if the opposite party give notice that he concedes certain points, on which alone the rule is afterwards made absolute, such opposite party will be allowed his costs. (Id.) *Rising v. Dolphin*, 8 Dowl. 309. *Macandrew v. Adam*, 3 Dowl. 120. A party, otherwise entitled to his costs, may sometimes be deprived of them, if he has

VI. Execution on Rules.[1]

RUNNING Account.[2]

Days.[3]

come to the court in a case where the application ought to have been made to a judge at chambers (*Vaughan v. Trewent*, 2 Dowl. 299), or if he has used affidavits containing scandalous and impertinent matter. *Thompson v. Dicas*, 2 Dowl. 93.

Where a rule is discharged on the ground of a defective affidavit, it is not necessarily discharged with costs. *Re Lloyd*, 15 Q. B. 682.

The court will not, in general, limit a time for the payment of the costs of the rule. If a rule allowing an amendment or other indulgence is made "upon payment of the costs of the rule," and the rule is abandoned, there is no mode of compelling payment of costs to the opposite party. *Bennett v. Gardener*, 2 Dowl. N. S. 50. *Pugh v. Kerr*, 5 Mee. & W. 164; 6 id. 17; 8 Dowl. 218. To avoid this, the rule should be framed so that the costs shall be paid at all events. *Field v. Sawyer*, 6 C. B. 71.

[1] Before the stat. 1 & 2 Vic. c. 110, s. 18, rules were generally only enforced by attachment, but by that statute it is enacted that "all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgment in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses are by such orders or rules respectively directed to be paid." The above section has been extended to the palatine courts by 18 & 19 Vic. c. 15, s. 2.

A judge's order must previously be made a rule of court. *Rickards v. Patterson*, 1 Dowl. N.S. 52; 8 Mee. & W. 313), which may be done as of course. *Watson v. Halcombe*, 4 Man. & G. 136. *Black v. Low*, 16 L. J. Ex. 56. If the order was obtained *ex-parte*, a rule *nisi* to show cause why the money should not be paid may be made absolute, and execution may then issue. It is no answer to such rule *nisi* that the judge had no power to make the order. *Wilson v. Northorp*, 4 Dowl. 441. The rule of court is not a judgment in the full sense of the term, but merely gives a better remedy than before. *Newton v. Boodle*, 18 L. J. C. P. 73. *Farmer v. Mottram*, 7 Scott, N. R. 408; 1 D. & L. 781.

Where the rule expressly orders payment, it is not necessary to obtain leave of the court, or to make prior demand on the party before issuing execution. *Hobson v. Patterson*, 2 Dowl. N. S. 129. *Wallis v. Sheffield*, 7 id. 793. So, if the rule ordered payment when the costs should be taxed, and the master's *allocatur* has been obtained, execution may issue without any fresh rule. (Id. *Watson v. Halcombe*, 4 Man. & G. 136. *Wright v. Burroughs*, 2 D. & L. 94. *Doe d. Pennington, v. Barrell*, 10 Q. B. 531. *Doe d. Harrison v. Sampson*, 5 D. & L. 484; 4 C. B. 745. If, however, the rule of court orders payment of money on a condition, and not otherwise, proceeding cannot be taken upon it under the 18th section. *Gibbs v. Flight*, 13 C. B. 803. And if the rule directs money, other than costs, to be paid on taxation, execution cannot be issued until a further rule is obtained and made absolute for the direct payment of the money, and the master's *allocatur* must then, unless under special circumstances, be personally served (*Doe d. Steer v. Bradley*, 1 Dowl. N. S. 259. *Abrahams v. Taunton*, 1 D. & L. 319. *Smith v. Troup*, 7 C. B. 757), and an affidavit of the fact produced on applying for the further rule. *Pearson v. Archbold*, 11 Mee. & W. 108; 2 Dowl. N. S. 769. *Smith v. Troup, supra.*

Where the rule is to pay money pursuant to an award, it need not be made part of the rule that the applicant should be at liberty to issue execution. *Burton v. Mendizabel*, 1 Dowl. N. S. 336. The rule *nisi* in such a case should be personally served. *Jordon v. Berwick*, 1 Dowl. N. S. 271. *Winwood v. Holt*, 3 D. & L. 85. *Wilson v. Foster*, 1 id. 496; 6 Scott, N. R. 936. *Doe v. Amey*, 1 Dowl. N. S. 23.

The writ of execution must pursue the rule of court. *Badman v. Pugh*, 6 Scott, N. R. 150; 5 Man. & G. 381. See *Re Spooner v. Payne*, 11 Q. B. 136. For forms of execution on rules for payment of money, &c. *see* Rules (Pr.) H. T. 1853. As to attachment for disobedience, *see* Attachment, vol. i. p. 575.

[2] An open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled. *See* vol. i. p. 116.

[3] In maritime law, days allowed in a charter-party for loading and unloading a vessel, and for other purposes. Abbott on Ship. 254, 255, 259. See *Brown v. Johnson*, 10 Mee. & W. 334, where *Lord Abinger* said, "'Days' and 'running days' mean the same thing—consecutive days—unless there be some particular custom." *See* vol. iii. p. 88.

S.

SABBATH. *See post*, Sunday.

SACRILEGE.[1]

"SAID last mentioned."[2]

SALE, Bill of. *See* Bill of Sale, vol. ii. p. 494.

of Ships. *See post*, Ship and Shipping.

SALES. *See* Auction, vol. ii. p. 63; Auctioneer, id. p. 65; Frauds, Statute of, vol. iv. p. 535; Goods Bargained and Sold, id. p. 605; Goods Sold and Delivered, id. p. 607; *post*, Set-Off, p. 369; Stoppage in Transitu; Vendor and Purchaser.

SALES by Sheriff. *See* Fieri Facias, vol. iv. p. 455.

SALVAGE. *See post*, Ship and Shipping.

SANCTUARY.[3]

SATISFACTION. *See* Accord and Satisfaction, vol. i. p. 88.

I. By Levy under a Fieri Facias. *See* Fieri Facias, vol. iv. p. 455.[4]

[1] Larceny from a church. 4 Steph. Com. 164. The crime of breaking a church or chapel and stealing therein. 1 Russ. on C. & M. 843. By 24 & 25 Vic. c. 96, s. 50, "whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit *any felony* therein, or being in any church, chapel, meeting-house, or other place of divine worship, shall commit *any felony* therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." As to breaking into a church, &c., with intent to commit felony, no felony being actually committed therein, *see* 24 & 25 Vic. c. 196, s. 57.

Stealing property from the tower, communicating with the church by an internal door, is held to be sacrilege within 7 & 8 Geo. 4, c. 29, s. 10. *R. v. Wheeler*, 3 C. & P. 585. And the vestry is part of the church for this purpose. *R. v. Evans*, C. & M. 298. The allegation of property in the parishioners, rector or churchwardens, will be sufficiently proved by evidence that the church is a parish church; but the property in goods in a chapel must be proved as in ordinary cases. *R. v. Hutchinson*, R. & R. 412.

Where a prisoner was indicted for stealing a Bible, a hymn-book, and a pair of brass sconces, the property of J. B. and others, which, it appeared, had been stolen from a Methodist chapel at Fakenham, and the Bible and hymn-book had been presented to the Society of Methodists there, of which J. B. was one, and also a trustee of the chapel, but the trust deed was not produced, *Parke, J.*, held, that as J. B. was one of the society, the property was well laid in him. *R. v. Boulton*, 5 C. & P. 537. Where the property stolen was a box containing money collected for the poor, which was screwed to the outside of a pew in the centre aisle of a church, the property was held to be well described as in the churchwardens in their individual names. *Reg. v. Wortley*, 1 Den. C.C. 162; 2 C. & K. 283. As to setting fire to church, &c., *see* vol. i. p. 539. But now, since the publication of that volume, it is enacted by the 24 & 25 Vic. c. 97, s. 1, that "whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

[2] Ambiguous use of these words refer to last antecedent. *Ashton v. Brevitt*, 10 Mee. & W. 107.

[3] Pretended privileged places to elude public justice, under the pretences of their having been palaces of the Crown, especially in London and Southwark; such as Whitefriars, Savoy, Salisbury Court, Ram Alley, Mitre Court, Fullwood's Rents, Baldwin's Gardens, Montague Close; or the Minories, Mint Clink, Deadman's Place, within the hamlet of Wapping or Stepney. All these sanctuaries are now abolished; and by the stats. 8 & 9 Wm. 3, c. 27, s. 15; 9 Geo. 1, c. 28, s. 1; 11 Geo. 1, c. 22, s. 1, persons opposing the execution of any process in such pretended privileged places, or assaulting or abusing any officers executing or having executed the same, shall be felons.

[4] When the sheriff has taken the defendant's goods upon a *fieri facias*, to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar

II. By Taking Body under Ca. Sa.[1] *See* vol. iii. p. 27.

III. Entering of on Roll.[2]

SAVINGS' BANKS.[3]

The statutes in force relating to savings' banks are:—

9 Geo. 4, c. 92: An Act to Consolidate and Amend the Laws relating to Savings' Banks.

3 & 4 Wm. 4, c. 14: An Act to enable Depositors in Savings' Banks, and others, to purchase Government Annuities through the medium of Savings' Banks, and to Amend an Act of the Ninth Year of his late Majesty to Consolidate and Amend the Laws relating to Savings' Banks.

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to an action of debt or *scire facias* upon the judgment. But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized but not sold, this cannot be pleaded in an action of debt against the other obligor, because it is not an actual satisfaction.

[1] When a judgment has been satisfied by a writ of execution, or other means, the defendant has a right to call on the plaintiff for a warrant or authority, directed to some attorney of the court wherein the judgment is recovered, authorising such attorney to enter up satisfaction on the judgment-roll. *Lambert v. Parnell*, 15 L. J. Q. B. 55.

[2] Where a plaintiff had recovered damages under a writ of inquiry in trover, for the conversion of his title-deeds, the court permitted satisfaction of the damages to be entered on the roll, upon the terms of the defendant delivering up the deeds, and paying all the plaintiff's costs as between attorney and client, and submitting to other terms, by which plaintiff was placed in as good a situation as he was in before the cause of action. *Combe v. Sandon*, 1 D. & R. 281.

By r. 80, H. T. 1853, "in order to acknowledge satisfaction of a judgment, it shall be requisite only (*Wood v. Hurd*, 2 Bing. N. C.; 3 Scott, 368) to produce a satisfaction-piece in form as thereinafter mentioned (*see* Chit. Forms), and such satisfaction-piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster, expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction-piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney: Provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit, and in cases where the satisfaction-piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the master may direct."

[3] The certificate of a barrister appointed under the 9 Geo. 4, c. 92, that the rules of a savings' bank are in conformity with the act, is not conclusive. *Ex-parte Haynes*, 3 Mont. D. & De Gex, 663. Bankers are not officers within the 3 & 4 Wm. 4, c. 14, s. 28. *Ex-parte Harris*, 1 De Gex, 162. *Ex-parte Oxford*, 21 L. J. Bank. 31.

Where A. being appointed actuary, and a cashier of a savings' bank, by one of the rules of which it was declared that the bank should be opened for receiving deposits every Saturday from eleven till two o'clock, at his house, when the committee, or some of them, would attend to receive deposits and pay money out; and none of the committee ever attended, and A. received the deposits without control, and, at the time of his bankruptcy, was a defaulter in respect thereof to a considerable amount; it was held, under the 28th section, that he did not receive the deposits by virtue of his office, and that the amount due from him was not payable out of his estate in priority to his other debts. *Ex-parte Fleet, re Jardine*, 19 L. J. Bank. 10. *Ex-parte Trustees of Dartford Savings' Bank*, 1 Fonb. 137. Under this section, also, the court will, on petition, order payment before any report made, in a suit for the administration of the officer's estate, but no order will be made for the payment of the costs of the partition. *Hatch v. Lee*, 10 L. J. Ch. 223.

No action is maintainable by a depositor against the trustees of a savings' bank; the only mode of adjusting disputes being by reference under the act. *Crisp v. Bunbury*, 8 Bing. 394. *Rex v. Mildenhall*, 6 Ad. & E. 952. *Rex v. Cheadle*, 3 Nev. & M. 418; 1 Ad. & E. 323. *Marshall v. Nicholls*, 21 L. J. Q. B. 343.

Where, by the rule of a savings' bank, no claim for any sum of money could be made more than seven years from the death of a depositor, the court discharged a rule for a *mandamus* to the trustees of such bank to appoint an arbitrator, under 9 Geo. 4, c. 92, s. 45, to decide a dispute as to money, the depositor having been dead more than seven years. *Reg. v. Northwich Savings' Bank*, 9 Ad. & E. 729.

The directors of a savings' bank were not compellable to appoint an arbitrator for the purpose of deciding upon the claim of persons professing to apply on behalf of a body of depositors, if it were a matter of dispute whether the applicants were entitled to represent the body. *R. v. Witham Savings' Bank*, 1 id. 321.

7 & 8 Vic. c. 83: An Act to Amend the Laws relating to Savings' Banks, and to the Purchase of Government Annuities through the medium of Savings' Banks.

11 & 12 Vic. c. 133: An Act to Amend the Laws relating to Savings' Banks in Ireland. Continued by 22 Vic. c. 17, and 25 & 26 Vic. c. 75.

14 & 15 Vic. c. 102, s. 38: An Act to Amend the Acts relating to the Merchant Seaman's Fund, and for the better Management thereof in the meantime.

15 & 16 Vic. c. 60: An Act to Continue an Act of the Twelfth Year of Her present Majesty, for Amending the Laws relating to Savings' Banks in Ireland.

16 & 17 Vic. c. 45: An Act to Consolidate and Amend the Laws, and to Grant additional Facilities in relation to the Purchase of Government Annuities through the medium of Savings' Banks, and to make other Provisions in respect thereof.

17 & 18 Vic. c. 50: An Act to Continue an Act of the Twelfth Year of Her present Majesty, for Amending the laws relating to Savings' Banks in Ireland, and to authorise Friendly Societies to Invest the whole of their Funds in Savings' Banks.

22 & 23 Vic. c. 20: An Act to Amend the Laws relating to Military Savings' Banks.

22 & 23 Vic. c. 53: An Act to enable Charitable and Provident Societies, and Penny Savings' Banks, to Invest all their Proceeds in Savings' Banks.

23 & 24 Vic. c. 137: An Act to make further Provision with respect to Monies received from Savings' Banks and Friendly Societies.

24 Vic. c. 14: An Act to Grant additional Facilities for Depositing small Savings at Interest, with the Security of the Government for due Repayment thereof. The 7 & 8 Geo. 4, c. 29, s. 5, makes it larceny to steal any document entitling a person to a deposit.

SCAVENGER.[1]

SCHOOL and SCHOOLMASTER.

I. Grammar-School.

(A) *Endowment and Regulation of.*[2]

(B) *Appointment and Resignation of Master.*[3]

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[1] Under the Metropolitan Paving Act of 57 Geo. 3, c. 29, ss. 59, 60, the scavenger of a particular district is entitled only to such dust, ashes, &c. as are, in the contemplation of the owner, rubbish or refuse, and as he desires to dispose of in that character. *Fibley v. Combe*, 2 Mee. & W. 677.

[2] As to the endowment and regulation of these schools *see* 3 & 4 Vic. c. 77; 4 & 5 Vic. c. 38; 7 & 8 Vic. c. 37; 12 & 13 Vic. c. 49; 14 & 15 Vic. c. 24; 15 & 16 Vic. c. 49; and 23 Vic. c. 11. Concerning parochial schoolmasters in Scotland, *see* 20 & 21 Vic. c. 59.

[3] Trustees of a free grammar-school, whose origin did not appear, held property "to the use of the school." Having elected a schoolmaster, they obliged him to enter into a bond or agreement stipulating that he should not have or claim a freehold in the school, or estates, and should quit at six months' notice, and should not intermeddle with the estates, and certain other stipulations as to the government and management of the school: — *Held*, that the trustees had exceeded their powers. *In re Royston Free Grammar-School*, 2 Beav. 228. In settling a scheme for a free grammar-school, the master will be restricted from holding ecclesiastical preferment which, from its distance, will prevent him from attending to his scholars on a Sunday. *King's Grammar-School, Warwick*, 1 Phil. C. C. 564.

Where the nomination to a school was vested in the vicar and churchwardens of X., to devolve, on their neglecting to nominate, to the corporation of Y., and on their neglecting: — *Held*, that the nomination by the vicar and a *majority* of the churchwardens was good. *Withnell v. Gartham*, 6 T. R. 388.

If a schoolmaster be dismissed for misconduct by the visitors and feoffees of a free grammar-school, they cannot maintain ejectment to recover possession of the schoolhouse, unless they have determined the master's interest therein by summoning him to appear before them before dismissal, that he might answer to any charges that might be preferred against him. *Doe d. Thanet (Earl) v. Gartham*, 1 Bing. 357; 8 Moore, 368.

Where, upon the construction of the instruments of endowments, the intent of a founder of a free school is manifest that it should be a grammar-school, the court can only enforce that trust according to the intent of the founder. *Attorney-General v. Earl of Mansfield*, 2 Russ. 95.

A general resignation-bond to the patron by the master, though having a freehold in his office, is unimpeachable at law. *Legh v. Lewes*, 1 East, 391; 3 B. & P. 231.

I. Grammar School (*continued.*)
(C) *Dismissal of Master.*[1]
II. Contracts for Schooling.[2]
III. Correction of Scholars. *See* vol. i. p. 568; id. v. p. 506.

[1] By a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, confirmed by the Lord Chancellor, it was declared that the trustees should have authority, upon such grounds as they should at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed:—*Held*, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal. *Doe d. Child v. Willis*, 5 Ex. 894; 20 L. J. Ex. 85; S. P. *Reg. v. Manchester, &c. Railway Co.* 1 Jur. N. S. 419, Q. B. Queen Elizabeth, by charter, founded and endowed a grammar-school, and incorporated certain persons and their successors as governors, and granted to them, for ever, full power and authority, from time to time, of electing, nominating, and appointing a master and usher of the school, so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the master or usher from the school according to their sound discretion, and of placing or appointing other or others, more fit, in their stead or steads:—*Held* by the Queen's Bench, and by the Exchequer Chamber affirming their judgment, that by the terms of the charter the governors might, in their discretion, remove a master without summons or hearing, and although no charge against him had been exhibited to them. *Reg. v. Darlington School* (*Governors*), 6 Q. B. 682; 9 Jur. 21; 14 L. J. Q. B. 67; Ex. Cham. in the court below, 7 Jur. 417; 12 L. J. Q. B. 124. The governors were empowered by the charter to make by-laws, and they made a by-law requiring certain qualifications in the master, and ordaining (for the encouragement of well-qualified persons to accept the office), that no master should thereafter be displaced, removed, or removable from the office, unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause:—*Held* by both courts, that the governors had no right thus to limit the discretion given by the charter, and that the by-law was void. (Id.) But although trustees of a school have, by the foundation-deed, power to remove the master at their discretion, and *they may remove him* without assigning any reason, they must not act from corrupt or improper motives. *Ex-parte Holland*, 11 Jur. 581.

In ejectment against a schoolmaster who had been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. *Doe v. Haddon*, 3 Dougl. 310.

[2] In an action for a quarter's salary for taking away a child from school without a quarter's notice, evidence was given, on the part of the plaintiff, that a prospectus was handed to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—*Held*, that this evidence was not admissible; but that the witness might be asked whether she had ever received any prospectus when her children came home for the holidays. *Delamotte v. Lane*, 9 Car. & P. 261.

In an action by a schoolmaster for a sum of money, in lieu of three months' notice of the removal of the defendant's sons from school, it appeared that the defendant's agent having expressed a wish to place the defendant's sons under the plaintiff's care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice of payment was required previously to the removal of the pupil. The plaintiff, at the time of delivering the prospectus, agreed verbally that the boys should be charged for at the rate of fifty guineas per annum each. The boys were thereupon sent to the plaintiff's, and were taken away without the stipulated notice:—*Held*, on an objection to the reception of the prospectus for want of a stamp, that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. *Clay v. Crofts*, 20 L.J.Ex. 361.

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—*Held*, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle. *Darnell v. Tratt*, 2 C. & P. 82.

A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar. *Clements v. Williams*, 8 C. & P. 58.

A child at school, for whom payment

SCIENCE.[1]

SCIENTER. *See* Animals, vol. i. p. 355; Deceit, vol. iii. p. 561; *post*, Vendor and Purchaser; Warranty.

SCIRE FACIAS. *See* Joint-Stock Companies, vol. v. pp. 253, 254; *ante*, Revivor, Writ of, p. 346.

I. Definition of.[2]

II. When it Lies, and how Writs to be Tested.

(A) *Cases mentioned in the C. L. P. Act*, 1852, *s.* 32.[3]

(B) *In what Case abolished by C. L. P. Act*, 1852, *s.* 129.[4]

(C) *Lies against Executors on Judgment* Quando acciderint.[5]

(D) *Lies to Repeal Letters Patent.*[6]

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had been made quarterly, was sent home on account of illness, four days after the commencement of a quarter, and did not return:—*Held*, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day-school, in which the child was the only boarder. *Collins v. Price*, 5 Bing. 132. These payments accrue quarterly, therefore the defendant having become bankrupt pending a quarter, his bankruptcy was held to be no bar to a claim for the quarter. *Hopkins v. Thomas*, 7 C. B. (N. S.) 711; 29 L. J. C. P. 187. Under the common *indebitatus* count for money due to the plaintiff, as a schoolmaster, in instructing, &c., the plaintiff cannot recover for removing the pupil without notice, although prevented from earning a compensation by the act of the defendant. 2 East, 145; 6 T. R. 320; 8 East, 300; 1 Salk. 65; 2 N. R. 333. In such case he should declare specially. *See* Form, B. & L. 150.

[1] 17 & 18 Vic. c. 112, facilitates the conveyance and gifts of sites for promotion of literature, science, and the fine arts; and 6 & 7 Vic. c. 36, exempts buildings for these purposes from liability to poor-rates. *See* Poor-Rates, *ante*, p. 174.

[2] *Scire facias* is a judicial writ, directed to the sheriff or other officer, and deriving its title from the mandatory part, viz. "*Scire facias*, that you make known to the party," &c. This writ is in personal actions given by stat. 13 Geo. 1, c. 45, and is considered as an action. *Fenner v. Evans*, 1 T. R. 267.

The writ of *scire facias* is founded upon some matter or proceeding of record, as a judgment, recognisance, or letters patent, or upon some matter incidental thereto; a regular and judicial statement of which is necessary to be made in order to further and accomplish the end and intent of the record, by insuring its final operation in behalf of the parties thereto, and really and legally interested therein.

In some cases it is merely an *interlocutory* proceeding, and in the nature of process, as in the case of a *scire facias quare executionem non*, and *scire facias ad audiendum errores;* sometimes a proceeding after the action has terminated, as in the case of a *scire facias quare restitutionem non*, and *scire facias ad rehabendam terram*. Ch. Arch. Pr. p. 1090.

[3] By the C. L. P. Act, 1852, s. 132, "all writs of *scire facias* issued out of any of the superior courts of law at Westminster against bail on a recognizance *ad audiendum errores;* against members of a joint-stock company or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; by or against a husband to have execution of a judgment for or against his wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum, pursuant to the statute passed in the eighth and ninth years of the reign of King William the Third, intituled, 'An Act for the better Preventing Frivolous and Vexatious Suits;' or for the recovery of land taken under an *elegit*, shall be tested, directed, and proceeded upon, in like manner as writs of revivor."

[4] By the C. L. P. Act, 1852, s. 129, the *sci. fa.* is abolished for the revival of judgment, whether such revival is necessary by reason either of lapse of time or of a change, by death or otherwise, of the parties entitled or liable to execution.

[5] But besides the instances mentioned *supra* in s. 132 of the C. L. P. Act, 1852, the *scire facias* lies against an executor on a judgment of assets *quando acciderint*, in which case, by C. L. P. Act, 1854, s. 91, proceedings may be had and taken in the manner provided by the C. L. P. Act, 1852, as to writs of revivor. *See ante*, Revivor, Writ of, p. 346; *post*, Suggestion.

As the judgment *quando acciderint* is, that the plaintiff do recover his debt, to be levied of the goods, &c. of the testator, which shall thereafter come to the hands of the executor, &c., it is necessary that the *scire facias* should state that the assets came to the executor's hands after the judgment, otherwise it would be bad. 2 Saund. 219, a; Wms. Exors. 1243. If upon this *scire facias* assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of assets *in futuro*. 1 Sid. 448; 1 Saund. 336, b.

[6] A *scire facias* is also the only means of repealing letters patent. See *ante*, Patents, p. 79; and generally, if a Crown grant prejudice and affect the rights of third persons, the queen is by law bound, on proper petition to him, to allow a subject to use his royal name to repeal it in a *scire facias;* and it is said that in such a case the party prejudiced

(E) *In case of Outlawry.*[1] (F) *To Certify Bill of Exceptions.*[2]
(G) *Against the Sheriff after a Levy on a* Fieri Facias.[3]
(H) Sci. Fa. ad Rehabendam Terram.[4]

III. Within what Time, and How it must be Sued Out.[5]
IV. Pleadings and Practice in.[6]
V. Must strictly pursue the Judgment.[7]

SCOT. A tax or tribute. A contribution of several.

SCRIP.[8] *See* Joint-Stock Companies, vol. v. pp. 250, 251; *post*, Stock.

SCULPTURE. *See* Copyright, vol. iii. p. 251; and 25 & 26 Vic. c. 68.

SEAL.[9]

SEAMAN. *See post*, Ship and Shipping.

SEA-SHORE.[10] As to bathing on, *see ante*, p. 15; and Town Police Clauses Act, 10 & 11 Vic. c. 89, s. 69; and *Griffiths v. Coleman*, 4 H. & N. 265.

I. Rights on Sea-Shore.
(A) *Of the Crown and Public.*[11]

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may, upon the enrolment of the grant in Chancery, have a *scire facias* to repeal it, as well as the queen. 6 Mod. 229; 2 Saund. 72).

[1] Also where an outlaw is pardoned by the Crown, a *scire facias* may be sued out by the defendant calling on the plaintiff to appear and prosecute his suit. *Allen v. Powel*, 1 Sid. 231. *Ellis v. Pipin*, Styles, 348.

[2] It lies, if a bill of exceptions be sealed by a judge, and he die, against his personal representatives to certify it. 2 Inst. 438.

[3] If a sheriff, after returning to a *fieri facias*, that he has levied the debt, retain the money in his hands, a *scire facias* may be sued out to compel him to pay it over to the party. Hutt. 32; Cro, Jac. 514; Andr. 47; Godb. 276. The course now is to apply to the court for a rule that he should pay it over. Or, if the sheriff to a *fieri facias* return that he seised goods, and sold part of them, but that the remainder were rescued, a *scire facias* lies against him to have execution for the entire sum returned. Cro. Jac. 514; 2 Saund. 243. But if the sheriff return merely that the goods remain on his hands for want of buyers, in such case a *scire facias* does not lie, but a *venditioni exponas*, or a *distringas, nuper vice comitem*, as mentioned in 2 Saund. 71.

[4] Where a plaintiff in an action has execution by *elegit*, and is put in possession of a moiety of the rents and profits of the defendant's lands, if the defendant tender the debt, &c. to the plaintiff, and it be refused, or if the plaintiff have been satisfied his debt from any casual profit of the land, the defendant may have a *scire facias ad rehabendam terram;* or, if the plaintiff have been satisfied his debt from the extended value of the lands, the defendant may either have this *scire facias*, or he may enter upon the land, and recover actual possession by ejectment. 6 Bac. Abr. Scire Facias, C. 2; 2 Saund. 72.

[5] By 3 & 4 Wm. 4, c. 42, s. 3, a *sci. fa.* on a recognisance must be sued out within twenty years after the cause of action. It should be sued out of the court in which the record is supposed to remain. 2 Saund. 72, n.; 3 Salk. 320. Proceedings in error do not prevent proceedings on a *sci. fa. Thomas v. Williams*, 3 Dowl. 655.

[6] There are now no rules of practice applicable to a *sci. fa.*, the old rules having been abolished by R. H. T. 1853, and the new rules not affecting it. For proceedings in, *see* Revivor, Writ of, *ante*, p. 346.

[7] The *scire facias* must strictly pursue the judgment or it will be bad. *Panton v. Hall*, 2 Salk. 598. *Baynes v. Forrest*, 2 Stra. 893.

[8] The "scrip" are merely instruments in the nature of certificates, entitling the persons who may have executed the subscription contract at the time of obtaining them to have shares given to them by the company after the act has been procured. But they convey no property by assignment. *Jackson v. Croker*, 4 Beav. 59. The mere possession is *primâ facie* evidence of ownership. Add. Cont. 203.

[9] Lord Coke (3 Inst. 169) defined a seal to be wax impressed or wax with an impression, adding that wax without an impression is not a seal. Practically, an impression upon some tenacious substance capable of being impressed. 4 Kent's Com. 452. The courts take judicial notice of the several seals of the queen, of the seals of the superior courts, of the City of London, and the Palatine, Admiralty, and Ecclesiastical Courts; but the seals of a foreign court must be proved. "Sealed and delivered," in an attestation, does not import signing. *Wright v. Barlow*, 3 M. & S. 512. *See* 5 id. 581; W. Taunt. 213; 6 Man. & G. 386.

[10] *Littus maris:* the ground between the ordinary high and low-water mark. *See* Hall on Sea-Shores; Schultz on Aquatic Rights: Hales, *De Partibus Maris;* Hargreave Tracts; 3 Kent's Com. 341. All rivers, until they flow past the furthest point of land next the sea, are within the jurisdiction of the common-law courts. 1 Co. 175; 3 T. R. 315.

[11] In the absence of all evidence of particular usage the extent of the right of the Crown to the sea-shore landwards, is *primâ*

(B) *Private Individuals.*[1]

II. Sea-Walls and Banks.[2]

III. Wreck. *See ante*, Salvage, p. 358; *post*, Ship and Shipping.

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facie limited by the line of the medium high tide between the springs and the neaps. *Attorney-General v. Chambers*, 4 De Gex, M. & G. 206; 18 Jur. 779. Acts of ownership exercised by a lord of a manor upon the sea-shore adjoining, between high and low-water mark, such as the exclusive taking of sand, stones, and sea-weed, may be called in aid, to show that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, and which professes to grant the manor with "wreck of the sea," "several fishery," and other rights of an extensive description, does not expressly purport to convey *littus maris*. *Calmady v. Rowe*, 6 C. B. 861; Hale's *De Jure Maris*, 25.

The sea-shore between high and low-water mark may be parcel of the adjoining manor. *Duke of Beaufort v. Mayor, &c. of Swansea*, 3 Ex. 413. Where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible to show that such sea-shore is parcel of the manor. (Id.) Thus, evidence of modern acts of ownership held to have been properly admitted as evidence to show that grants by King John and King Edward I., of lands by the terms of *terra de Gower*, and *dominium de terræ de Gower*, included the sea-coast down to low-water mark. (Id.) The rights of the Crown to the soil in arms of the sea and public navigable rivers is subject to the public rights of passage, and any grantee of the Crown must take subject to such right. *Mayor, &c. of Colchester v. Brooke*, 7 Q. B. 339; 9 Jur. 1090; 15 L. J. Q. B. 59. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. (Id.) It is, therefore, no excuse if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although by custom or agreement a fine may be payable to the lord of the soil for such grounding. (Id.) The *alveus*, or bed of a navigable river, is *inter regalia*. *Lord-Advocate v. Hamilton*, 1 Macq. H. L. Cas. 46. But where trustees of a public navigable river had agreed, by way of compromise, to pay an adjacent landowner a sum of money in respect of soil, the right to which was in dispute, the Crown was not allowed to claim the money, although the soil had formerly been part of the *alveus*, or bed of the river, and was, consequently, *inter regalia*. (Id.) On an information, an issue was raised as to the right of the Crown to alluvion produced by artificial causes, the Crown claiming to have the boundary of the rights of the Crown defined, as it would have existed but for such artificial causes. *Atty.-Gen. v. Chambers. Same v. Lewis. Same v. Rees*, 5 Jur. N. S. 745.

Where there is a gradual accretion of land, which is the result of artificial causes produced by the lawful use of the land by the owner, such accretion does not belong to the Crown. (Id.) Where the accretions are of gradual and imperceptible progress, there is no distinction between accretions produced by natural and artificial causes. (Id.) If, however, the artificial causes can be shown to have been intended to produce the accretion, the Crown would be entitled. (Id.) The portion of land on the sea-shore between ordinary high-water mark and ordinary low-water mark may form part of the parish coming down to the shore, but there is no *primâ facie* presumption that it does so; and in the absence of evidence that it does form part of the parish, it must be taken not to be part of it. *Reg. v. Musson*, 8 El. & Bl. 900; 4 Jur. N. S. 111; 27 L. J. M. C. 100.

[1] Alluvial lands which are gradually gained from a river belong, by way of accretion, to the lands of the adjoining proprietor, until the contrary appear. *Mussumat Imam-Bandi v. Hurgovind Ghose*, 4 Moo. Ind. App. 403. *Lowe v. Govett*, 3 B. & Adol. 863. *Teebkrists v. East India Co.* P. C. C. 140; 6 Moo. Ind. App. 267. Slow and gradual accretions of soil will justify a jury in finding that the accretion was imperceptible. *Rex v. Lord Yarborough*, 3 B. & C. 91; 4 D. & R. 790. *See* vol. i. p. 308, n.

[2] Every one who takes a grant of land from the Crown, accepts it subject to the servitude imposed thereon, as keeping sea-walls, sluices, &c., in repair. *Henley v. Mayor of Lyme*, 5 Bing. N. S. 107. Such liability to repair *ratione tenuræ*, may not be limited to such as are sufficient to resist ordinary tides and weather; and the orders of commissioners, made long back, are admissible evidence of the extent of the liability of those who are bound by precedent, prescription, customs, and tenures. *Reg. v. Leigh*, 2 Per. & D. 357. A highway originally ran down to the sea to the water's edge. The action of the waves in process of time swept away a portion of the land, and destroyed a part of the road, so that the road ran to the edge of a cliff twenty feet high. The road up to this point was in good repair. Upon an indictment against a parish for non-repair of the highway:—*Held*, that the road beyond the edge of the cliff having been swept away by natural causes, there was nothing which the parish could reasonably be called on to repair. In fact, as regarded that part, there was no road in existence, and therefore nothing to repair. *Reg. v. Hornsea*, 1 Dear. C. C. R. 291; 18 Jur. 315; 23 L. J. M. C. 59. A railway constructed in conformity with its act of parliament, was carried along an embankment upon low lands lying between a

SEAWORTHY. *See* Insurance, vol. v. p. 179.

SECONDARY Evidence. *See* Evidence, vol. iv. pp. 303–308.

SECURITY for Costs. *See* Costs, vol. iii. p. 308–310.

SEDUCTION.

I. Loss of Service a Ground of Action.[1]
II. What Service Sufficient.[2]
III. „ Sufficient Residence.[3]
IV. Who in Loco Parentis may bring Action.[4]

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river and the plaintiff's land. The low lands were separated from the plaintiff's land by a bank, which, before the railway embankment was placed there, sufficed to protect his land from the flood-waters of the river; but in consequence of the embankment, the flood-waters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land:— *Held*, that although the company was not required by their act to make flood openings to their embankment, and would not be compellable by *mandamus* to make them, yet, as they might by proper caution have prevented the injury sustained by the plaintiff, an action was maintainable against them for such injury. *Laurence v. Great Northern Railway Co.* 16 Q. B. 643; 6 Railway Cas. 656; 15 Jur. 652; 20 L. J. Q. B. 293. A surveyor of highways cannot justify a trespass under a prescriptive right or a custom to take stones from the waste, whether adjoining the sea-shore between high and low-water marks, or otherwise, for the purpose of repairing the highways of the parish. *Padwick v. Knight*, 7 Ex. 854; 22 L. J. Ex. 198. As to malicious injuries to sea-banks, &c., *see* vol. v. p. 417.

[1] The law gives no redress to the parent for the mere seduction of his daughter. The remedy given is based upon an alleged loss of filial service. Some proof of service, or liability to service, must be given. It is not sufficient merely to show that the plaintiff incurred an expense in consequence of the confinement of the daughter, &c. (*Grinnell v. Wells*, 7 Man. & G. 1033. *Hall v. Hollander*, 4 B. & C. 662. *Blaymire v. Haley*, 6 Mee. & W. 55); and such loss of service must be occasioned by the act of the defendant. Hence, where the jury found that the defendant seduced the plaintiff's daughter, but was not the father of the child whose birth occasioned the loss of service, the defendant was held entitled to a verdict (*Eager v. Grimwood*, 1 Ex. 61); and the relation of master and servant must exist at the time of the seduction. *Davies v. Williams*, 10 Q. B. 725.

[2] It is not, however, necessary to prove an actual contract of service, or that wages have been paid. The slightest evidence of service, such as milking cows, has been held sufficient. *Bennett v. Allcott*, 2 T. R. 168. Even making tea has been said to be an act of service. *Per Abbott, C. J.: Carr v. Clarke*, 2 Chit. Rep. 261. *Mann v. Barrett*, 6 Esp. 32. *Fores v. Wilson*, Peake, 55. A right to the service is sufficient; and where a daughter is living with her father, forming part of his family, and liable to his control, no proof of service is required. *Maunder v. Venn*, M. & M. 324. *R. v. Chillesford*, 4 B. & C. 102. And if the child is a minor, and of an age capable of service, the service may be presumed. *Harris v. Butler*, 2 Mee. & W. 542. The action is maintainable, though the daughter was of age (*Tullidge v. Wade*, 3 Wils. 18. *Booth v. Charlton*, 5 East, 47); or even a married woman. *Harper v. Luffkin*, 7 B. & C. 387. The fact of a daughter, while out at service, occasionally, with her mistress's consent, helping her mother in needlework, does not constitute the relationship of master and servant between the mother and daughter, so as to enable the former to maintain an action for the seduction of her daughter. *Thompson v. Ross*, 29 L. J. Ex. 1; 5 H. & N. 16. And in order to support an action by a father for the seduction of his daughter, it is necessary that the relationship of master and servant should subsist between them at the time of the seduction; and the fact that the daughter renders services, in the sense of conferring benefits upon the father, is not, of itself, sufficient to constitute such relationship. *Manley v. Field*, 29 L. J. C. P. 79; 7 C. B. (N. S.) 96.

[3] The daughter must reside with the plaintiff at the time of the seduction. *Dean v. Peel*, 5 East, 45. *Blaymire v. Haley*, 6 Mee. & W. 55. But if she be merely absent on a visit, the action lies. *Harris v. Butler*, 2 Mee. & W. 542. *Johnson v. M'Adam*, 5 East, 47.

A. occupied two farms, seven miles distant from each other. A. resided at one, and his son and daughter at the other. The daughter acted as mistress of the house at the latter, and had the poultry for her own benefit:— *Held*, that she was sufficiently the servant of A. for him to maintain an action for her seduction. It is not absolutely essential to prove actual service by the daughter; it is sufficient if she was under the control of her father. *Holloway v. Abell*, 7 C. & P. 528.

[4] An uncle may maintain an action for seducing his niece, living with him at the time, and performing offices of service in his house, no servant being kept, and notwithstanding, on coming of age, she may be entitled to property; her illness, and receiving medical attendance in his house, held sufficient to raise the presumption of loss of service: in the case of uncle and niece, it being requisite to show also the relation of master and servant. *Manvell v. Thomson*, 2 C. & P. 303. So, also, an aunt may sue.

V. Damages.[1]

SEISIN.[2] *See* Livery of Seisin, vol. v. p. 402.

SEPARATION, Judicial. *See* Marriage, id. p. 454.

SEQUESTRATION.[3]

Edmonson v. Machell, 2 T. R. 4; 11 East, 24. So where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain the action. *Irwin v. Dearman*, 11 East, 23. So, a master not related to the party seduced, may recover damages against the defendant for debauching her. *Fores v. Wilson*, Peake, 55. *Hall v. Hollander*, 4 B. & C. 663. But such action is not maintainable by the assignees of a bankrupt master. *Howard v. Crowther*, 8 Mee. & W. 601.

[1] In estimating damages in this action, the jury are not confined to the mere loss of service, but may give some damages for the distress and anxiety of mind which the plaintiff has felt, and it is for them to say, taking into consideration the situation in life of the parties, what they think is a reasonable compensation. *Andrews v. Askey*, 8 C. & P. 7. *Irwin v. Dearman*, 11 East, 24. Damages may, therefore, be awarded for the loss of the society and comfort of the child, and for the dishonour. *Southernwood v. Ramsden*, Sel. N. P. 1042. *Bedford v. M'Kowl*, 3 Esp. 120. *Tullidge v. Wade*, 3 Wils. 19. The plaintiff may prove the expenses sustained by him. *Tullidge v. Wade*, *supra*. *Dixon v. Bell*, 1 Stark. 289. In mitigation, the defendant may show the loose character of the daughter (*Verry v. Watkins*, 7 C. & P. 308); but if the daughter be asked whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question. *Dodd v. Norris*, 3 Camp. 519. He may prove expressions of the daughter tending to show the levity of her character; but if the expressions also tend to contradict her evidence, they cannot be proved without previously asking her, on cross-examination, whether she used them. *Carpenter v. Wall*, 11 Ad. & E. 803. Evidence of good character may be given in reply to evidence of bad; but only in that case. *Bamfield v. Massey*, 1 Camp. 460. *Bate v. Hill*, 1 C. & P. 100. The defendant may also show gross misconduct on the part of the father. *Reddin v. Scoolt*, Peake, 240.

[2] This term is properly applied to freeholds; possession to goods and chattels. Seisin in deed is actual possession of the freehold. Seisin in law is a legal right to possession. 4 Kent's Com. 386.

[3] Signifies the separating or setting aside of a thing in controversy from the possession of both parties that contend for it; and it is twofold, voluntary and necessary. Voluntary is that which is done by consent of each party; necessary, is what the judge of his authority does, whether the party will or not. Fortescue, c. 50; Dyer, 232, 256. There is likewise a sequestration in the nature of a distress infinite on a person's standing out all the processes of contempt for non-appearance in Chancery, upon a bill exhibited. So, where obedience is not yielded to a decree, the court may grant a sequestration of the lands of the party, &c.

There is also a sequestration of a benefice, upon a vacancy, for the collection of the fruits of the benefice to the use of the next incumbent. The profits of the church being in abeyance, are to be received by the churchwardens by appointment of the bishop, to make provision during the vacancy. 28 Hen. 8, c. 11.

Sequestration is likewise the act of the ordinary disposing of the goods of a deceased party, whose estate is not claimed.

There is another sequestration, a kind of execution for debt, in the case of a beneficed clerk, of the profits of the benefice to be paid over to the judgment creditor, till the debt is satisfied. 2 Inst. 472; 2 Roll. Abr. 474.

If the sheriff return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, there may issue a *fieri* or *levari facias* to the bishop of the diocese wherein the benefice is, commanding him to make or levy the sum recovered of the ecclesiastical goods and chattels of the defendant. This writ is similar to a common *fieri facias*, and the bishop, who is in nature of a temporal officer or ecclesiastical sheriff, may seize and take the profits of the benefice. But he must return *fieri* or *levari feci*, and not *sequestrari feci*, upon this writ. He may also, like the sheriff, be called on by rule to return the writ, and if he make a false return will be liable to an action. Upon this writ the bishop or his officer makes out a sequestration, directed to the churchwardens, or, upon proper security, to persons of the plaintiff's own appointment, requiring them to sequestrate the tithes and other profits of the benefice, which sequestration should be forthwith duly published, which is now done by affixing a copy of the sequestration, either in writing or in print, previously to the commencement of divine service on a Sunday, on or near to the doors of all the churches and chapels within the parish or place where the benefice is situated. 7 Wm. 4, and 1 Vic. c. 45. *Bennett v. Apperley*, 6 B. & C. 630. The writ only begins to operate from the time of the publication. *Waite v. Bishop*, 3 Dowl. 234; 1 C., M. & R. 507. And merely lodging the writ with the registrar of the bishop does not bind the property as against conflicting rights (*Wise v. Beresford*, 2 Con. & L. 282), though it will, as against the defendant, from the time when the sequestrator is appointed. Writs

SERJEANTS-AT-LAW. *See* Barrister, vol. ii. p. 374; Precedence, *ante*, p. 211.

SESSIONS of the Peace. As to Appeals to Quarter Sessions, *see ante*, p. 296.

I. Court of General or Quarter Sessions.[1]

of *levari facias* delivered to a bishop's officer, in order that writs of sequestration may be issued out thereon, are not entitled to priority according to the date of their teste, but the bishop's officer is bound to issue the writs of sequestration in the order in which the writs of *levari facias* are delivered to him. *Sturgis v. Bp. of London*, 26 L. J. Q. B. 209. Writs of *levari facias* are not within the 16th section of the Statute of Frauds. (Id.)

The writ of sequestration is not retrospective. *Waite v. Bishop*, *ante*. A sequestration is a charge within 18 Geo. 2, c. 20. As to qualification for justice of the peace, see *Pack v. Turpley*, 1 Per. & D. 478; 9 Ad. & E. 468. The sequestrator of a benefice is the mere agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them. *Harding v. Hall*, 10 Mee. & W. 42.

Pending the sequestration, the bishop, under the 1 & 2 Vic. c. 106, s. 99, is empowered, and if the incumbent does not perform the duties, he is required to appoint and license a curate, or curates if the benefice has more than one church, or a population exceeding two thousand.

[1] *Jurisdiction of the Court.*—It is a court of record, deriving its jurisdiction in counties, ridings, &c., from the commission of the peace, or from particular statutes.

It is styled the general quarter sessions, or quarter sessions of the peace, when held quarterly at the usual times appointed for that purpose; when otherwise, it is styled the general sessions of the peace.

The power of justices (and of recorders in boroughs) in general and quarter sessions, to hear and determine offences as a court of gaol delivery, is defined by the 5 & 6 Vic. c. 38, which enacts that neither the justices acting in and for any county, &c., nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person for treason, murder, or capital felony, or for any felony which, when committed by any person not previously convicted of felony, is punishable by transportation (or penal servitude, 16 & 17 Vic. c. 39) for life, or any of the following offences:—

1. Misprision of treason.
2. Offences against the queen's title, prerogative, person, or government, or against either house of parliament.
3. Offences subject to the penalties of *præmunire*.
4. Blasphemy and offences against religion.
5. Administering or taking unlawful oaths.
6. Perjury and subornation of perjury.
7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor.
8. Forgery.
9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern.
10. Bigamy, and offences against the laws relating to marriage.
11. Abduction of women and girls.
12. Endeavouring to conceal the birth of a child.
13. Offences against any provision of the laws relating to bankrupts and insolvents.
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.
15. Bribery.
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.
17. Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein.
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate or any interest in any lands, tenements, or hereditaments.

Provided that nothing herein contained shall be construed to give authority to the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, to try any person or persons for any offence committed or alleged to be committed within the jurisdiction of the Central Criminal Court. Nor can the sessions try individuals for night poaching under 9 Geo. 4, c. 69, s. 9; or for injuries to persons or property by fire or explosive substances. 9 & 10 Vic. c. 25.

Officers and Justices acting in.—The *custos rotulorum* is an officer to whose custody the records and rolls of the sessions are committed. He is always one of the justices of the peace for the county, riding, &c., nominated by the Crown and appointed by the commission. The clerk of the peace is his deputy, and acts as clerk to the court of quarter sessions. The treasurer of the county, &c., is also an officer of the sessions appointed and removable by them. The sheriff is also an officer of the court; so are all constables within the county, &c. In boroughs the town-clerk has the custody of the records, &c. of the quarter sessions, and the

II. Of Petty Sessions.[1]

clerk of the peace acts as clerk of the court. There is also a treasurer appointed by the council.

Magistrates should not interfere or take part in any case in which they are personally interested. If they do so, the judgment will be quashed upon a *certiorari*. Thus, on an appeal to sessions against an order of removal, justices rated to the relief of the poor in either of the contending parishes ought not to vote. *R. v. Yarpole*, 4 T. R. 71. So, in appeals against orders, or the allowance of overseers' accounts, or even on the question of granting a case for the opinion of the Court of Queen's Bench, an interested justice ought not to interfere. *R. v. Gudridge*, 5 B. & C. 459. *R. v. Justices of Monmouthshire*, 8 id. 137. *R. v. Cheltenham Paving Commissioners*, 1 Q. B. 467. If an interested justice form part of the court hearing the case, an order so made is bad (*Reg. v. Justices of Hertfordshire*, 6 Q. B. 753); and he ought, it has been said, not even to remain on the bench during the hearing of the case, unless the parties consent. *Reg. v. Justices of Suffolk*, 18 id. 416. *Reg. v. Justices of Surrey*, 12 L. J. M. C. 195. But if he is shown to have taken no part, and to have been in court for a different purpose, the order will not be set aside. *Reg. v. Justices of London*, 18 Q. B. 421. If a justice be assaulted, or grossly insulted in his office, and no other magistrate be present, it seems that he may commit the offender till he finds sureties. Dalt. c. 173. *R. v. Revel*, 1 Stra. 420. However, by 16 Geo. 2, c. 18, justices for a county, &c. may do all the acts appertaining to their office, so far as relates to the poor-laws, vagrants, highways, or to any other laws concerning parochial taxes, levies, or rates, notwithstanding that they are rated to or chargeable with the taxes, &c. within any such parish, &c. affected by any such acts. This does not, however, empower them to act in the determination of any appeal to the quarter sessions for any such county, &c. from any order, matter, or thing relating to any such parish, &c. where they are so charged, taxed, &c. (Id. sect. 3.)

When holden, and course of Proceeding.— In counties, ridings, &c. the quarter sessions are holden in the first full week after the 11th Oct., after the 28th Dec., after the 31st March, and after the 24th June (11 Geo. 4, and 1 Wm. 4, c. 70, s. 25); and Sunday is deemed the first day of the week in this respect; and therefore, if the 11th Oct. &c. fall upon a Sunday, the sessions cannot be holden on the Monday or during that week, but must be holden on the Monday or some other day in the week next following. But the act in this respect has been decided to be directory only, and that the quarter sessions holden out of such full week were not on that account invalid. *R. v. Justices of Leicestershire*, 7 B. & C. 6. As to the Easter sessions, however, the justices at the Epiphany sessions may appoint two justices, who, as soon as the spring assizes for the county, &c. shall be appointed, may fix the day for holding the sessions, so as not to interfere with the assizes. 4 & 5 Wm. 4, c. 47. In boroughs within the Municipal Act the recorder shall hold a court of quarter sessions of the peace once in every quarter of a year, or at such other or more frequent times as he may think fit, or the Crown may direct. 5 & 6 Wm. 4, c. 76, s. 105.

The public business at the quarter sessions consists of the trial of offenders, the trial of appeals, and the hearing of motions upon different subjects of which the sessions have cognisance. Some begin with the appeals, some with the trial by jury, others with the motions; but it is a general rule with all, that once the trials by jury commence, the court will take no other business until they have been disposed of, except short motions.

The justices may divide the court (59 Geo. 3, c. 28, s. 1), and the same may be done at an adjourned session. 1 Vic. c. 19, s. 4. So in boroughs, if the mayor or two aldermen shall certify to the recorder, before the sessions, that such a division would be expedient. 1 Vic. c. 19, s. 1.

If the sessions last more than one day, they must be adjourned to another, and so on from day to day until the business is finished, otherwise the sessions are at an end, and the justices cannot afterwards legally proceed with the business. *R. v. Polsted*, 2 Stra. 1263. The adjournment may be either to the next day, or to some other day prior to the next quarter sessions. *R. v. Gunie*, 19 Vin. Abr. 358. And see *R. v. Mullaney*, 6 C. & P. 96. In counties, such adjournment must be by two justices at the least. *R. v. Westrington*, 2 Bott, 981. *R. v. Justices of Middlesex*, 5 B. & Adol. 1113. In boroughs, by the recorder or his deputy; or, in his absence, by the mayor. 5 & 6 Wm. 4, c. 76, s. 106.

[1] A petty session is a private meeting of two or more justices of the peace in the same place, for the execution of some power vested in them by law, either on their own mere motion or at the requisition of some party entitled to require their attendance in discharge of some duty. *Reg. v. Rawlins*, 8 C. & P. 439. Two or more justices always attend them, and they have jurisdiction not only in all cases where a single justice of the peace may act, but in all cases where cognisance is specially given to two justices by statute, as well as where jurisdiction is given to the petty sessions by name.

A clerk to justices in petty sessions holds his office at their pleasure, and may be summarily dismissed by one of them without cause assigned. *Ex-parte Sandys*, 4 B. & Adol. 863.

It is the duty of magistrates in petty sessions to appoint overseers of the poor. 43 Eliz. c. 2, s. 1; 54 Geo. 3, c. 91, s. 1.

III. Of Special Sessions.[1]

SET-OFF.

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I. As to when Allowed, or Not.

See *Collier v. Hicks*, 2 B. & Adol. 665. Petty sessions which enter on the hearing of a case must hear it through. *R. v. Justices of Cumberland*, 4 Ad. & E. 695.

[1] A special sessions is a meeting of the justices of a division of a county called for a particular purpose, by virtue of a provision in that behalf in some act of parliament. For instance, ale licenses are granted and transferred at special sessions; surveyors of highways are appointed at special sessions, where the inhabitants of the parish have neglected to appoint them; and special sessions for all other matters relating to the highways are required to be holden in each division, not less than eight or more than twelve times in every year. Claims upon the hundred, in case of a riot, where the damage does not exceed 30*l.*, are heard and determined at special sessions. Appeals against poor-rates, "on the ground of inequality, unfairness, or incorrectness in the valuation of any hereditaments included therein," may be tried at special sessions (6 & 7 Wm. 4, c. 96, s. 6); and there are many other instances as to which they are holden: they are the same as those within which petty sessions are holden.

The important distinction between a special and petty sessions consists in this, that to constitute a legal special session every magistrate of the division, &c., must have had an option presented to him of attending at, and taking part in, the proceedings.

In the case of ale licenses, the time for holding the special sessions is appointed at a petty sessions previously holden, and a precept is issued directed to the high constable, requiring him to give notice thereof to each justice of the peace within the division. Special sessions for the highways are appointed at a special sessions holden within fourteen days after the 20th March in every year; and there is no necessity of giving notice to the justices of the division of the day or time of holding them: but in all other cases not otherwise provided for by act of parliament, notice is given to all the justices of the division, by the clerk of the special sessions, of the time and place of holding a special sessions; and such notice must be given a reasonable time before the holding of the sessions (*R. v. Justices of Worcestershire*, 2 B. & A. 228), and in strict conformity with the directions (if any) in the statute upon the subject (see *R. v. Justices of Surrey*, 5 B. & C. 24. *R. v. Justices of Suffolk*, 6 id. 110), otherwise the proceedings at such sessions will be deemed irregular. 2 Arch. J. 260.

(A) *In General.*[1]

[1] At common law, and independently of statutory right, a defendant is entitled to retain or claim, by way of deduction (*Newton v. Forster*, 12 Mee. & W. 772) all just allowances or demands accruing to him, or payments made by him in respect of the same transaction or account, which forms the ground of an action: this cannot be termed a set-off in the strict legal sense of the word, because it is not in the nature of a cross-demand or mutual debt, but rather constitutes a deduction, rendering the sum to be recovered by the plaintiff so much less. So, where demands originally cross, and not arising out of the same transaction, have by subsequent express agreement been connected, and stipulated to be deducted, or set off against each other, the balance is the debt, and the only sum recoverable by suit, and cannot strictly be called a set-off. But before the statutes of set-off were, there were mutual cross-demands unconnected with each other; a defendant could not in a court of law defeat the action by establishing that the plaintiff was indebted to him even in a larger sum than that sought to be recovered, and relief could only be obtained in a court of equity. To remedy this inconvenience, it was enacted by the 2 Geo. 2, c. 22, s. 13, that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue [now only pleadable; *see post*, p. 377], or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff's, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise, such matter shall not be allowed in evidence upon such general issue. This clause was made perpetual by 8 Geo. 2, c. 24, s. 4; and it having been doubted whether mutual debts of a different nature could be set against each other, it was by the last-mentioned statute further declared, that by virtue of the said clause mutual debts may be set against each other, either being pleaded in bar, or given in evidence under the general issue in the manner therein mentioned [it must now be pleaded], notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue, by reason of a penalty contained in any bond or specialty; and in all cases where either the debts for which the action has been or shall be brought, or the debt intended to be set against the same, has accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid. These statutes were passed for the benefit of defendants, and they are not imperative, so that a defendant may waive his right to set off, and bring a cross-action for the debt due to him from the plaintiff; and where he is not prepared at the time the plaintiff sues him to prove his cross-demand, it is most advisable not to plead a set-off: for, in case he should go into evidence upon the trial in support of his cross-demand, and fail in the attempt, he cannot afterwards proceed in a cross-action for the amount, and the party cannot bring an action for what he has succeeded in setting off in a former suit against him, though, if the set-off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein might then maintain an action for the surplus. *Hennell v. Fairlamb*, 3 Esp. 104. There is a difference as to a set-off in equity and at law. In equity it prevailed long before the statute; and even in equity it must be a strict set-off sustainable at law, or a case of mutual debt or credit (19 Ves. 467); though, under circumstances, in a court of equity, a joint debt may be set off against a separate demand. 3 Mer. 618; Story, s. 1437.

Where there are cross-demands, of such a nature that if both were recoverable at law they would be the subject of a set-off, there, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity. Story, s. 1436, a. But a set-off is ordinarily allowed in equity in those cases only where the party seeking the benefit of it can show some equitable ground for being protected against the demand of the other party. The mere existence of cross-demands will not be sufficient. *A fortiori*, a court of equity will not interfere, on the ground of an equitable set-off, to prevent a party from recovering a sum awarded to him for damages for a breach of contract, merely because there is an unsettled account between him and the other party in respect of dealings arising out of the same contract, where it cannot be assumed that the balance will be found to be in favour of the latter. Story, s. 1436, and note.

Equity will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt, unless there are other special circumstances to justify such an interposition, nor allow cross-demands existing in different rights to be set the one against the other; and therefore an executor and the trustee of a legacy, who was also the residuary legatee, who had become a creditor of a person who was the husband and administrator of a deceased legatee,

(B) *In Particular.*

(*a*) *Nature of the Debt.*

(1) *Must be a Debt, and not Damages.*[1]

(2) „ *have existed when Action brought.*[2]

was not, in the absence of any special agreement, allowed to set off his debt against a legacy to which the husband, as such administrator, was entitled. *Freeman v. Lomas*, 9 Hare, 109. And where a creditor of an intestate purchases part of the intestate's goods from his administrator, the creditor cannot set off the sum at which he purchased the goods against a debt due to him from the intestate at the time of his decease. *Lambarde v. Older*, 17 Beav. 542.

[1] The debt to be set off must be a debt in the legal acceptation of the term, and not merely a claim sounding in damages. And, therefore, in an action by a servant for wages, the master cannot set off the value of goods lost by the servant's negligence. *Le Loir v. Bristow*, 4 Camp. 134. See *East-Anglian Railway Co. v. Lythgoe*, 10 C. B. 726; 20 L. J. C. P. 84. So, a claim of a sum of money as due to the defendant from the plaintiff upon a guarantee (*Morley v. Inglis et al.* 4 Bing. N. C. 58. *Crawford v. Stirling*, 4 Esp. 207. And see *Penny v. Foy*, 8 B. & C. 11. *Williams et Ux. v. Flight*, 2 Dowl. N. C. 11); or on a guarantee under seal (*Williams v. Flight*, 17 Jur. 197: but see *Hutchinson v. Sidney*, 10 Ex. 438); or unliquidated damages arising from a breach of covenant (*Howlett v. Strickland*, Cowp. 56. *Weigal v. Waters*, 6 T. R. 488); or a loss upon a policy of insurance (*Wilson v. Creighton*, 1 Marsh. Ins. 297. *Cumming v. Forrester*, 1 M. & S. 494; and see *Thompson v. Redman*, 11 Mee. & W. 487), unless it be an average loss, and the amount be adjusted (*Wienholt v. Roberts*, 2 Camp. 586. *Lucky v. Bushby*, 13 C. B. 864; 22 L. J. C. P. 220. *Boddington v. Castilli*, 1 E. & B. 879; 23 L. J. Q. B. 31), cannot be made the subject of a plea of set-off, for they are all merely claims sounding in damages. But money paid by the defendant for the plaintiff, and at his request, although in satisfaction of an illegal demand (*Roper v. Bumford*, 3 Taunt. 76), a payment made for the plaintiff by bills since due, without showing that they were paid (*Hebden v. Hartsink*, 4 Esp. 46); or in an action for work, labour, and materials, a payment made to a third person for part of the materials (*Allinson v. Davies*, Peake, Add. Ca. 82), or in an action for goods sold and delivered, money due to the defendant on the plaintiff's acceptance, although the defendant promised to pay in ready money (*Cornforth v. Rivett*, 2 M. & S. 510); or for not providing for an accommodation bill (*Hardcastle v. Netherwood*, 5 B. & A. 93). But to debt on bond, conditioned to replace stock, a set-off cannot be pleaded (*Gillingham v. Waskett*, 13 Price, 484); or in an action on a policy of insurance (*Grant v. Royal Exchange Assurance Co.* 5 M. & S 439); or in covenant for not indemnifying the plaintiff against certain taxes (*Cooper v. Robinson*, 2 Chit. 161); or in an action for not giving a bill for goods, according to agreement, where the action is commenced before the bill, if given, would have been due (*Hutchinson v. Reid*, 3 Camp. 329), or the like; or in actions *ex delicto*, a set-off cannot be pleaded, because such actions are for unliquidated damages. But in an action for money had and received (*Thorpe v. Thorpe*, 3 B. & Adol. 580); or in debt on bond conditioned for payment of a gross sum of money (*Symmons v. Knox*, 3 T. R. 65); or for payment of an annuity (*Collins v. Collins*, 2 Burr. 820), or the like; it may, even although it appear that the defendant had originally promised payment (*Lechmere v. Hawkins*, 2 Esp. 626); a judgment recovered by the defendant against the plaintiff in another action, even although a writ of error be pending upon it (*Reynolds v. Beerling*, 1 Dougl. 112), provided he have not taken the plaintiff in execution (*Taylor v. Waters*, 5 M. & S. 103; and see *Jaques v. Withy*, 1 T. R. 557); a sum agreed to be given as liquidated damages for the non-performance of an agreement, and which is really in law liquidated damages (*Fletcher v. Dyche*, 2 T. R. 32. *Duckworth v. Alison*, 1 Mee. & W. 412. See *Charles v. Alton*, 15 C. B. 46; 23 L. J. C. P. 197), and not merely a penalty (*Davis v. Penton*, 6 B. & C. 216. *Nedriff v. Hogan*, 2 Burr. 1024); a bond debt, although the bond was conditioned to pay an annuity to a third person, but for the payment of which the defendant was liable. *Penny v. Foy*, 8 B. & C. 11. All these and similar claims may be made the subject of a plea of set-off.

[2] A debt, to be set off, must not only be due to the defendant at the time of his pleading the set-off, but also at the time of the commencement of the action (*Braithwaite v. Coleman*, 4 Nev. & M. 654. *Richards v. James*, 2 Ex. 471; 17 L. J. Ex. 277), and continue up to the time of the trial. *Eyton v. Littledale*, 4 Ex. 159; 18 L. J. Ex. 369. *Murray v. Mann*, 2 Sc. 538; 17 L.J.Ex. 256. And, therefore, a plea stating that the plaintiff was indebted to the defendant at the time of the plea pleaded, was holden bad. *Evans v. Prosser*, 3 T. R. 186. The plea must also show the debt to be set off is an existing debt at the time of pleading it. *Dendy v. Powell*, 3 Mee. & W. 442. Whether, if the debt to be set off have been paid, or paid into court in an action by the defendant against the plaintiff for the same matter, and taken out of court by him in satisfaction, after the plea of set-off and before replication, this matter may be replied, was in one case decided in the negative (*Evans v. Prosser*, 3 T. R. 186); in a recent case it was replied, and the court seemed to think that it might be so; but the replication was

(3) *Must not be an Illegal or mere Equitable Demand.*[1]
(4) „ *Barred by the Statute of Limitations.*[2]
(5) „ *Mutual and Due in the same Right.*[3]
(6) *In what Actions allowed.*[4]

holden bad upon another ground. *Briscoe v. Hill*, 12 L. J. Ex. 126; 10 Mee. & W. 735. It is no answer, however to a plea of set-off to say, that before the commencement of the present action the defendant had brought an action against the plaintiff for the amount of the set-off, and that afterwards the defendant obtained a verdict. *Baskerville v. Brown*, 2 Burr. 1229.

[1] Where a debt arises from an illegal consideration it cannot be set off. But where a demand for malt sold and delivered was set off, and it appeared that it had been sold by a measure different from the standard measure, but it was also proved that after the sale the plaintiff and defendant had settled an account together, in which credit was given to the defendant for the malt, the court held, that after this settlement of the account the plaintiff could not object to the sale being by an illegal measure. *Owens v. Denton*, 1 C., M. & R. 711.

By 1 & 2 Wm. 4, c. 37 (Truck Act), s. 5, in actions by certain classes of artificers for wages, no set-off by employer for goods supplied, shall be allowed. The debt must be a legal and not an equitable demand. *Wake v. Tinkler*, 16 East, 36. *See* remarks of Lord Ellenborough, 7 id. 153; and *ante*, p. 370.

[2] *Remington v. Stevens*, 2 Stra. 1271. And if pleaded, the Statute of Limitations should be replied, "that the alleged set-off did not accrue within six years before the suit."

[3] The Statute of Set-off (8 Geo. 2, c. 24) applies only where the debts between the parties are mutual legal debts, the object of the statute being to prevent cross-actions between the same parties (*Isberg v. Bowden*, 8 Ex. 852; 1 C. L. R. 722; 22 L. J. Ex. 322. See *Murdall v. Thelluson*, 17 Jur. 389; 21 L. J. Q. B. 410), unless there be some express agreement between the parties to the contrary. *Kinnerley v. Hossack*, 2 Taunt. 170. *Williams et al. v. Vines et al.* 13 L. J. Q. B. 326. In an action by A. against C., C. cannot set off a debt due to him from A. and B., or a debt due from A. to C. and D., unless the action be brought by or against a surviving partner. *Slipper v. Stidstone*, 5 T. R. 493. *French v. Andrade*, 6 id. 582. But he may plead that the promises in the declaration were made by him jointly with D., and then set off a debt due from the plaintiff to him and D. jointly. *Stackwood v. Dunn*, 3 Q. B. 822. So in an action by A. and B. against C., C. cannot set off a debt to him from A. or B. separately (*France et al. v. White et al.* 9 L. J. C. P. 27), unless the other were at the time a dormant partner. *Stracey v. Deey*, 7 T. R. 361, n. So in an action by A. against C. and D., C. cannot set off a debt due to himself separately. *Jones v. Fleming et al.* 7 B. & C. 217.

To an action for freight due upon a charter-party, the defendant pleaded that the plaintiff entered into the charter-party as master of the vessel, and from and on behalf and as agent for the vessel; that the plaintiff never had any beneficial interest in the charter-party, nor had he any lien whatever on the freight, and that he brought the action solely as agent and trustee for the owner. The plea proceeded to state that the owner was indebted in a sum of money to the defendant, which he offered to set off against the plaintiff's claim:—*Held*, that such debt was not a mutual debt between the plaintiff and the defendant within the true meaning of the Statutes of Set-off (2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5); and, therefore, that the plea was bad. *Atwool v. Atwool*, 1 E. & B. 21; 1 C. L. R. 242; 17 Jur. 789; 22 L. J. Q. B. 287.

The corporation of P., in addition to the ordinary functions of a municipal corporation, performed those of managers of baths and washhouses under the Baths and Washhouses Act, 1846, and also those of a local board of health under the Public-Health Act, 1848, and kept at plaintiff's bank three separate accounts, corresponding with these three classes of transactions. At the time of plaintiff's suspending payment, there was due to defendants, on the account of the municipal affairs of the corporation, a large sum of money, and there was due from plaintiff to defendants, in respect of the local board of health account, a similar sum. It was held that defendant might set off these claims one against the other, inasmuch as, though the accounts were separate, defendants were debtors in the one and creditors in the other, and in the same right. *Pedder v. the Mayor, Aldermen, and Burgesses of Preston*, 31 C. P. 291.

Where upon the voluntary winding up of a joint-stock company, registered with limited liability under 19 & 20 Vic. c. 47, the liquidators sue a contributory of the company for calls, he may, under sect. 17 of 21 & 22 Vic. c. 67, plead as set-off a debt due to him from the company. *The Garnett Mining Co. v. Sutton*, 32 L. J. Q. B. 47.

[4] Since the statutes only speak of mutual debts, the demands, as well of the plaintiff as of the defendant, must be a debt, and a set-off is not allowed in actions or claims for torts, as in actions upon the case, trespass, replevin, or detinue. The only forms in which a set-off is allowed are *assumpsit*, debt, and covenant for the non-payment of money, and for which an action for debt or *indebitatus assumpsit* might be sustained. *Dowsland v. Thompson*, 2 Bl. Rep. 911.

In an action for schooling it was held that the defendant could not set off the amount of overcharges in former accounts which had been settled. *Lawes v. Eastmure*, 8 Car. & P. 205. So, if a man, in purchasing goods for money, expressly promise that he will not avail himself of a set-

(7) *As to Verdicts.*[1]
(8) ,, *Judgments, Damages, and Costs.*[2]

off he may have against the seller, he cannot plead his set-off in an action for the price of the goods. *Colson v. Welsh*, 1 Esp. 379. But see *M'Gillifray v. Simpson*, 9 D. & R. 35. On the other hand, if by agreement, or by the custom of a particular trade, the amount of injury done to goods in the progress of manufacture shall be deducted from the wages or price of manufacturing them; in an action for such wages or price the defendant shall be entitled to such deduction, without pleading it as a set-off. *Bamford v. Harris*, 1 Stark. 343.

Actions on Bonds.—A set-off cannot be pleaded to an action on a bond conditioned to indemnify generally. *Atwool v. Atwool*, 1 E. & B. 21; 1 C. L. R. 242; 17 Jur. 789; 22 L. J. Q. B. 287. To an action on one conditioned for payment of interest half-yearly, and the principal sum six months after notice, the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable, with an allegation that notice to pay the principal had not been given:—*Held*, that the plea was an answer to the action under the 8 Geo. 2, c. 24, s. 5. *Lee v. Lester*, 7 C. B. 1008; 7 D. & G. 137; 18 L. J. C. P. 312. See *Rodgers v. Mawe*, 15 Mee. & W. 444; 16 L. J. Ex. 137. As to not pleading the penalty, *see ante*, p. 370.

Overdue Bills and Notes.—An indorsee of an overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by an indorsee of an overdue note against the payee, a distinct debt due to the payee from a former indorsee cannot be set off. *Whitehead v. Walker*, 10 Mee. & W. 696; 12 L. J. Ex. 28. See *Cripps v. Davis*, 12 Mee. & W. 159; 13 L. J. Ex. 217. *Burrough v. Moss*, 10 B. & C. 558.

The right of an indorsee of an overdue bill of exchange to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor; and notice by the latter to the drawer before indorsement of his election to set off the amount against the bill; nor is the indorsee of such overdue bill of exchange affected by the existence of a right to set off as between the acceptor and the drawer, although the bill was indorsed without value, and for the purpose of defeating the set-off. *Oulds v. Harrison*, 10 Ex. 572; 3 C. L. R. 353; 24 L. J. Ex. 66.

To an action on a bill of exchange for 20*l.* drawn by J. L., and indorsed to the plaintiff and accepted by the defendant, the defendant pleaded that before and at the time of the indorsement J. L. was indebted in 1*l.* 13*s.* 1*d.* to the defendant, and that J. L. held the bill on the terms that the sum so due should be set off against the amount of the bill, and that J. L., in fraud of the defendant and in collusion with the plaintiffs, indorsed the bill to them, who sued as agents merely of J. L.:—*Held*, a non-issuable plea. *Mayhew v. Blofield*, 1 Ex. 469; 17 L. J. Ex. 28.

Liquidated Damages and Penalties.—By a deed, it was provided that certain specified works should be done by the plaintiff for 418*l.*, but that the defendant should be at liberty to order additional work, or to diminish that specified, and that payments or deductions were to be made or allowed accordingly. That if the specified work were not completed by the 23d of October, the plaintiff should pay 1*l.* per day used over and beyond the day as liquidated damages, provided that if the defendant should require additional works, the plaintiff should be allowed such extra time beyond the 23d of October as was necessary for completing the same. In an action brought to recover the contract price, and also a sum of money as the fair value of extra work ordered by the defendant, it was held that the stipulation for payment of 1*l.* per day extended to the time unnecessarily used after October 23d, and that the defendant was entitled to set off against the plaintiff's demand so much money as had become due under that stipulation. *Legge v. Harlock*, 12 Q. B. 1015; 18 L. J. Q. B. 45; 13 Jur. 229. See *Parkes v. Smith*, 15 Q. B. 297; 19 L. J. Q. B. 405.

[1] A verdict against a plaintiff in a prior action may be set off against a present demand. *Baskerville v. Brown*, 2 Burr. 1229.

[2] The cost of one judgment may be set off against the debt and costs of another. (*Thrustout v. Crafter*, 2 Bl. Rep. 826), even though the nominal parties are different, if the expenses are to be defrayed out of the same funds. *Gravatt v. Hall*, 16 L. J. Q. B. 352. Interlocutory costs may be set off against each other, although no leave is given for the purpose. *Levy v. Drew*, 5 D. & L. 307; 12 Jur. 119. It is no objection to an application to set off two judgments against each other that they are in different courts, provided the parties are beneficially as well as legally interested in such judgments. *Bristowe v. Needham*, 8 Scott, N. R. 366; 7 Man. & G. 648. *See* as to attorney's lien, *post*, p. 376.

A defendant may set off a judgment recovered from the plaintiff against the demand for which he is suing and the costs incurred, though the plaintiff is in execution on the judgment. *Peacock v. Jeffery*, 1 Taunt. 426. *Simpson v. Hanley*, 1 M. & S. 696.

Where several actions were brought upon two policies of insurance, underwritten by the same parties, and the actions on each were respectively consolidated, after which the plaintiff in one of the consolidated causes became entitled to costs, and in the other the defendant, the court directed the costs taxed and allowed to the defendant to be set off against those taxed and allowed to the plaintiff, although the same underwriter was not the defendant in both actions. *Nunez v. Modigliani*, 1 H. Black.

(9) *In Discharge of an Execution.*[1]
(10) *By Payment of Money into Court.*[2]
(11) *As to Deduction from Contract Price.*[3]
(12) „ *being a Payment, and not a Set-Off.*[4]
(13) *Costs of Abortive Issue.*[5]

217. If A. be equitably entitled to the costs of a nonsuit in an action by B. against C., and liable to pay the costs of a nonsuit in an action by himself, A. against B., the costs of the nonsuit in the action by B. against C. may be set off against the costs of the nonsuit in the action by A. against B. *O'Connor v. Murphy*, id. 657. Costs taxed upon an interlocutory order made in an inferior court, in the course of a suit there, may be set off. *Emerson v. Lashley*, 2 id. 248. Motion to set off costs in a suit in C. B., for which the plaintiff (here in the Exchequer) had retained the defendant as the attorney (though he himself was not the party) against the judgment here, was granted. *Murphy v. Cunningham*, 1 Anst. 271. But the defendant cannot set off the debt and costs against a judgment recovered against the plaintiff, if the plaintiff has still another demand against him. *Glaister v. Hewer*, 8 T. R. 69. It seems that the court will not permit one judgment to be set off against another on motion, unless the same might be done by plea in an action thereon (*Doe v. Darnton*, 3 East, 149), nor allow one judgment to be set off against another on motion, where the interests of third persons have intervened; therefore, not a judgment recovered by A. from B. when solvent, against one recovered by A. from the assignees of B. since his insolvency. (Id.) B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution. *Taylor v. Waters*, 5 M. & S. 103.

Where the plaintiff sued out execution against the defendant, an uncertificated bankrupt, notwithstanding the allowance of a writ of error, which execution was set aside on the ground of irregularity with costs, the court refused to permit the amount of those costs to be set off against the costs of the action. *Hill v. Febb*, 1 N. R. 311.

[1] The court will not, in a summary way, enable a prisoner to set off a debt from the plaintiff against the execution under which he is taken. *Philipson v. Caldwell*, 6 Taunt. 176.

[2] A plaintiff cannot be allowed to pay into court a cross-demand, for which the defendant is suing him, to go in reduction of the damages that he shall recover from the defendant. *Sherborne v. Siffkin*, 3 Taunt. 525.

[3] Where a person is employed to do work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter not of set-off but of deduction. *Turner v. Draper*, 2 Man. & G. 241; 2 Scott, N. R. 447. See *Pardow v. Webb*, C. & M. 531.

In all actions for goods sold and delivered with a warranty, or for work done, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action is worth by reason of the breach of the contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and he is precluded from recovering in another action to that extent, but no more. *Mondel v. Steel*, 8 Mee. & W. 858; 1 Dowl. N. S. 1; 10 L. J. Ex. 426.

Where, however, the plaintiff contracted to do certain work for the defendant, and to find the materials, for a gross sum, but the defendant in fact found some of the materials, to the amount of 5*l.*, which the plaintiff used up in the work; it was holden that the defendant had a right to have this 5*l.* deducted from the sum payable to the plaintiff, without making it the subject of a plea of set-off. *Newton v. Foster*, 12 Mee. & W. 772.

[4] The defendant being indebted to the plaintiff on a bill of exchange for 25*l.*, and, being unable to pay the full amount, left 9*l.* 10*s.* in cash, and a bill for 17*l.*, in renewal of the balance, at the plaintiff's house, in discharge of the debt. A few days afterwards he met the plaintiff, who then refused to take the bill in renewal, and stated he should retain the cash as payment of another debt, which he said was due. The defendant then demanded back the money, in addition to the bill, but the plaintiff refused to return it. The plaintiff shortly afterwards sued the defendant on the original bill:—*Held, per Pollock, C. B.*, and *Platt, B.*, that under the circumstances, the receipt and retainer of the money by the plaintiff were evidence of payment. *Per Parke, B.*, and *Martin, B.*, that it did not amount to a payment, but to a set-off. *Thomas v. Cross*, 7 Ex. 728; 21 L. J. Ex. 251. On a settlement of account between the plaintiff and the defendant, the plaintiff was found to have been overpaid by 1*l.* 11*s.* 5*d.*, which sum (as the jury found) it was agreed should go to the defendant's credit in their future dealing. This claim, however, was barred by the Statute of Limitations. The plaintiff afterwards did work for the defendant to the amount of 5*l.* 6*s.* 6*d.*, and brought an action to recover the sum. The defendant paid 4*l.* into court:—*Held*, that he had a good answer to the balance of 1*l.* 6*s.* 6*d.* under never indebted. *Smith v. Winter*, 12 C. B. 487; 10 Jur. 908; 21 L. J. C. P. 158.

[5] By 15 & 16 Vic. c. 76, s. 145, upon an

(*b*) *As regards Particular Persons.*

(1) *Bankrupts or Insolvents, and their Assignees.*[1]

(2) *Husband and Wife.*[2]

(3) *Insurance Claims.*[3]

(4) *Principal and Agent.*[4]

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arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of pleading, for defect of which the judgment is given upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any.

[1] By 12 & 13 Vic. c. 106, s. 171, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed. *See* the law and the cases, vol. ii. p. 268.

A discharge under the Insolvent Debtors' Act, 1 & 2 Vic. c. 110, s. 91, is a legal answer to a plea of set-off. *Francis v. Dodsworth*, 4 C. B. 202; 17 L. J. C. P. 185.

[2] A debt due to a husband in right of his wife cannot be set off in an action against him on his own contract. *Paynter v. Walker*, Bull. N. P. 179. So, a debt of the wife's *dum sola* cannot be set off against a claim made by the husband alone, unless after the marriage he make the debt his own by some promise to pay made in writing, in consideration of forbearance, or some other new consideration, even though the action be upon a note given to the wife after marriage. *Borough v. Moss*, 10 B. & C. 558. *Wood v. Akers*, 2 Esp. 594. So, a debt due from a bankrupt to a married woman *dum sola*, cannot be set off against a debt due to the husband, a bankrupt. 19 Ves. 465. *Yates v. Sherrington*, 11 Mee. & W. 42; 12 L. J. Ex. 216.

[3] A policy-broker, who makes an assurance in his own name for his principal under a *del credere* commission, may set off the amount of adjusted losses and return of premium in an action against him by the underwriter for premiums. *Grove v. Dubois*, 1 T. R. 112.

Declaration on policy of insurance on a ship and cargo, alleging an average damage or loss on a portion of the cargo insured, and a breach by reason of the non-payment of the defendant's proportion of the average loss. *Plea*, set-off for premiums:—*Held*, on demurrer, bad, as the action was for unliquidated damages, by the Exchequer Chamber affirming the judgment of the Queen's Bench. *Boddington v. Castilli* (in error), 1 E. & B. 879; 1 C. L. R. 281; 17 Jur. 781; 23 L. J. Q. B. 31, Ex. Ch. *Castilli v. Boddington* (in court below), 1 E. & B. 66; 17 Jur. 457; 22 L. J. Q. B. 5. Notwithstanding that a marine policy of insurance is a contract of indemnity, it is to be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages. *Irving v. Manning*, 6 C. B. 391. See *Dalney v. India and London Life Assurance Co.* (in error), 15 C. B. 365; 18 Jur. 1024; 24 L. J. C. P. 2. See *Thompson v. Redman*, 11 Mee. & W. 487; 12 L. J. Ex. 310. *Luckie v. Bushby*, *ante*, p. 371.

[4] Where an agent represents himself as principal, those with whom he deals as such have a right of set-off against the agent in an action by the real principal (*Rabone v. Williams*, 7 T. R. 360, n. *George v. Cloggett*, id. 359. *Purchell v. Salter*, 1 Q. B. 197; see id. 209. *Carr v. Hinchliff*, 4 B. & C. 547. *Baring v. Corrie*, 2 B. & A. 137); and if a buyer purchases goods of a factor with the knowledge that he sells as a factor, and not as principal, the buyer cannot set off a debt due to him from the factor in an action for the price of the goods bought by the principal. *Fish v. Kempton*, 7 C. B. 687; 13 Jur. 750; 18 L. J. C. B. 206.

The plaintiffs, who were merchants at Dieppe, sold to the defendant, a merchant at Wisbeach, a cargo of oil-cake, and delivered the same at Wisbeach in December 1841. The defendant paid for the cargo, but afterwards considering that it did not answer the sample, landed a portion of it for the purpose of examination, and afterwards landed the whole and lodged it in the public granaries. He then informed the plaintiffs that it lay there at their risk and costs, and required them to take it back. This the plaintiffs refused to do. After some negotiation the defendant, in May 1842, gave notice to the plaintiffs that the cargo was lying at the granaries at their disposal, and if no directions were given by them would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered, that they considered the transaction at an end, and demanded payment of the price. Where-

(5) *Vendor and Purchaser.*[1]
(6) *Partners.*[2]
(7) *Executors and Administrators,*[3] *or Trustees.*[4]
(8) *As to Attorney's Bill not Delivered in One Month.*[5]
(9) „ *Lien and Set-Off.*[6]

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upon the defendant offered the cargo for sale in his own name to a third party:—*Held*, that the defendant had accepted the goods, and was not to be considered an agent of the plaintiffs from necessity, and therefore he could not, in an action against them for the price of the goods, set off the money received by the plaintiffs for his use. *Chapman v. Morton*, 11 Mee. & W. 534; 12 L. J. Ex. 292. See *Pollard v. Ogden*, 2 E. & B. 459; 22 L. J. Q. B. 439. *Doils v. Lloyd*, 12 B. B. 531; 17 L. J. Q. B. 247.

A ship's husband and part owner in this country, employed an agent in Quebec to obtain freight. The agent did so: made it payable to himself at Quebec, and set it off against a debt due to him by the ship's husband:—*Held*, in an action for the freight by the owners against the agent, that the agent was liable, and that he had no right either to make the freight so payable or so to set it off. *Walshe v. Provan*, 1 C. C. R. 823; 8 Ex. 843; 22 L. J. Ex. 355.

[1] Where a debt due from the vendor to the vendee is to be taken in part payment, it need not be set off in an action by the former. *Leddi v. Burrows*, 12 East, 1.

[2] A joint debt due from a firm to the defendant cannot be set off against a debt due to the plaintiff solely. *Arnold v. Bainbridge*, 9 Ex. 153, n.[3]. A plea of set-off alleged, that the debt claimed from the defendant was due by him and A. jointly, and then proceeded to allege that the plaintiff was indebted to the defendant and A., which debt the defendant and A. are ready and willing to offer to set off. On special demurrer, on the ground that the Statute of Set-off applied only to mutual debts between the plaintiff and the defendant, exclusively of any third person, the plea held good. *Stackwood v. Dunn*, 3 Gale & D. 115; 3 Q. B. 822; 12 L. J. Q. B. 3. *Gordon v. Ellis*, 2 C. B. 821; 15 L. J. C. P. 178; 10 Jur. 359. *See ante*, p. 372.

[3] In an action by an executor or administrator, if the cause of action accrued since the death of the testator or intestate, the defendant cannot set off a debt due to him from the deceased (*Shipman v. Thompson*, Willes, 103. *Warn v. Bickford*, 7 Price, 550. *Schofield v. Corbett*, 11 Q. B. 779; 6 Nev. & M. 527); but if the cause of action accrue before the death, he may.

A set-off for money due from the plaintiff to a testator in his lifetime may be pleaded in answer to a declaration on a cause of action which accrued to the plaintiff from the defendant, as executor after the death of the testator. *Blakesley v. Smallwood*, 8 Q. B. 538; 10 Jur. 470; 15 L. J. Q. B. 185.

Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued since the death of his testator. *Mardall v. Thelluson*, 17 Jur. 389; 21 L. J. Q. B. 410.

To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Walls v. Rees*, 9 Ex. 696; 2 C. L. R. 1278; 18 Jur. 433; 23 L. J. Ex. 238.

Where a lessor of the plaintiff obtained a verdict in ejectment in 1834, and taxed his costs, and issued a writ of possession, which was set aside in 1837 for irregularity, with costs:—*Held*, that not having revived the judgment by *sci. fa.* he could not set off his costs in the judgment against the defendant's costs in setting aside the writ of possession. *Doe d. Stevens v. Lord*, 1 Per. & D. 388; 6 Dowl. P. C. 256.

[4] The defendant cannot plead that the plaintiff sues as a trustee on behalf of a third person, and a set-off in respect of a debt due to the defendant from the latter, unless by way of equitable defence. *Isberg v. Bowden*, 8 Ex. 852.

[5] Is the subject of a set-off. *Martin v. Heides*, 1 Dougl. 199. But where the defendant, under a plea of set-off, put in an account rendered to him by the plaintiff, by which he charged himself with items due to the defendant; on the other side of the account were items due to the plaintiff for costs due to an attorney, but for which no signed bill was proved to have been delivered, and which left a balance due to the plaintiff:—*Held*, that the plaintiff was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it. *Harrison v. Turner*, 10 Q. B. 482; 11 Jur. 817; 16 L. J. Q. B. 295.

[6] No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted. Reg. Gen. Q. B., C. P., & Ex., H. T., 16 Vic. c. 63; 1 E. & B. App. 13.

Reg. Gen. H. T. 2 Wm. 4, r. 93 (which is similar to this rule), only applied to cases in which the court has a discretion, to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off. *Dun v. West*, 10 C. B. 420; 15 Jur. 88; 20 L. J. C. P. 1.

II. As to the Mode of Set-Off.

(A) *Of the Plea.*[1]
(B) „ *Replication.*[2]

On a reference to arbitration of an ejectment and all matters in difference between the parties, the arbitrator directed that a sum of money should be paid by the lessor of the plaintiff to the defendants by way of compensation for building erected by them, and that a verdict should be entered for the former. On motion the court directed the sum awarded to the defendants to be set off against the costs of the lessor of the plaintiff, saving the lien of their attorney. *Doe d. Swinton v. Sinclair*, 5 Dowl. P. C. 27; 3 Scott, 42; 2 Hodges, 111. See *Scott v. De Richebourg*, 11 C. B. 447; 20 L. J. C. P. 263. *O'Hare v. Reeves*, 13 Q. B. 659; 18 L. J. Q. B. 231.

An attorney undertook to conduct a cause charging his client only money out of pocket. The client advanced money to the attorney during the progress of the cause, which was properly expended in carrying it on. By subsequent negligence in the attorney, the cause failed:—*Held*, first, that the attorney was not entitled to recover money out of pocket paid by him subsequently to the negligence of which he had been guilty; and, secondly, that the client was not entitled to set off the money advanced and expended previously to such negligence. *Lewis v. Scannel*, 8 Q. B. 685; 10 Jur. 429; 15 L. J. Q. B. 218.

[1] This must in all cases be specially pleaded. Rule Pl., H. T. 4 Wm. 4, s. 3. It cannot now be given in evidence under the general issue. *Graham v. Partridge*, 1 Mee. & W. 395. It may be pleaded to the whole declaration, or to some of the counts only; and if pleaded to the whole, it may be taken distributively (15 & 16 Vic. c. 76, s. 75); and by sect. 84 it may be pleaded with other pleas, without leave of the court or a judge. And the plaintiff will be entitled to his verdict generally, if he prove a cause of action under any of the counts to a greater amount than the set-off proved. *Moore v. Butlin*, 7 Ad. & E. 595. It may be pleaded as to a particular sum, "parcel of the sums in the declaration mentioned," without particularising to what count, or to what part of each count, it is pleaded (*Noel v. Davies*, 4 Mee. & W. 136. And see *Cook v. Dixon*, Bull. N. P. 179); and in such a case it is not necessary to commence the plea with an *actionem non*, or conclude with a prayer of judgment. *Ratton v. Davis*, 1 Q. B. 496. *Fairthorne v. Donald*, 13 Mee. & W. 424; 14 L. J. Ex. 205. *Blakesley v. Smallwood*, 8 Q. B. 538. If it be pleaded generally, without confining it thus to a particular sum, care must be taken that the set-off be stated at an amount equal or greater than the aggregate of the sums in the declaration (*Mee v. Tomlinson*, 5 Nev. & M. 624), even although the plaintiff, by his particulars, claim a much less sum as a balance due to him. *Townson v. Jackson*, 14 L. J. Ex. 57.

Where the amount proved under a plea of set-off pleaded to the whole declaration did not cover the plaintiff's demand in the action, the defendant could not have had a verdict on the plea for the amount proved, but it went in reduction of damages. *Rodgers v. Maw*, 15 Mee. & W. 444; 4 D. & L. 66; 16 L. J. Ex. 137. A defendant cannot set off by plea to the further maintenance of the action a debt which accrued after action brought, and before plea pleaded. *Richards v. Jones, or James*, 2 Ex. 471; 6 D. & L. 52; 17 L. J. Ex. 277.

Action for work and materials. *Plea*, that the promises were made jointly by the defendant and A., and that the plaintiff was and is indebted to the defendant and A. in a sum of money exceeding the damages of the plaintiff, out of which sum of money the defendant and A. are ready and willing to set off the full amount of plaintiff's debt;—*Held* good, on special demurrer. *Stockwood v. Dunn*, 3 Gale & D. 115; 3 Q. B. 822; 6 Jur. 993. If the set-off be a bond debt, the plea must state what sum is due upon the bond for principal and interest. *Symons v. Knox*, 3 T. R. 65. And the same in all cases where the debt set off has accrued by reason of a penalty in any other specialty. 8 Geo. 2, c. 24, s. 5. This plea may be pleaded with the general issue, or a plea of payment, the Statute of Limitations, &c.; and in such a case it may be general to the whole declaration. But if pleaded with a plea of tender, or of payment of money into court, it must be pleaded to all the sums in the said declaration mentioned, except the sum of ——*l.*, and then the plea of tender, or payment of money into court, may be pleaded as to the sum thus excepted. *See* form of pleas, B. & L. 399.

[2] Where the replication is that the plaintiff was not nor is indebted, he may give payment in evidence. *Harvey v. Holtman*, 12 L. J. Q. B. 185; 7 Jur. 398. Where, on the other hand, the plaintiff replied "*Nunquam indebitatus*," it was held not necessary for him to have done so, as the rule of pleading related to the general issue in debt, and not to replications; but as he had pleaded it, and the defendant had proved the debt set off, it was not competent to the plaintiff, under that replication, to show that the debt had in fact been paid before the commencement of the action. *Brown v. Daubeny*, 4 Dowl. 585. *Stockbridge v. Sussams*, 3 Q. B. 239. *Miller v. Atlee*, 3 Ex. 799. This replication will be proper to a plea of set-off upon a recognisance, if the plea do not state it to be enrolled; for, until enrolled, it is not a record. *Glyn et al. v. Thorpe*, 1 B. & A. 153. If, indeed, it appear to be enrolled, or if a set-off of a judgment be pleaded, the replication must be *nul tiel record*. And in all other cases, the replication should be similar to a

(C) *Issue.*[1] (D) *Particulars of Set-Off.*[2]
(E) *Evidence to Support.*[3]

plea to a declaration for the same demand. The set-off pleaded, also, may be such as to require different replications to the different parts of the plea. In such a case each replication should state, in its commencement, to what part of the plea it is pleaded; as thus: "the plaintiff, as to so much of the said plea as relates to —— in that plea mentioned, says that," &c.

A plea of set-off stated that the plaintiff, before and at the time of the commencement of the suit, was and still is indebted. *Replication*, that the plaintiff was not indebted as alleged:—*Held*, on special demurrer, that the allegation was well traversed without adding "nor is." *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567; 3 Jur. 638; 18 L. J. C. P. 189.

A replication that since the plea of set-off the plaintiff had paid the defendant the amount of the set-off is good. *Eaton*, or *Eyton, v. Littledale*, 7 D. & L. 55; 4 Ex. 159; 18 L. J. Ex. 369.

Under a replication of *nil debet* to a plea of set-off, the plaintiff may object that the debt sought to be set off is not due from himself alone, but from himself and a third party. *Arnold v. Bainbridge*, 9 Ex. 153; 23 L. J. Ex. 59.

The Statute of Limitations must be replied specially to a plea of set-off, and cannot be relied on under a replication taking issue. *Chapple v. Durston*, 1 C. & J. 1. The set-off must have been barred before the commencement of the suit in order to support the replication. *Walker v. Clements*, 15 Q. B. 1046.

The plaintiff, on a replication of the Statute of Limitations to a plea of set-off, cannot on the trial reduce the amount of the set-off by showing payment of part. The payment of part ought to be replied. *Moore v. Wood*, 2 M. & Rob. 407: *Tindal. Mead v. Bashford*, 5 Ex. 336; 2 Pr. Rep. 238; 20 L. J. Ex. 190. The plaintiff should in such case reply that part of the subject-matter of the set-off is barred by the statute, and that he is not indebted to the defendant in any sum which (excluding the part so barred) equals the amount of the plaintiff's demand. (Id.)

A discharge under the Insolvent Debtors' Act cannot be given in evidence under a replication of *nil debet* to a plea of set-off, but must be specially replied. *Ford v. Dornford*, or *Dunford*, 8 Q. B. 583; 10 Jur. 285; 15 L. J. Q. B. 172.

Action for a debt. *Plea*, set-off. *Replication*, that after the set-off had become due, the plaintiff, by an order of the Court for the Relief of Insolvent Debtors, was discharged under 1 & 2 Vic. c. 110, s. 91, from the set-off. Without this, that the order of discharge still remains in full force:—*Held*, that the order, and adjudication, and discharge, would be a legal answer to the plea of set-off of property. *Francis v. Dodsworth*, 4 C. B. 202; 17 L. J. C. P. 185.

[1] By 15 & 16 Vic. c. 76, s. 75, pleas of set-off are to be taken distributively, and if issue be taken thereon, and so much thereof as shall be sufficient to answer to part of the causes of action proved, shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. See *Tuck v. Tuck*, 5 Mee. & W. 109. *Watkinson v. Kirby*, 15 C. B. 430, 444; 23 L. J. C. P. 224.

The sum mentioned in a plea of set-off is as immaterial as the sum mentioned in a declaration, and the real question is, whether the sum proved by the defendant equals the sum really due to the plaintiff. *Tuck v. Tuck, supra;* 1 C. L. R. 532; 17 Jur. 624; 22 L. J. Q. B. 351.

To a declaration for a debt recoverable on the common counts, the defendant pleaded, first, never indebted; secondly, to a set-off; thirdly, as to 3*l.* parcel, &c., payment after action brought; and fourthly, a defence under the Tippling Act. At the trial the set-off proved was less than the plaintiff's claim as it stood at the commencement of the action, but exceeded it when the payment pleaded after the action brought was taken into account:—*Held*, that the plaintiff was entitled to the verdict on the plea of set-off. *Spradberry v. Gillam*, 2 Pr. Rep. 366; 6 Ex. 422; 20 L. J. Ex. 237.

[2] By r. 19, H. T. 1853, "with every plea of set-off, containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And if any plea of set-off shall be delivered without such particulars, and a judge shall afterwards order a delivery of particulars, the defendant shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver." *See ante*, Particulars of Demand, p. 57.

Particulars of set-off are merely explanatory of the plea, and the plaintiff, by putting them in evidence to prove his case, as, for instance, to rebut the defence of the Statute of Limitations, does thereby admit the correctness of their contents. *Barkett v. Blanchard*, 3 Ex. 89; 18 L. J. Ex. 34. S. P. *Buckmaster v. Mecklegston*, 8 Ex. 634; 1 C. L. R. 839.

An order for delivery of particulars of set-off, and in default precluding the defendant from giving evidence of his set-off, makes such evidence inadmissible at the trial. *Young v. Geiger*, 6 C. B. 552; 6 D. & L. 337; 18 L. J. C. P. 43. *Ibbett v. Levrer*, 16 Mee. & W. 770; 16 L. J. Ex. 208.

[3] Under a replication denying the set-off, the defendant must prove his counter-claim,

(F) *Effect of.*[1]

SET of Exchange.[2]

SETTLE.[3]

SETTLEMENT in contemplation of Death.[4]

See post, Voluntary Deeds.

SETTLEMENT, Marriage.

See vol. v. p. 459.

precisely in the same manner as if he were plaintiff in an action for the demand set off, and *nil debet* or other denial pleaded. If he establish a claim to an equal or greater amount than the demand proved by the plaintiff, he will be entitled to a verdict upon the issue, although he do not prove the amount, or all the items mentioned in his plea, in the same manner as upon a plea of payment. See *Falcon v. Bunn*, 11 L. J. Q. B. 73. So if he plead the general issue, a set-off, and other special pleas, and under the other special pleas (such as a plea of payment, or payment of money into court), he establish a defence to a certain amount, and under the set-off he prove the residue, he will be entitled to recover upon the whole record; that is to say, he will be entitled to a verdict upon the set-off for the sum he shall have proved under it, and the plaintiff to a verdict for the residue; and the same as to the other pleas. *Cousins v. Paddon*, 2 C., M. & R. 547. But where in such a case the defendant did not plead the general issue, but special pleas merely; namely, a set-off as to part, goods returned as to another part, and payment into court as to the residue (which latter the plaintiff accepted in satisfaction of the residue), and the defendant at the trial failed to prove the entire of his set-off by a sum of 2*l.*, it was held that the plaintiff was entitled to a verdict for this 2*l.*, although the defendant had in fact proved altogether a sum equal to the plaintiff's demand in his particulars. *Green v. Marsh*, 5 Dowl. 669. And if the defendant do not prove to a sufficient amount to countervail the proved demand of the plaintiff, the plaintiff shall have a verdict upon the issue, but the defendant will be entitled to have the sum proved by him under the set-off deducted from the damages to which the plaintiff would otherwise be entitled. *Tuck v. Tuck*, 5 Mee. & W. 109. *Kilner v. Bailey*, 9 L. J. Ex. 37. *Moore v. Butlin*, 7 Ad. & E. 595. And see *Barnes et al. v. Butcher*, 9 Car. & P. 725. Where the defendant pleaded as a set-off a bond of the plaintiff to him, conditioned to pay an annuity to a third person, for which the defendant would otherwise be liable, and it was alleged that a certain sum was in arrear, to which the plaintiff replied that he was not indebted, the court held that all the defendant had to do, in proof of his set-off, was to produce the bond, without proving that he had been obliged to pay the annuity, and that it was for the plaintiff to prove payment of the alleged arrear, if he could. *Penny v. Foy*, 8 B. & C. 11.

[1] If the defendant fail to prove his set-off at the trial, and a verdict be against him upon that issue, he cannot afterwards maintain an action to recover the amount of the same claim. *Eastmure v. Laws*, 5 Bing. N. C. 444. S. C. nom. *Eastmure v. Hawes*, 8 L. J. C. P. 236. And to such an action it will be a good plea in bar to state the former action, the plea of set-off as to the same identical demand for which the present action is brought, and the verdict and judgment on the issue (Id.; and see *Brokenshir v. Monger*, 11 L. J. Ex. 90). But if, on the other hand, the defendant prove his set-off, he may have an action afterwards to recover any excess of set-off over and above what was sufficient to answer the plaintiff's demand. *Hennell v. Fairlamb*, 3 Esp. 104.

To a declaration for goods sold and delivered, the defendant pleaded that in an action brought by the now defendant in a county court against the now plaintiff, the now plaintiff set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off of 15*l.* That it was adjudged that the now defendant was not indebted to the now plaintiff in that sum, or any part thereof, and that the now plaintiff had no claim against the now defendant, averring the identity of the two debts. *Replication*, that by the rules of the county court made in pursuance of the statute, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court, and that the now plaintiff did not give such notice:—*Held*, on demurrer, that the plea was bad. *Stanton v. Styles*, 5 Ex. 578; 1 Pr. Rep. 575; 19 L. J. Ex. 336. S. P. *Dank v. Farley*, 1 C. L. R. 95.

[2] "Set of exchange," in mercantile law, is a bill of exchange drawn in several parts (called the first exchange, second exchange, &c.), any one part of which being paid the others are to be void. Story on Bills, ss. 66, 67. *See* vol. ii. p. 482.

[3] "Settle" and "Pay" have been held to be not equivalent terms. Authority to an agent to settle does not authorise him to submit to arbitration the matters in dispute.

[4] A settlement of all his property made by a father on his family in contemplation of death was set aside on his recovery, though no power of revocation was reserved in the deed. *Forshaw v. Welsby*, 30 L. J. Ch. 331. See *Hammersley v. De Biel*, 12 Clark & Fin. 45.

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[1] *Definition.*—A settlement is the right acquired in any one of the modes pointed out by the poor-laws, to become a recipient of the benefit of those laws, in that parish or place which provides for its own poor, where the right has been *last* acquired. It is not forfeitable, and may be communicated from person to person, notwithstanding an attainder, which works a forfeiture of most civil rights (*Rex v. St. Mary Cardigan*, 6 T. R. 116), though it ceases and is destroyed for ever in the parish or place where it once existed, upon the acquisition of the same right in any other such parish or place. *See post*, Div. II. as to Removal, p. 410.

Wherever a district of known limits contributes to one common fund raised within it, and which is disbursed within it, for the relief of its own poor, this right may be acquired, whether such district be a parish, a township, or a hamlet, even though the township or hamlet be extra-parochial, for overseers may be appointed to an extra-parochial township or village. *Rex v. Rufford*, 1 Stra. 512. *R. v. St. Martin's*, 9 Q. B. 241. See *R. v. Hunnington*, 5 id. 273. *R. v. Acton*, 8 id. 108.

By 4 & 5 Wm. 4, c. 76, s. 33, the guardians of any union joined under that act may agree that it be deemed one parish for the purpose of settlement.

Origin.—The present law of settlement is derived from 13 & 14 Car. 2, c. 12, s. 1. It enacts, that upon complaint made by the churchwardens and overseers of the poor of any parish, to any justice of the peace, within forty days after any such person coming to settle in any tenement under the yearly value of ten pounds, for any two justices of the peace, whereof one to be of the quorum, of the division where any person that is likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish where he was last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least, unless he give sufficient security for the discharge of the said parish, to be allowed by the said justices.

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I. As to the Settlement of.

(A) *In General.*

(*a*) *Who Entitled to.*[1]

(*b*) *Mode of Interpreting the Law connected with.*[2]

(*c*) *Of Accumulative Settlements.*[3]

(B) *In Particular.*

(*a*) *By Birth.*

(1) *Of Legitimate Children.*[4]

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[1] A settlement may be acquired by all natural subjects of the queen, born in any part of her dominions annexed to the Crown of England. In fact, a subject of any country at peace with England may gain a settlement by occupying a tenement. *Rex v. Eastbourne*, 4 East, 463. And an attainted felon discharged under the sign manual may, by purchasing an estate, gain a settlement. *Rex v. Haddenham*, 15 id. 463.

[2] *Ashhurst, J.*: "In all cases upon settlement law, it is the safest way to adhere to the words of the act; for, if we once depart from that line, it leads to endless uncertainty." *Rex v. Inhabitants of Fillongley*, 1 T. R. 460.

[3] *Per Lord Ellenborough, C. J.*: "There is no such thing as a cumulative settlement known in the law." *Edwards v. Bobbitt*, 1 M. & S. 120.

[4] The place of birth, or first known place

(a) By Birth — Of Legitimate Children.
(a 1) Where and How Gained.[1]
(a 2) Evidence of.[2]

of abode (Comb. 364, 372), is *primâ facie* the place of settlement of legitimate children (*R. v. Heaton and Norris*, 6 T. R. 653). But this is the case only until the parish find the father's, or in default thereof, the mother's place of settlement, if either of the parents had acquired a settlement. See *R. v. St. Mary's*, 3 Ad. & E. 644.

The settlement of a child is that which the father has at the time of its birth (*Cox v. Shillingford*, Fort. 313); whether the father dies previous to its being born or not (*Cummer v. Milton*, 6 Mod. 87); and though neither of them have been in the place since the birth. *St. Giles's v. Eversley, Blackwater*, 1 Stra. 580.

The manner in which the parental settlement has been acquired is equally immaterial: it may be gained by the father's own act, or derived from his father or grandfather, or any other more remote relation, to whom a settlement is first traced in the direct ascending line. See *R. v. St. Mary's, Beverley*, 1 B. & Adol. 201.

An unemancipated child has the settlement of its parents, and as that settlement changes, so does the settlement of such child. *Reg. v. St. Mary Arches, Exeter*, 5 L. T. (N. S.) 637, Q. B.

[1] Where the father has no settlement, the child follows the mother's maiden settlement. *St. Botolph's v. St. John's*, Burr. S. C. 367. But as the father's settlement, where he has one, must always fix that of his child, it is obvious that recourse should be had to the settlement of the father's mother prior to that of the pauper's own mother, for it is the father's settlement, if the father have one; and, upon the same principle, that of the father's grandfather's mother precedes that of his own mother, and so on, to the more remote degrees of lineal ancestry. Where the parents have no settlement, or if it cannot be ascertained, a legitimate child is settled in the place of its birth; or, if that is unknown, where it is first found. *Reg. v. Newchurch*, 32 L. J. M. C. 19; 11 W. R. 24; 7 L. T. (N. S.) 271, Q. B. And if the father die, the mother becomes the head of the family; and, as such, acquires a settlement for herself and children (*St. George's v. St. Katherine's*, 1 Sess. Ca. 69), although past the age of nurture; but if she acquired a settlement by another marriage, it is not gained as the head of a family, but as a subordinate part of some other, and therefore is not communicated to her former offspring. And where the father who gained a settlement became attainted for felony and married, it was holden that the settlement gained before the attainder was communicated to the children. *Rex v. St. Mary, Cardigan*, 6 T. R. 116.

No incapacity in the child will supersede its settlement. *Hard's case*, 2 Salk. 627. Residence in the parish of birth for forty days is not requisite to confer this species of settlement. *R. v. Watford*, 9 Q. B. 626. The children of foreigners born in a parish or place having overseers in England or Wales, may acquire a birth settlement there; and so may children of Irish, Scotch, &c. parents, who have gained no settlement in England. But these latter are not removable to their birth settlement so long as they are unemancipated, but must be passed with their parent to their own country under the 8 & 9 Vic. c. 117. *Reg. v. Preston*, 12 Ad. & E. 822. If, however, the foreign parent is dead, or has deserted the children, they may be removed alone to their birth settlement in England (*Reg. v. All Saint's, Derby*, 14 Q. B. 207); and so if the child becomes chargeable to a parish in which its parent does not reside, and from which he cannot therefore be removed. *Reg. v. St. Giles Without, Cripplegate*, 17 Q. B. 636.

Where a person is born in an extra-parochial place, which has no overseers, he gains no birth settlement therein. *R. v. St. Nicholas, Leicester*, 2 B. & C. 889. See *R. v. Oakmere*, 5 B. & A. 775. *R. v. Tipton*, 3 Q. B. 215.

[2] The place of a legitimate child's birth is *primâ facie* its place of settlement. *Rex v. Heaton Norris*, 6 T. R. 653. The marriage, and that the pauper is the issue of the marriage, must be proved; when the actual descent is proved, very slight evidence will be sufficient, in the first instance, to establish the legitimacy. It lies on the other side to prove the bastardy by the evidence, which will be stated in treating of the settlement of illegitimate children by birth, *post*, p. 383. The testimony, therefore, of the father and mother; an examined copy of the parish register of the pauper's birth or christening (see *R. v. Petherton*, 5 B. & C. 508. *R. v. Trowbridge*, 7 id. 252. *R. v. Crediton*, 27 L. J. M. C. 265), with evidence of his identity (*Rex v. Creech*, Burr. S. C. 765; 1 Bott, 16, Pl. 34), or that his parents were considered as married persons; or the testimony of any who knew his father and mother, and their being reputed man and wife. *Rex v. Bucklebury*, 1 T. R. 164; 2 Bott, 26, Pl. 48. But the mere declarations of the father or mother upon the subject are not evidence, though tendered as proof after their death. *R. v. Erith*, 8 East, 539.

The first settlement to be relied upon is that of the father (2 Bott, 16, Pl. 33); and if he has done no act to gain one, it will be necessary to resort to that of his grandfather or grandmother. If no settlement can be proved on the side of the father, recourse is to be had in the same way to that of the mother. In all these cases the settlement last gained before their child becomes emancipated is that of the pauper.

(*a* 3) *Exceptional Instances.*[1]

(2) *Of Illegitimate Children.*

(*b* 1) *Where and How Gained.*[2]

[1] *Children born out of England and Wales.*—Persons born abroad, or even in Ireland, Scotland, Jersey, or Guernsey, or elsewhere out of England and Wales, have no settlement here, unless they acquire it in their own right, or derive it by marriage or parentage. But a foreigner may gain a settlement in this country. *R. v. Eastbourne*, 4 East, 103. So may an Irishman, Scotchman, &c. And children born in this country of Irish or Scotch parents who have no settlement, are entitled to their settlement by birth as soon as they are emancipated. *R. v. Preston*, 10 L. J. M. C. 22; 12 Ad. & E. 832. *See* 8 & 9 Vic. c. 117. *R. v. All Saints, Derby*, 19 L. J. M. C. 14. *R. v. St. Giles*, 21 id. 26.

Of Certificate-men.—The child of a certificate-man, born in the parish to which the father is certificated, has no settlement there by birth, even although the father were not married until after the certificate was granted. See *R. v. Sherborne*, Burr. S. C. 182. Nor have the children of any of his children named in the certificate. See *R v. Batheaston*, 8 T. R. 446. *R. v. Darlington*, 4 id. 797.

Born in Prisons or Lying-in Hospitals.—By 54 Geo. 3, c. 170, s. 2, no person shall be deemed to acquire any settlement in any district, parish, &c., by reason of such person being born of any mother actually confined as a prisoner within the walls of any prison, or in any house licensed for the reception of pregnant women. *See* 13 Geo. 3, c. 82, ss. 3, 5. *R. v. Manchester*, 4 B. & A. 504.

Born in Workhouses of Unions, &c.—By 54 Geo. 3, c. 170, s. 3, whensoever any person shall be born in any house of industry, or house for the reception and care of the poor of any district, parish, &c., which shall be locally situated in any district, parish, &c., contributing to the expenses of maintaining the poor in such house, or in any other district, parish, &c., contributing to such expense, such person shall, so far as regards the settlement of such person, be deemed and taken to be born in the district, parish, &c., by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house. *See* 20 Geo. 3, c. 36, s. 2. And by 7 & Vic. c. 101, s. 56, the workhouse of a union shall be deemed to be in the parish to which each poor person therein relieved is or has been chargeable. See *R. v. Manchester*, *supra*.

[2] A bastard child is settled where born (*Whitechapel v. Stepney*, Carth. 433. *R. v. Spitalfields*, 1 Ld. Raym. 567), or if the mother come into the parish under the protection of a certificate (1 Stra. 186. *Rex v. Hilton*, Burr. S. C. 187); unless the parish certifying expressly describes the child therein, and undertakes to provide for it. If a certificate is granted when the woman is unmarried, and undertakes to provide for the child she is then pregnant with, and all other children that she may thereafter have, until she or they acquire subsequent settlements, it does not extend to an illegitimate child born eight years after the certificate is granted, but it is settled where born. *Rex v. Mathon*, 7 T. R. 362.

Where the birth is on or before the 14th Aug. 1834, being *nullius filius*, it neither had nor followed the settlement of the father or mother; consequently, if it were born in a place that was extra-parochial, it had no place of settlement at all until it had acquired one. *R. v. St. Nicholas, Leicester*, 2 B. & C. 889. *R. v. Mattersey*, 4 B. & Adol. 211. *R. v. Oakmere*, 5 B. & A. 575. *R. v. Lubben*, 5 B. & Adol. 968; *see* id. 970. But by 4 & 5 Wm. 4, c. 76, s. 71, every child which shall be born a bastard after 14th Aug. 1834, shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right. But if the mother have no settlement, then it should seem that the child will be entitled to its birth settlement, as before the statute. *R. v. St. Mary, Newington*, 12 L. J. M. C. 68.

To the general rule, that the birth is its place of settlement, there are exceptions:—1. where a child is born after an order made for the mother's removal (*Rex v. Isleford*, 1 Sess. Ca. 32. *R. v. Gt. Salkeld*, 6 M. & S. 408. *R. v. St. Andrews*, id. 411. *R. v. Marlesham*, 10 B. & C. 77); 2d. where the child is born whilst the mother is in gaol. *Suckley v. Whitbor*, 2 Bulst. 358. A bastard, however, could not be removed from its mother whilst a nurse child, that is, until seven years of age, although it was settled in the place where born. *Cripplegate v. St. Saviour's*, Fol. 265. *Skiffreth v. Walford*, 2 Bott, 4. But the parish in which it was born must have maintained it, though resident with its mother elsewhere. *R. v. Hemlington*, Dougl. 9, n. 2. And 3d, where the mother is in the workhouse belonging to united parishes. *Rex v. St. Peter's & St. Paul's*, Cald. 213. 4th, where a child is born in an extra-parochial place; in which event it has neither a settlement where it is born, nor derives one from its mother, but continues casual poor until it has gained one for itself. *Rex v. St. Nicholas's, Leicester*, 5 Geo. 4, MS. The 5th exception is, where a woman with child of a bastard is removed out of one parish into another, through the *fraud or collusion* of its officers. In this case the child, wheresoever it is born, is settled in the parish from which the mother has been collusively removed. *Masters v. Child*, 3 Salk. 66. But the re-

(*b* 2) *Evidence of.*[1]

(*b*) *By Marriage.*

(1) *Where and How Gained.*[2]

(2) *Evidence of.*[3] *See* Marriage, vol. v. p. 443.

(*c*) *By Hiring and Service.*[4]

(1) *Of the Persons capable of Gaining a Settlement.*[5]

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moval of the woman must have been effected with a fraudulent purpose; for, if she should without fraud leave her own parish with the knowledge of the overseers, for the purpose of finding the putative father of the child with which she is quick, and be suddenly delivered in some other parish whilst endeavouring to reach her own, these form no exceptions to the general rule, and the birth decides the settlement.

By statutes there are also various exceptions. *See* 2 Bulst. 349; 3 Salk. 66; and *R. v. Mattersey*, 4 B. & Adol. 211. *R. v. Halifax*, id.

The 54 Geo. 3, 170, s. 2, provides, that no person shall be deemed or taken to acquire any settlement in any district, parish, &c. by reason of such person being born of the body of any mother, actually confined as a prisoner within the walls of any prison, or any house licensed for the reception of pregnant women. *See* also sect. 3.

[1] Hearsay evidence cannot be received to establish the bastard's place of birth. *Rex v. Erith*, 8 East, 539. But it may be proved by the copy of the parish register of christenings, and by identifying the person. *Rex v. Creech*, 2 Burr. 765.

Athough birth is *primâ facie* evidence of a settlement, without any reference to the legitimacy of the pauper, yet questions on the latter point must frequently arise between contending parishes, for the purpose of either getting rid of this birth settlement, by procuring one by parentage; or, *vice versâ*, of establishing conclusively that which arises from birth, by destroying the presumption that a preferable one is derived from the parents.

By law no man can be a bastard who is born after marriage. This presumption of legitimacy may be rebutted. *See* Bastard, vol. ii. p. 384.

[2] By marriage, the settlement of the husband becomes *instanter* and *ipso facto* that of the wife (*St. Giles's v. Eversley*, 2 Sess. Ca. 102; S. C. 1 Stra. 580; S. C. 2 Ld. Raym. 1332. *R. v. Birmingham*, 8 B. & C. 29); and whether she have ever lived with him in his place of settlement or not. (Id.) And every succeeding settlement that he acquires is, in like manner, to be transferred to her immediately, and she cannot gain a new one by any act of her own during her husband's lifetime, even by residence upon her own estate, after he has deserted her and his children. *Berkampstead v. St. Mary's North Church*, 2 Bott, 33. But where the husband has no settlement, she may resort to the one she had previous to marriage (*Uphottery v. Dunkswell*, 1 Sess. Ca. 80. *R. v. St. Botolph*, Burr. S. C. 367); or if he is in the progress of a settlement, as by renting a tenement for a year, and he dies a few days only before it is completed, the widow cannot, by continuing to reside and paying the year's rent, perfect the settlement for herself and children. *R. v. Crayford*, 6 B. & C. 68; 9 D. & R. 80); or if he leaves his wife, and it is not known whether he is living or dead (*Rex v. Ryton*, Cald. 39. *St. George's v. St. Catherine's*, 4 Burr. 289); or, running away, lives separate from her (*Rex v. Wilsborough Green*, Gilb. 79); or, being unable to maintain her, consents to the removal (*Rex v. Eltham*, 5 East, 113), the settlement she had previous to marriage continues; so that she may be removed thither when chargeable. But as the 59 Geo. 3, c. 12, s. 33, is construed, these decisions have ceased to extend to the wife of a Scotchman or Irishman not having a settlement in this country, provided the husband resides with his family, notwithstanding that the wife, as well as her issue, were born there. It has therefore been decided, that the wife of a Scotchman who had been settled in England before her marriage, and her children who were born in this country, but had not acquired a subsequent settlement here, must, if chargeable, be sent along with the husband to Scotland, and cannot be removed to the wife's maiden settlement, even with her husband's consent. *Rex v. Leeds*, 4 B. & A. 498.

[3] An adjudication of the settlement of the husband and wife may be made on the examination of the wife only. *Rex v. Binegar*, 3 Smith, 353; S. C. 7 East, 377. And the removal of a *feme covert* is *primâ facie* evidence that her husband's settlement is in the parish to which she was removed. *Rex v. Leigh*, Dougl. 46. But the fact that the husband is described in the marriage register as being of such a parish is no evidence of his settlement. *Rex v. Harberton*, 13 East, 311.

Where a woman marries a second time, the death of the first husband will be presumed. *Reg. v. Twyning*, 2 B. & A. 386.

[4] This is only applicable to settlements prior to 14th Aug. 1834. *See* 4 & 5 Wm. 4, c. 76, s. 64, *post*, p. 385.

[5] If any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, and shall continue and abide in the same service during the space of one whole year (8 & 9 Wm. 3, c. 30, s. 4), the master not being a certificate man (12 Anne, st. 1, c. 18, s. 2), nor the service being to a toll-collector (3 Geo. 4, c. 126, s. 51), in the Foundling Hos-

(2) *Of the Contract of Hiring.*[1]

pital (13 Geo. 2, c. 29, s. 7), in the Magdalen Hospital (9 Geo. 3, c. 31, s. 8), or in the Forest of Alice Holt (52 Geo. 3, c. 72, s. 8), such service shall be a good settlement therein (3 & 4 Wm. & M. c. 11, s. 7), provided he have resided therein forty days. 13 & 14 Car. 2, c. 12, s. 1.

This was one of the principal modes of acquiring a settlement till 1834. The law is now only applicable to antecedent hirings and services, and will, therefore, be stated as shortly as possible, and a reference given only to the leading cases.

By 4 & 5 Wm. 4, c. 76, s. 64, from and after the 14th of August, 1834, no settlement shall be acquired by hiring and service, or by residence under the same; and by sect. 65, no person under any contract of hiring and service not completed at the time of the passing of the act shall acquire, or be deemed or adjudged to have acquired, any settlement by reason of such hiring and service, or of any residence under the same. (Sect. 51.)

The word "unmarried," in the 13 & 14 Car. 2, means when the contract is made (*Farringdon v. Witty*, 2 Salk. 527. *Rex v. Sullen*, 2 Sess. Ca. 133. *Rex v. Hanbury*, Burr. S. C. 322), and is not nullified by the marriage after the hiring, and before the year begins *Rex v. Allendale*, 3 T. R. 382. So, the servant being married at the time of hiring is immaterial, if he be single when the contract becomes absolute and complete. *Rex v. Bank Newton*, Burr. S. C. 455.

The servant must be without children (*Rex v. New Forrest*, 5 T. R. 478); but this is adjudged to mean children who, by following their parents' settlement, might become chargeable to that parish in which one may be acquired under the new servitude. *Anthony v. Cardigan*, Fort. 309. They must be emancipated at the commencement of his contract for that particular year's service under which the settlement is sought to be obtained. *Rex v. Cowhoneyborne*, 10 East, 88. And where a pauper, at the time of hiring himself, had a daughter of the age of eighteen, who, from the age of four, had lived with her grandfather, and had been maintained by him until his death, and afterwards by her grandmother, which continued until she attained twenty-one, the grandfather having, by his will, directed the grandmother to educate and maintain her out of a fund given to the grandmother for life, and, after her decease, to the daughter: —*Held*, that the daughter was not emancipated, and consequently the pauper was not within stat. 3 & 4 Wm. & M., not being a person without a child at the time of the hiring. *The King v. Inhabitants of Uckfield*, 5 M. & S. 214. Neither a deserter nor an apprentice can hire himself so as to gain a settlement. *Rex v. Norton*, 9 East, 206. An invalid soldier of the line, on furlough from his dépot, having relinquished his pay during absence, but whose services may be called for at any time, cannot gain a settlement by hiring. That the relation of master and servant, *quoad hoc*, may subsist, the servant must be *sui juris*, having the power of communicating to the master an absolute right to his service for the whole period of hiring, whereas here he was encumbered with another relation, which might defeat the performance of his engagement. *Bayley, J., dissentiente. Rex v. The Inhabitants of Beaulieu*, 3 M. & S. 229.

[1] The contract may be either express or implied: 1st, express; if by deed the master need not sign, it is enough that he accepted the service under it (*Rex v. Houghton-le-Spring*, 2 B. & A. 375); 2d, implied. *Rex v. Stokesley*, 6 T. R. 757. But whether express or implied, it must be a contract for service (*Rex v. Bilborough*, 1 B. & A. 115), and the agreement of the servant. *Rex v. Burbach*, 1 M. & S. 370.

An express agreement may be in writing (*Pawlet v. Burnham*, 2 Bott, 307, Pl. 347), or verbal.

It is immaterial whether the agreement be to serve one or more masters (*Rex v. Eldersley*, 2 Bott, 247, Pl. 317); or is made by a third person, if subsequently ratified by the parties (3 T. R. 449); or with several persons covenanting to serve in the same deed. Neither is it necessary that they should be of full age, if the engagement is entered into with the parents' consent, and the pauper adopts it afterwards (*Rex v. Wantersett*, Cald. 298): but it must be so ratified; and, therefore, parish-officers can neither hire out adult (7 East, 33; 77 Burr.) nor infant paupers (*Rex v. Stowmarket*, 9 East, 211), unless such pauper afterwards adopts the contract. *Rex v. Norton*, id. 206. It is of no importance whether the master has a settlement in the parish, for the servant does not derive his settlement from the master, but from the service. *Chesham v. Missenden*, Fol. 152. The degree of relationship or consanguinity, also, makes no distinction, unless, as in the case of husband and wife, it is inconsistent with the formation of the contract itself; an agreement by an emancipated daughter to perform the office of a servant to her father, for a certain reward, is equally within the statute, as where the parties are strangers to each other in blood and connexion. *Rex v. Chertsey*, 2 T. R. 37. The nature of the service is likewise immaterial. It may be extended to all sorts of work, or confined to a particular description. *Rex v. St. Agnes*, Burr. S. C. 671.

Whether the party has acquired a settlement by hiring and service must depend upon whether there was originally, and to the intention of the parties, a contract to hire the party as a servant. *Rex v. Inhabitants of Mountsorrel*, 2 M. & S. 460. Hence service as an apprentice, though the binding be void, cannot be construed into service as

an hired service. *Rex v. Ditchingham*, 4 T. R. 769. Whether a contract be a contract of apprenticeship or of service depends upon the intention. *Rex v. Laindon*, 8 id. 379. If the parties use the term "apprentice" in describing the relation to be created by their agreement, or otherwise expressly declare their design to stand in the situation of master and apprentice, the contract cannot be considered as one for hiring a servant. *Rex v. Margram*, 5 id. 153.

But a contract to serve for the purpose of learning a trade is an hiring as a servant, in the absence of circumstances denoting a different intention. *Rex v. Coltishall*, 5 T. R. 193. An agreement with a weaver to serve him for a year and a half, the master to teach him to weave, and the pauper to have half of his earnings and find himself in everything, is a contract of service, not of apprenticeship. *Rex v. Eccleston*, 2 East, 298. A contract that the pauper should be with the master, and should work with him for two years, have what he got, and should allow the master 2*s.* per week out of his gains; viz. 1*s.* for teaching him the business of a frame-knitter, 9*d.* for the rent of a frame, and 3*d.* for the standing, is a contract, not of apprenticeship, but of hiring. *Rex v. Burbach*, 1 M. & S. 370. *R. v. Edingale*, 10 B. & C. 739. *R. v. Crediton*, 2 B. & Adol. 693. *St. Margarett's v. King's Lynn*, 6 B. & C. 97. Where a hiring is stated the court will presume it to be regular, unless the contrary appears. *Rex v. Weyhill*, Burr. S. C. 491.

After a boy has hired himself, the circumstance of the overseer furnishing him with the means of continuing in the service will not make the contract that of the overseer. *Rex v. Dunton*, 15 East, 352. But a Greenwich pensioner placed out to board by the parish at 2*s.* 6*d.* a-week, paid by them to an inhabitant of another parish for his board, &c., and he working as a servant for him, does not acquire a settlement by such residence and service. *Rex v. Rickinghall*, 3 Smith, 373; 7 East, 373.

Retrospectively.— The pauper, R. D., and his wife and children, were removed from Marton to Singleton. The sessions discharged the order of removal. The counsel who was to have then shown cause, admitted that the order of sessions could not be supported, because a retrospective hiring was not sufficient. Accordingly, the rule was made absolute to quash the order of sessions. *Rex v. Marton*, 4 T. R. 257. *See* Cald. 23; 1 Glas. 63.

A year's service is indispensable. *Rex v. Mursley*, 1 T. R. 694. A. met a servant girl, then in place with B., and asked her whether she was again hired to B. She replying in the negative, he inquired if she would come and live with him. She consented, and soon after went and lived with him a year:—*Held*, a sufficient yearly hiring and service. *Rex v. Worfield*, 5 T. R. 506. S. P. *Rex v. The Inhabitants of Newton Toney*, 2 id. 453.

If no particular time be expressed, a hiring for a year will be intended. *Rex v. Inhabitants of Dodderhill*, 3 M. & S. 243. And wherever the relation of master and servant is to continue for an indefinite time, and cannot be put an end to at the election of either party without notice, the hiring must be understood to be an hiring for a year; but where the time of notice corresponds with that at which the wages are rendered payable, the contract is no longer indefinite, but is an hiring for the precise time at which the wages are payable. *Rex v. Hampreston*, 5 T. R. 205. *Rex v. Hanbury*, 2 East, 423. And where the reserved interval between the time of giving warning and that of quitting the service is longer than the time at which the wages are made payable, it is strong enough to control the conclusion against a yearly hiring, which would otherwise arise from that mode of payment. And this is not only where it is accompanied with corroborating circumstances, such as an hiring at 3*s.* a-week the year round, each to be at liberty on a fortnight's notice; but the servant not to go away at seed-time, hay, or harvest (*Rex v. Hampreston*, *supra*); but also where the insertion of the notice is the only circumstance from whence the inference can be drawn. *Rex v. Birdbrooke*, 4 T. R. 245. And if a contract of service be expressed to be made for a shorter term than a year, when in reality it is meant to last for that period, it is a hiring for a year. *Rex v. Inhabitants of Mursley*, 1 T. R. 694. If, on the expiration of a service, fresh terms are offered to the servant for the ensuing year, who continues serving as before, until the second day after the offer, when he accepts it, the acceptance has relation back to the time of the offer; so that there has been a hiring for a year. *Rex v. the Inhabitants of Sulgrave*, 1 T. R. 778. A servant is hired for a period less than a year, at a gross sum for the whole time. On its expiration the master says, "You may as well stay on an end," meaning an indefinite time, without mentioning wages:—*Held*, that the second hiring was a general one, and therefore a hiring for a year. *Rex v. the Inhabitants of Macclesfield*, 3 T. R. 76.

A hiring at weekly wages does not imply a hiring for a year. *Rex v. Newton Toney*, 2 T. R. 453. S. P. *Rex v. Pucklechurch*, 5 East, 382; S. C. 1 Smith, 552. *R. v. St. Andrew's*, 8 B. & C. 679.

A hiring at weekly wages, either party to be at liberty to part at a month's notice, was held to be a yearly hiring, although the case stated that the pauper let himself by the week; it being also stated that at the time the pauper let himself by the week nothing passed between him and his master as to his being hired by the week, except that he was to have weekly wages. *Rex v. Great Yarmouth*, 5 M. & S. 114.

A hiring at so much a-week for as long a time as the master and servant could agree is a hiring by the week. *Rex v. Mitcham*, 12 East, 351. A hiring at 8*s.* per week, and two guineas for the harvest, to do anything the gardener should set him about, is not a

(3) *Of the Year's Service.*[1]

yearly, but a weekly hiring. An endeavour to distinguish this case from *Rex v. Dodderhill*, 3 M. & S. 243, was made, that here was an agreement for a gross sum to be paid for the harvest, and not merely, as in that case, for an increase of the weekly wages in the harvest month; that "for the harvest" imports a consolidated period at least as long as a month, which is inconsistent with the notion of a weekly hiring. But here the parties only contemplated that possibly the retainer might last through the harvest. *Rex v. Inhabitants of Lambeth*, 4 M. & S. 315. The words "until such a day" must be taken to be inclusive. *Rex v. Skiplam*, 1 T. R. 490. The hiring must not only be for a year's service, but uninterrupted (*Rex v. Inhabitants of Gresham*, 1 T. R. 101), unless the interruption proceed from a permission to be absent. *Rex v. Inhabitants of Sulgrave*, 2 T. R. 376. Where the terms of the contract are equivocal, they may be explained by the subsequent acts of the parties. *Rex v. Overnorton*, 15 East, 347.

Service under a contract to serve from six in the morning till seven in the evening, except on Sundays, confers no settlement. *Rex v. Kingswinford*, 4 T. R. 219); nor does a hiring for five years, at weekly wages, as a colt-shearman, to work twelve hours each day. *Rex v. North Nibley*, 5 id. 21. And an exception of two days in each half year, the servant being a pensioner of the East India Company, to go and receive his pension, is not a sufficient hiring. *Rex v. Over*, 1 East, 599. So, service under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends, confers no settlement. *Rex v. Rusholm*, 10 East, 325. So, service under a hiring for a year as a shepherd, at weekly wages, with a liberty to be absent during the sheep-shearing season, but to find a fit man at his own expense to do his work while absent, his wages to go on, gives no settlement. *Rex v. Arlington*, 1 M. & S. 622. And where a pauper, in consideration of weekly wages, agreed to serve J. S., a bricklayer, for three years, but in case he should neglect his master's business, or lose any time on his own account on any one week during the first year, then that J. S. should deduct for such time from his weekly wages in proportion, and J. S. agreed that he would pay wages in proportion to any overwork which the pauper might do in any one week. There were similar stipulations for the second and third years of the term; and it was also agreed that in case they could not work, through severity of weather, in any one year in the winter time, then that J. S. should pay no wages during that time, but should permit the pauper to employ himself in any other business whatsoever:—*Held*, that these were express exceptions in the contract, and that the pauper, by serving a year under it, did not gain a settlement. *Rex v. Edymond*, 3 B. & A. 107. *R. v. Norton Bavant*, 3 Ad. & E. 161. *R. v. Birmingham*, 9 B. & C. 925. *R. v. Cowper*, 5 Ad. & E. 333; 12 L. J. M. C. 78. *R. v. Walbottle*, 15 id. 153.

[1] The service must be for one whole year; therefore, if it want a day or two, it confers no settlement. *Rex v. Grentham*, 3 T. R. 754. *Rex v. Bray*, Burr. S. C. 682. The words of 8 & 9 Wm. 3, are, "unless he shall continue and abide in the same service for the space of a whole year."

Where there was a hiring three days after Old Michaelmas until the next Michaelmas, and the pauper continued in the service until the day after Old Michaelmas-day, which, being leap-year, the court was clearly of opinion against the settlement, because there was no hiring for a year by a contract made three days after Michaelmas; to serve till the Michaelmas following is a hiring two days short (*Rex v. Ackley*, 3 T. R. 250); and its being the customary mode of hiring in that part of the country makes no alteration in the law. A service for 365 days suffices (*Rex v. Ulverstone*, 7 T. R. 564), unless it be leap-year. *R. v. Roxby*, 10 B. & C. 51. And where the completion of the service is obstructed by any act of violence on the master's part, it causes no interruption in the service (*Rex v. Hardhorn*, 12 East, 51); as, imprisonment at the instigation of the master. *Rex v. Barton-upon-Irwell*, 2 M. & S. 329. *Rex v. the Inhabitants of Burton-on-Trent*, 3 id. 537. So an interruption of the service by arrest of the servant is not a dissolution of the contract, if the master chooses to receive him again. *Rex v. the Inhabitants of Kenilworth*, 2 T. R. 598.

The rule to determine whether absence amounts to a dispensation with service or a dissolution of the contract is, whether the servant continues liable to serve for the whole year, though the master dispenses with actual service for part of it. *Rex v. Thistleton*, 6 T. R. 185. *Rex v. Polesworth*, 2 B. & A. 483. The length of absence is not material, and whether it be at the beginning or end of the year makes no difference. *Rex v. East Shefford*, 4 T. R. 804. Thus, where a servant was hired from Michaelmas to Michaelmas, he came three days after the first Michaelmas, and stayed one day after the latter, and was absent at different times, nearly a fortnight, for which an abatement was made in his wages; it was held that he gained a settlement by serving the remainder of the year, for the absence was purged by the master's receiving him. *Rex v. Hanbury*, Burr. S. C. 322. Though a hiring by mutual agreement between the servant and master may be terminated before its commencement, yet neither can put an end to it by his own act. *Rex v. Inhabitants of St. Philip*, 2 T. R. 624. Hence a dissolution must be inferred where the agreement to separate is made by consent, and with a view of entering into another service before the year expires. *Rex v. Thistleton*, *supra*. *Rex v. Mildenhall*, 12 East, 482. So a dissolution of the contract may appear by the parties coming to a new agreement inconsistent with that under

(4) *Of Connecting Services under several Hirings.*[1]
(5) „ *Services with different Masters.*[2]
(6) „ *the Residence by, and Place in, which a Settlement is Gained.*[3]

which they had previously lived. *Rex v. Great Chilton*, 5 T. R. 672. And if the master and servant go before a magistrate, and agree to leave the decision of their dispute to him, and the latter is discharged, it amounts to a solemn dissolution of the contract. *Rex v. King's Pyon*, 4 East, 351. *Rex v. Leigh*, 7 id. 539.

[1] The 8 & 9 Wm. 3, c. 30, enacts, "that persons shall not only be hired for a year, but continue to abide in the same service for that period. The number and duration of the hirings are immaterial to the connexion of services, provided one is for a year. The rest may be for succession of years or months, or even weeks. *Rex v. Bagworth*, Cald. 179. Neither is it necessary that the services to be performed under each should be of the same kind. It may be as an out-door servant under one, and a family servant under the other. *Rex v. Great Chilton*, 5 T. R. 672. He may be employed, first, to milk and plough; and, secondly, as a carter. It seems also that service under an imperfect contract will connect with that under a lawful yearly hiring. As where an apprentice hired herself for a year, and her apprenticeship expiring during the year's service, she then hired herself to the same mistress for another year, of which she served ten months. There being no interruption in the service, it was held that they would connect so as to entitle her to a settlement under her last yearly hiring, for if the first contract was void it was service without a contract, and may be coupled with service under the second hiring. *Rex v. Dawlish*, 1 B. & A. 280. But the service must be under a contract, a contract creating the relation of master and servant, and an obligation to serve. Two services of the same nature may be joined, if there be no interval between them. *Rex v. Inhabitants of Sulgrave*, 1 T. R. 778. *Rex v. Grendon Underwood*, Cald. 359. Hence, when two services under different hirings amount together to a year, if they are uninterrupted, an increase of wages for the second service does not prevent the servant from gaining a settlement. *Rex v. Underbarrow*, Dougl. 309. So, where the pauper hired himself by the week, and nothing was said about Sunday in the contract, but he worked on that day occasionally when asked by his master, without receiving any additional wages, only sometimes victuals. He received his wages weekly, and lodged and boarded himself. Having served thus for nine months, he was hired by his master for a year as a family servant, and served eleven months:— *Held*, that the services might be connected. *Rex v. Sutton*, 1 T. R. 656. See *Rex v. Ellesfield*, Dougl. 310, n. *Rex v. Adson*, 5 T. R. 98.

It is requisite that the master shall have the same degree of control and authority over his servant during the entire year, under all the contracts, as would be necessary to give a settlement where the service is performed under one yearly hiring. But the rule necessary to enable services to connect does not apply to cases where the yearly contract and service are simultaneous. *Rex v. Barton-on-Irwell*, 2 M. & S. 329.

[2] Where the master dies, if the servant continues to serve his time with the widow (*Rex v. Hadhorn*, 12 East, 51), or the executor, even in another parish, he gains a settlement. *Rex v. Ladock*, Burr. S. C. 179. Where a servant, with his master's consent, worked with different masters, receiving their wages, and making an allowance to his original master out of the wages payable by him, in the same proportion as the time of his absence bore to his entire year, such absence was held to be immaterial, and the service virtually performed to the first master. *Rex v. Undermilbeck*, 5 T. R. 387. But to constitute the same service when the master is changed, the original contract must remain. *Rex v. Thistleton*, 6 id. 185.

[3] The 13 & 14 Car. 2, c. 12, requires a residence of forty days in the capacity of a servant in order to gain a settlement. 3 Wm. 3, c. 11, and 8 & 9 Wm. 3, c. 30, make no alteration in this particular, but superadd the requisites of a hiring and service for a year.

In settlement by hiring and service the pauper is settled where his place of rest is. *Rex v. Mildenhall*, 3 B. & A. 374. The residence need not consist of forty successive days. *Rex v. Greenwich*, Burr. S. C. 243. It was doubtful by these decisions how far interrupted residence of less than forty days, under distinct hirings for a year, and occurring at a greater interval than a year, could be connected. It is now determined that it cannot, and that the residence for forty days must be within the compass of a single year. *Rex v. Denham*, 1 M. & S. 221. Consequently, if he has resided part of a year in one parish and part in another, making, when added together, more than forty days in each, his settlement is in the parish where he slept the last night. *Rex v. Hulland*, Dougl. 657. Therefore, if there is a hiring for a year, and service for part of that year in the parish of A., and before the end of the year the servant removes with the master to the parish of B., serves out the year there, is hired to the same master for another year, with an increase of wages, and serves several months longer in B., without an interval, he gains a settlement in B. *Rex v. Underbarrow*, Dougl. 309.

But it sometimes happens that the servant may not only lodge apart from his master's abode in the same parish, but live in one parish and his service be performed in another. Neither is the master's knowledge or consent to the servant's sleeping away from his house material. If the servant marry during service, and sleep with

his wife in another parish, unknown to his master (*Rex v. Hedsor*, Cald. 51), he is settled there; and whether he sleeps there for successive nights or at intervals, his settlement is in the parish where he lodges the last night, if he has slept there forty in all. *Rex v. Great Bookham*, id. 290. Upon the same principle, if he should sleep the last night in a parish where he had first served under the contract of hiring, and has resided there forty days during the entire service, he is settled there.

The servant's situation and condition during residence is, in most cases, immaterial: it is of no importance whether he dwell on land or water (*Rex v. Friendsbury*, Burr. S. C. 644); or for what purpose the master comes into the parish, whether for a permanent residence or a temporary sojournment. Thus, if the servant spend the last forty days of his service at a watering-place, whither his master went for the purpose of bathing (*Rex v. Bath Easton*, Burr. S. C. 774); or at any other public place where he is a temporary resident (*Rex v. Alton*, id. 418); or sojourner or visitor (*Rex v. St. Peters in Oxford*, Fol. 193); he gains a settlement by inhabiting there. Neither does it make any difference that the master has neither settlement (*Missenden v. Chesham*, 1 Const. 178, Pl. 237), nor real property in the parish where his servant resides, and does not live there. So, also, a residence with different masters, provided the service is sufficient in other respects, will confer a settlement (*Rex v. La. Dock*, Burr. S. C. 179), and these rules apply equally where the service is dispensed with. *Rex v. Undermilbeck*, 5 T. R. 387.

[1] To establish a settlement by hiring and service it is necessary to prove, 1. An hiring for a year; 2. Service for a year; 3. Residence of forty days.

Where the agreement is in writing it is generally necessary to produce the written instrument; but a copy or parol evidence of the contents may be given in evidence in two cases:—1st. Where the writing cannot be found; 2d. Where it is in the custody of the adverse party, who refuses to produce it, after being served with a proper notice. *See* vol. iv. p. 304.

Where the agreement is not in writing, evidence may be given of the actual terms of the contract, or it may be inferred from what passed at the time of hiring, or from the mere fact of service. A year's service raises a presumption of a year's hiring. *Rex v. Inhabitants of Lyth*, 5 T. R. 327. *Rex v. Holy Trinity in Wareham*, Cald. 141. And such presumption is not rebutted by his leaving in a succeeding year at a period which does not correspond with its original close. *Rex v. Worfield*, 5 T. R. 506. And a subsequent hiring for a year may be presumed from three years' service, though the original hiring was for part of a year only. *Rex v. the Inhabitants of Abatton*, 5 id. 477. S. P. *Rex v. Hales*, id. 668.

Parishioners assessed to the poor-rates were expressly made competent witnesses by the 54 Geo. 3, c. 170, s. 9. The facts necessary to establish or overthrow this species of settlement are seldom left to inference; the witnesses usually called are qualified to give direct testimony of them. Such are the pauper or his master, their wives and fellow-servants; for all persons may be witnesses who are not affected by the general grounds of incompetency.

The declarations of a deceased person as to his being hired for a year, are not evidence of that fact. *Rex v. Inhabitants of Nuneham Courtney*, 1 East, 373. It has been a question how far the pauper's examination respecting his place of settlement, taken before a magistrate upon oath, or a declaration of his to the like effect, could be received in evidence, in the event of his death, insanity, or being beyond the reach of judicial process. It has, however, been subsequently determined, and must now be considered as settled law, that neither the *ex-parte* examination of the pauper, taken in writing on oath before two magistrates, whether for the purpose of inquiring into his settlement or of removing him (Id.), are admissible in evidence upon a question of settlement; and this whether the pauper is insane, or has absconded, or is dead (*Rex v. Ferry Frystone*, 2 East, 54); and hearsay evidence of the pauper's declaration as to his settlement is equally inadmissible under any circumstances. *Rex v. Chadderton*, id. 27. *Rex v. Harringworth*, 4 M. & S. 350. But examinations before a magistrate are made evidence of settlement by the Mutiny Act, and that whether the soldier be dead or absent from the kingdom. *Rex v. Warminster*, 3 B. & A. 121. The original examination has been held admissible in evidence as well as the attested copy (*Rex v. Warley*, 6 T. R. 534); but no other attested copy is legal evidence while the original is in existence, except that given to the soldier (*Rex v. Clayton-le-Moors*, 5 T. R. 704); and when produced, they must be proved and authenticated in the same manner as other written instruments.

Evidence of the master's declaration after his death is equally inadmissible as to the pauper's having been hired, as those of the pauper. *Rex v. Lyth*, 5 T. R. 327.

An unstamped indenture of apprenticeship is evidence to prove the period for which the party was hired, and the terms of the contract. *Rex v. Inhabitants of Pendleton*, 15 East, 449.

[2] By 13 & 14 Car. 2, c. 12, an apprentice gained a settlement by a residence of forty days; the 3 Wm. & M. c. 11, exempts him from the necessity created by different statutes that he should give notice of his inhabitancy. It enacts, that if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such

(5) *Of the Terms.*[1]
(6) *To the Sea Service.*[2]
(7) *To Chimney-Sweepers.*[3]
(8) *Of the Service.*[4]

binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published.

An apprentice is not encumbered, like a hired servant, with the condition that he shall be unmarried (*Rex v. Titchfield*, Burr. S. C. 510), and without emancipated children when he makes the contract. Apprentices are bound — 1st. By voluntary consent, without the intervention of parish officers. 2nd. By virtue of the power given to the parish officers, in which case they are called parish apprentices.

A mere intention to create a contract of apprenticeship will not avail if it be defective in substance and form. *Rex v. Laindon*, 8 T. R. 379.

[1] The 3 Eliz. c. 4, directs that the binding shall be for seven years, and the 43 Eliz. c. 2, enacts that *male* apprentices shall be bound till they are twenty-four years of age (altered by 18 Geo. 3, c. 47, to twenty-one years), and *female* till they are twenty-one, or the time of their marriage. But it is held that these statutes are merely directory, and that indentures not made in conformity thereto are not void, but voidable only, at the option of the parties. *St. Nicholas v. St. Peter in Ipswich*, 2 Bott, 263. And a binding for four years (*Gray v. Cookson*, 16 East, 27), or till the apprentice is twenty-three, or twenty-one (*Rex v. Chalbury*, 1 Bott, 610), or till the female is twenty-one, omitting the alternative of her marriage, will confer a settlement. *Rex v. St. Petrox*, Burr. S. C. 248. So, where a local act provided that boys should not be bound for longer than the time when they attained twenty-two, the indenture of a boy bound for a term which would not expire till after he had attained that age was held voidable only. *R. v. St. Gregory*, 2 Ad. & E. 99. And it is said that an indenture is good under the act, although it covenants for no certain time. *Rex v. Woolstanton*, 1 Const. 606.

[2] The act now regulating apprenticeship to the sea service, whether as a parish apprentice or otherwise, is statute 17 & 18 Vic. c. 104, ss. 141, 145. But by stat. 4 & 5 Wm. 4, c. 76, c. 67, it is enacted, that from and after the passing of that act (14th August, 1834), no settlement shall be acquired by being apprenticed to the sea service, or to a householder exercising the trade of the seas as a fisherman, or otherwise, nor by any person now being such an apprentice in respect of such apprenticeship. If, however, an apprentice to the sea service had gained a settlement by forty days' inhabitancy under the indenture before the passing of the above statute, he would retain that settlement, notwithstanding the term of his indenture did not expire until after the statute came into operation. *R. v. St. Giles-in-the-Fields*, 2 Q. B. 458; 12 L. J. M. C. 52.

[3] By stat. 3 & 4 Vic. c. 85, s. 2, after 17th August, 1840, it shall not be lawful to apprentice any child under the age of sixteen to any person using the trade or business of a chimney-sweeper; every such indenture shall be null and void. And by sect. 5, after the 1st day of July, 1842, all existing indentures of apprenticeship to that trade of any child who shall then be under the age of sixteen years, shall be null and void.

An apprentice used to work and sleep at B. during the week, returning on Saturdays to his father's at G., and sleeping there on the Saturdays and Sundays. On the last day of service, a Wednesday, he left off work at 4 P.M., at B., and went to see his mistress, at N., and then proceeded to G., and slept there that night:—*Held*, that G. was his place of settlement under the apprenticeship. *Reg. v. Elswick*, 3 L.T. (N.S.) 321, Q. B.

[4] The performance of actual service is not the thing material; it is the residence, the inhabitancy of an apprentice in a parish for forty days, which confers the settlement. *Rex v. Charles*, Burr. S. C. 706. But although the extent of the service may be immaterial, the apprentice gains no settlement unless he continue under the control of his indentures during such residence, liable not only in law but in fact to perform the duties prescribed by his covenants, otherwise he does not inhabit as an apprentice. This is what seems meant by the term "service," as applied to apprentices. And the latter part of the service of an apprentice may be connected with the former, notwithstanding an intermediate service. *Rex v. Inhabitants of Sansford*, 1 T. R. 281.

In strictness, though an apprentice is not assignable, yet, if he continue with an assignee, or personal representative of his master, it is such a continuance of the apprenticeship as to confer a settlement (*Rex v. Stockland*, Dougl. 70); provided the original master consent (*Rex v. Shebbear*, 1 East, 75. *Rex v. St. Paul's, Bedford*, 6 T. R. 452); which consent may be given not only by the original master, but by his executor (*Rex v. St. Paul's, Bedford*, *supra*); or even by his widow before taking out administration, or even by an executor *de son tort*. 1 M. & S. 377. Also the person receiving an apprentice with such consent may transfer his service to another, for his consent includes that of the original master, and this without the actual knowledge or consent of the first (*Rex v. Bradstone*, 2 Bott, 434; S. C. 459), or of his representatives, if he be dead. *Rex v. Sheepshead*, 15 East, 59. But since 32 Geo. 3, c. 57, it has been held, that where a parish apprentice served the son of his original mistress, to whom she had given her farm, and continued with him until her death, he could not gain a settlement in another parish by serving another person

with the son's consent, given after his mother's decease; for that act recites that the contract of service is at an end upon the mistress's death; and service by which a settlement is to be acquired, according to sect. 5, means a service with a subsequent master or mistress, who becomes so by the provisions of the act: it is the service under the authorised substitution that the act applies to. (Id.) *R. v. Sheepshead*, 15 East, 59.

To gain a settlement, therefore, by service with a third person—1st. The consent must be direct and explicit. 2nd. To serve a particular person. 3d. If more general, it must be for the immediate benefit of the master. 4th. It must be given by the master under a conviction that the indentures are still in force.

Where the party appeared to have been bound to P., in respect of W.'s estate, but the pauper never served P., nor did the latter execute the indenture; the pauper served W., but it did not even appear that there had been any communication between W. and P.:—*Held*, that it could not be deemed a service under the indenture; the sessions ought to find the facts of the assignment and consent, and not leave it for the inference of the court. *Rex v. Inhabitants of St. Cuthbert, Wells*, 3 Nev. & M. 100. So, the 10 Geo. 2, c. 31, prohibiting a waterman or his widow from taking an apprentice, unless he or she were the occupier of the house to lodge the apprentice, and also the taking of more than two apprentices by such party, under certain penalties: — *Held*, that a binding to the widow of a waterman not occupying such a house, but upon an understanding that the apprentice was to live at the house of a waterman (a foreman), and serve him, in conformity with the indenture, he having at the time two other apprentices, was, as a prohibited contract, absolutely void, and no settlement was thereby obtained. *Rex v. Inhabitants of Gravesend*, 3 B. & Adol. 240. So, where the pauper was bound apprentice to J. and W. M., who were partners. After a time, J. & W. M. dissolved partnership, and J. M. took into partnership P., and they continued to carry on the same business. The pauper continued to serve with J. M. and P. till the death of J. M., and afterwards with P. alone; but it did not appear that W. M. knew anything of the partnership between J. M. and P., or that he ever gave his assent to the pauper's serving with P.: — *Held*, that the residence of the pauper with P., after the death of J. M., could not be considered as a residence which had reference to the indenture; and that, therefore, the pauper gained no settlement thereby. *Rex v. Inhabitants of St. Martin's, Exeter*, 4 Nev. & M. 388.

A., a parish apprentice, having a general permission from B., his master, to seek employment in trade elsewhere, serves C. in the parish of Dale, and resides there forty days before the 1st October, 1816 (when the 56 Geo. 3, c. 139, came into operation), without the knowledge of B. B., subsequently to 6th October, assents to such service: — *Held*, that such subsequent assent to the service with C. does not relate back to the commencement of it, so as to make the service in Dale referable to the indenture. *Rex v. Inhabitants of Maidstone*, 6 Nev. & M. 545; S. C. 5 Ad. & E. 326. So, where a master, not having sufficient employment for a parish apprentice, agreed with another person in the same trade with himself, but in a different parish, that the apprentice should work for him, he paying to the first master 5*s.* a week. The apprentice worked accordingly, and lived with the second master for about three years, and until the expiration of his indenture, except for an interval of ten days, when his first master, who was ill, sent for him back:—*Held*, that this was a putting away of the apprentice without the consent of the justices, within 56 Geo. 3, c. 139, s. 9, and that no settlement was gained in the parish of the second master. *Reg. v. Inhabitants of Wainfleet All-Saints*, 3 Per. & D. 72. But where an apprentice was told by his master that he had no work for him to do, and that he had better see if he could get a place, and that one B., a person of the same trade, wanted hands; the apprentice went and engaged, with the consent of his master, to work for B. at the trade, being paid by the piece. Subsequently, the apprentice, learning that he could get better pay from another person in the same trade, wrote to his old master for leave, and received verbal leave. He agreed with and worked for that person for a considerable time, supporting himself by what he received from his earnings:—*Held*, by *Denman, C.J.*, *Littledale* and *Patteson, JJ.*, that the residences while in these services were under the indenture, and sufficient to confer a settlement; *Parke, J.*, dissentiente. *Rex v. Inhabitants of Banbury*, 3 B. & Adol. 706. And where the pauper was bound apprentice to his father-in-law, and resided with him during the indentures, a settlement is gained, although the pauper never served his master at his trade, or was instructed by him. *Reg. v. Inhabitants of Burslem*, 3 Per. & D. 38. So, where the pauper returned to his father in consequence of illness, and resided above forty days, until the indentures were cancelled, during which time his master occasionally visited him, and asked him to carry about and sell tickets for the disposal of articles manufactured by him by way of lottery, giving him 1*s.* a ticket: — *Held*, that such residence and service were connected with the apprenticeship, and a settlement gained in the father's parish, and was not affected by any illegality of such employment. *Reg. v. Inhabitants of Somerby*, 1 Per. & D. 180. And where an apprentice, after sleeping thirty-five nights in the master's parish, went a voyage with him, and, on his master's absconding, returned in the vessel to the same parish, and was sent by the master's wife, in consequence of illness, to the poor-house, where he was maintained by her for three weeks:—*Held*, that such

(9) *Where Indenture is made Abroad.*[1]
(10) *Effect of, if Proved in Fact.*[2]
(11) *Of the Residence by, and Place in, which a Settlement in Gained.*[3]

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was virtually a residence in the master's house under a continuance of the contract, and acquired a settlement. *Rex v. Inhabitants of Foulness*, 6 M. & S. 351. And so, the apprentice sleeping Saturday and Sunday nights at his parents' does not avoid the service. *Rex v. Ilkeston*, 4 B. & C. 64.

An articled clerk to an attorney is an apprentice within 3 Wm. & Mary, c. 11, s. 8, and, therefore, may acquire a settlement by apprenticeship. *St. Pancras v. Clapham*, 6 Jur. N. S. 700; 29 L. J. M. C. 141.

A pauper during the term of his apprenticeship, except when absent in the neighbouring villages, while executing work there for his mistress, slept at his father's house in G., going every day, except when so absent, to his work in N., where his mistress resided, returning at night to G. For some weeks before the last day of his apprenticeship he had been working at B., and had slept there. On the Tuesday before the expiration of his apprenticeship he slept at B. On Wednesday, the last day of his apprenticeship, he left his work at B., which was not then completed, at four o'clock, P.M., and went to N. for the purpose of seeing his mistress, and ascertaining from her whether she would continue him in her employ as a journeyman, and then went on to G., and slept there that night: — *Held*, that he gained a settlement by apprenticeship in G. *Reg. v. Elswick Township*, 7 Jur. N. S. 45, Q. B.

Where an apprentice is assigned, his settlement is in the second parish. *Rex v. Ribchester*, 2 M. & S. 138.

[1] An indenture of apprenticeship was made in Newfoundland by an English sailor, who thereby agreed to serve on board his master's ship: — *Held*, that a settlement was gained by a service and inhabitancy in England for forty days under that indenture. *Rex v. Inhabitants of Closworth*, 1 Nev. & P. 437.

[2] Notwithstanding a fraud on the parish officers a settlement may be gained. *Rex v. Inhabitants of Great Sheepy*, 8 B. & C. 74; S. C. 2 M. & R. 286.

[3] In this case, as in the instance of hiring and service, there must be a residence of forty days under the indenture, in some parish or place maintaining its own poor, in order to acquire a settlement. And therefore, where a boy was apprenticed, and served and resided in an extra-parochial place, it was holden that he gained no settlement by it. *Clerkenwell v. Bridewell*, 1 Ld. Raym. 549. It is immaterial, however, whether the apprentice reside the whole forty days consecutively or at different times.

The apprentice is settled in the place where he sleeps the last night under his indenture of apprenticeship, provided he has resided there forty days altogether. *Rex v. Brighthelmstone*, 5 T. R. 188; S. P. *Rex v. Undermilbeck*, id. 387. Therefore it floats undetermined until that expires, and he is then settled in that parish or town wherein he has served the last forty days capable of conferring a settlement. But forty days' residence and service under indentures confer an absolute settlement, which no subsequent disqualification by certificate or otherwise can defeat. *Rex v. Clisthydon*, Burr. S. C. 161. *St. Cuthbert v. Watling*, S. C. 170.

If the apprentice reside sufficiently long in one parish, although the indentures are cancelled on the forty-first day after their execution, he has acquired a settlement.

An apprentice cannot obtain a settlement except in a parish or township having overseers (*Clerkenwell v. Bridewell, supra. Rex v. Cirencester*, 1 Stra. 579); for the 13 & 14 Car. 2, c. 12, extends only to such places, and the provisions of 3 Wm. & M. are expressly confined thereto. He must reside forty days in the character of apprentice, and free from incapacity to acquire a settlement. *Rex v. Westbury*, Burr. S. C. 470. But it is unnecessary that the days should run in unbroken succession, as residence at intervals will connect for the purpose. *Rex v. Sandford*, 2 Bott, 398, Pl. 426. *Rex v. Brighthelmstone*, 5 T. R. 188. *Rex v. Cirencester*, Cas. Sett. & Rem. 119. Neither does it make any distinction that the residence is interrupted by periods of inhabitancy in a place where no settlement can be acquired. An apprentice served his master mostly on ship-board at sea, but inhabited the parish of West Stockwith the first fourteen days of his apprenticeship, and so many days after, at many different times, as with those fourteen days amounted to upwards of forty days in the whole, and in no other parish for forty days during his apprenticeship. He was held settled in West Stockwith. *Rex v. Gainsborough*, Burr. S. C. 586.

An apprentice must reside in the place in which he seeks a settlement, subject to the binding power of his indenture, and the control of his master. *Rex v. Topsham*, 7 East, 466. *Rex v. Smarden*, 13 id. 452.

It makes no difference whether an apprentice to a sea-captain inhabit on land or on ship-board, if the place in which the vessel lies is within a town or parish. *Rex v. Topsham*, 7 East, 466; 3 Smith, 457. In this case it was held, that an apprentice to a sea-captain, by serving his master every day on shore, and sleeping every night on board a ship, then lying in an extra-parochial place, gains no settlement under his indentures. *St. Mary Colechurch v. Radcliffe*, 1 Stra. 60.

An apprentice living in a different parish

(12) *Of Discharging the Apprentice from his Indentures.*[1]

(13) *Of the Evidence necessary to Establish.*[2]

from his master through illness, is settled where he resides, provided he performs any service for his master either there or elsewhere during his residence therein. *Rex v. Stratford-upon-Avon*, 11 East, 176.

Where the pauper, apprenticed to the master of a small trading vessel, had slept more than forty days at S., but slept the last night of his service at B., and had slept there previously more than forty nights at his grandmother's, in consequence of being ill of a fever, and was received back by his master:—*Held*, that he was not settled in B., the residence, except for the last night, being only in consequence of sickness. *Rex v. Barmby*, 3 Smith, 375; 7 East, 381. But a pauper, apprenticed to a mariner at Topsham, to serve on board a ship trading from Poole to Shields, is at Poole with the vessel in the course of his service, where his master becomes a bankrupt, and the service is terminated, and there resides more than forty days, sleeping on board the vessel:—*Held*, that he gains a settlement at Poole. *Rex v. Topsham*, 3 Smith, 457; 7 East, 466.

The mere fact of an apprentice returning into his master's parish, having left him with consent, and sleeping there unknown to his master, without either returning, in fact, into his master's service, or even having any intention to do so; but, on the contrary, where it is found that he had no such intention; cannot be coupled with a former service in the same parish, so as to get rid of an intervening settlement acquired in another parish. *Rex v. Smarden*, 13 East, 452. *R. v. Inhabitants of Ribchester*, 2 M. & S. 135. And where a parish apprentice and his master, both being on the permanent staff of the local militia, in consequence of that circumstance resided together with his master, and continued to serve him in the parish of B. for forty days, it was held that this residence was sufficient, and that he thereby acquired a settlement in B., notwithstanding they were both under the control of their superior officers during the whole time. *Rex v. Chelmsford*, 3 B. & A. 411. But where by an indenture of apprenticeship it was stipulated that the master should provide meals, &c., during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid by unrigged; during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Upon this stipulation, the apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during that residence:—*Held*, that this was not a residence under the indenture, and conferred no settlement. *Rex v. Ilkeston*, 4 B. & A. 84. See *Reg. v. Barton-upon-Irwell*, 32 L. J. M. C. 102.

[1] The sessions or two justices have power to dissolve the indenture of apprenticeship. *Rex v. Collingburne*, 1 Stra. 663.

[2] In order to establish a settlement by apprenticeship, it is necessary to prove,—1st. The binding by indenture; 2nd. The identity of the apprentice; 3rd. His service and residence of forty days in the town or parish; 4th. If the service is with any other than the original master, the latter's consent.

To prove the binding, the deed of apprenticeship, if in existence, and not in the hands of the opposite party, must be produced. *Rex v. Holbeck in Leeds*, Burr. S. C. 198. *Rex v. Helen's* id. 735. If in the custody of a third person, unless, perhaps, where there is a privity between such person and the actual party to the inquiry (*Baldney v. Ritchie*, 1 Stark. N. P. C. 338); he should be served with a subpœna *duces tecum*, to bring it with him on the hearing of the appeal. *Anxly v. Long*, 9 East, 472. *See* vol. iv. p. 304. If possessed by the opposite party, he should be served with notice to produce it. Id. p. 305; and see *R. v. Hinckley*, 32 L. J. M. C. 158. It will appear by the deed whether it is properly stamped, without which it cannot be read in evidence; but the court may look into it for the purpose of seeing when it ceased to operate, in order to guide them as to receiving parol evidence respecting a subsequent settlement. *Rex v. Pendleton*, 15 East, 449.

If by any intendment an indenture of apprenticeship, in the manner in which it is executed, might be sufficient, it lies on the party disputing its validity to impeach it by evidence. *Rex v. Hinckley*, 12 East, 361.

Upon a question whether G. W. had acquired a settlement by service as a parish apprentice to P., it was proved that in 1824 he and his father were taken by the overseers before the justices; that P. and the overseers were there; that papers were drawn up; that the justices asked the father whether he had any objection to his son being bound apprentice to P.; that G. W. went the next day to P.; and that he remained with him two or three years. It also appeared from the register-book, that one G. P. W. had in 1824 been bound apprentice to P. The sessions, from these facts, inferred that G. W. had been duly bound a parish apprentice to P.:—*Held*, that they were right in drawing such an inference. *Reg. v. Broadhempston*, 28 L. J. M. C. 18, Q. B.; 5 Jur. N. S. 247. *R. v. the Inhabitants of Hinckley*, 32 L. J. M. C. 158. *R. v. Llanfothly*, 23 id. 33.

In order to establish a settlement by apprenticeship, the existence of a deed of apprenticeship may be presumed from evidence of facts consistent therewith, and not reasonably accounted for on any other supposition. *Reg. v. Fordingbridge*, 4 Jur. N. S., 951; 27 L. J. M. C. 290, Q. B. See *R. v. Wickham*, 2 Ad. & E. 517.

(*e*) *By Renting a Tenement.*[1]

(1) *Under stat.* 13 & 14 *Car.* 2, *and before* 2*d July*, 1819.[2]

(*a* 1) *Who may obtain such a Settlement.*[3]

(*a* 2) *As to the Kind of Tenement.*[4]

The statement of a deceased person respecting his indenture of apprenticeship is not admissible to prove that the deed ever existed. (Id.)

To prove a settlement by apprenticeship, evidence was given that proper search had been made for an indenture, but in vain; and a person deposed that more than sixty years back he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house with two others, who were apprentices:—*Held*, evidence from which a settlement by apprenticeship under an indenture might be presumed. *Reg. v. Fordingbridge*, E. B. & E. 678. *R. v. Braintree*, 28 L. J. M. C. 1; 1 E. & B. 51.

[1] The application of the law upon this subject depends upon the date or time when the renting existed. There are five periods, the law of each being different to the preceding period:—1st. Prior to the 2d July, 1819; 2d. From that date to 22d June, 1825; 3d. From 22d June, 1825, to 30th March, 1831; 4th. From 30th March, 1831, to 14th August, 1834; 5th. Renting a tenement subsequent to that date.

[2] Anterior to the 2d July, 1819, the 13 & 14 Car. 2, c. 12, s. 1, made it lawful for justices to remove, within forty days, all such persons as came to settle upon tenements of less yearly value than 10*l.*, provided they were likely to be chargeable to the parish. Thus a person, by remaining forty days in a parish, as an occupier of a tenement of the yearly value of 10*l.*, gained a settlement; and if he afterwards removed to another parish, and was found likely to become chargeable before he had resided forty days there also, he might be removed to the former parish, which was his last place of settlement.

[3] Any person might acquire a settlement in this way. Thus a soldier, who is not *sui juris* to make a contract of service (*R. v. Brighthelmstone*, 1 B. & A. 270), and an alien by occupying a tenement of the proper yearly value. *R. v. Eastbourne*, 4 East, 103. A certificate-man, by taking a *lease* of the tenement of the annual value of 10*l.*, gains a settlement. 9 & 10 Wm. 3, c. 11. And although the terms of this act are more precise than those of 13 & 14 Car. 2, c. 12, yet the two are to be considered together, being *in pari materiâ*, and no distinction is to be made either as to the nature of the tenement, or of the taking thereof. *R. v. Croft*, 3 B. & A. 178. *R. v. Nacton*, 3 B. & Adol. 543. But by the general turnpike act (3 Geo. 4, c. 126, s. 51), no toll-collector, or renter of tolls, or apprentice, or servant of such collector or renter, shall, by residing in the toll-house, gain a settlement. See *R. v. Denbigh*, 5 East, 333. The collector of bridge tolls, vested by act of parliament in a company, was also held to be exempt from the prohibition. *R. v. Bubwith*, 1 M. & S. 514.

By 54 Geo. 3, c. 170, s. 5, no person renting the tolls of any turnpike-road, or navigation, and residing in the toll-house, shall thereby gain a settlement. See *R. v. St. Andrew the Less, Cambridge*, 10 B. & C. 742. So prisoners in the King's Bench Prison, or within the rules thereof (23 Geo. 3, c. 23, s. 1), nor in any other prison, or being confined or detained as prisoners within any district (54 id. c. 170, s. 4), shall gain a settlement by renting a tenement. See *R. v. St. George the Martyr, Southwark*, 7 T. R. 466.

[4] As questions are scarcely likely to arise in settlements before 1819, a few of the cases will only be noticed. Anything is a tenement which is a profit out of land. 4 T. R. 675. An incorporeal hereditament would confer such settlement. 5 East, 239. Hence a cattle-gate in Yorkshire is a tenement. *Rex v. the Inhabitants of Whixley*, 1 T. R. 137), or a common in gross (*Rex v. Dersingham*, 7 id. 671); or a ferry. 10 Ad. & E. 706. So, renting a dairy of cows to be fed in particular pastures, with exclusive right, gains a settlement. *Rex v. Tolpuddle*, 4 id. 671. So, several fisheries is a tenement within the act 9 & 10 Wm. 3, c. 11 (Certificate Act). *Rex v. the Inhabitants of Old Alresford*, 1 T. R. 358. So the fags, or after-grass of a meadow. *Rex v. Brampton*, 4 id. 348. And renting the hire or privilege of milking two cows belonging to another at so much per week per cow, for forty weeks, which cows were to be depastured by the owner on his farm, in common with his other cattle, and were to be milked by the pauper, confers a settlement. *Rex v. Stoke-upon-Trent*, 10 East, 496. So a grant of the profits of the land, which carries the land itself; thus, a lease of the hay, grass, and aftermath of a meadow, is a tenement within the stat. 13 & 14 Car. 2, s. 12. *Rex v. the Inhabitants of Stoke*, 2 T. R. 451. A right to take the herbage by the mouth of one or more cattle hired for the purpose, though not exclusive, is a tenement. *Rex v. Hollington*, 3 East, 113. *Rex v. Stoke-upon-Trent, supra. Rex v. Darley Abbey*, 14 East, 286.

Where a pauper, by order of a corporation made at a common hall, was allowed the liberty to take sand and gravel from the bed of a river (of which the corporation were entitled to the soil), with a condition that he sold the sand to the inhabitants of the town, at a certain rate, for which liberty he paid to the

(*a* 3) *As to the Value of the Tenement.*[1]

(*a* 4) „ *Occupation, or coming to Settle.*[2]

corporation at the rate of 10*l.* per annum: —*Held*, that he thereby acquired a settlement. *Rex v. All Saints, Derby*, 5 M. & S. 90. A rabbit-warren with a cottage on it, although the tenant have no right to the soil of the warren, except that of entering upon and killing the rabbits there, is a tenement. *Rex v. Piddletrenthide*, 3 T. R. 772. The tolls of a market are a tenement within the statute. *Rex v. Chipping Norton*, 5 East, 239; *see* 10 B. & C. 742; 1 Smith, 502. Tolls are not less a tenement from the shares of the proprietors being made personal estate. *Rex v. Bubwith*, 1 M. & S. 514. Residing in a tenement in one parish, of which possession was obtained under a treaty to purchase, and occupying his own freehold property in another, gives a settlement. *Rex v. Culmstock*, 6 T. R. 730. But a right to the enjoyment of a local privilege or franchise is not a tenement. *Rex v. Warkworth*, 1 M. & S. 473. So, an agreement to have the use of any two pointing places in a needle-maker's mill confers no settlement. *Rex v. Dodderhill*, 8 T. R. 449. A post windmill not let with the freehold, built by the tenant, with liberty from the lord to remove it at pleasure, is not a tenement. *Rex v. Londonthorpe*, 6 id. 377. And the exclusive use of rooms for scouring needles, &c., and a packeting-room paying rent at one shilling per packet, is not a tenement (*Rex v. Tardebigg*, 1 East, 528); nor is a standing-place in a mill for a carding-machine. *Rex v. Mellor*, 2 East, 189.

The party must actually occupy the premises sought to be united for an occupation, as tenant in one parish cannot be coupled with an interest as landlord in another. *Rex v. South Bemfleet*, 1 M. & S. 154. *See* also on this subject, *Rex v. St. Giles-in-the-Fields*, Burr. S. C. 798. *Kinver v. Stone*, 1 Stra. 678. *Everlyn v. Rentcomb*, 2 Salk. 536. *Rex v. Butley*, Burr. S. C. 107. *Rex v. North Bedburn*, Cald. 452. *Rex v. Skingle*, 1 Stra. 100. *Rex v. St. Margaret's, Fish-street Hill*, Burr. S. C. 677. *Rex v. Lockerly*, id. 315. *Rex v. Sandwich*, id. 44. *Rex v. Newnham*, id. 756. *Rex v. Donington*, id. 744.

[1] The worth at the time when the tenant enters is immaterial, provided it is sufficient during any year of his occupation, and the manner in which it becomes of that value is equally immaterial. *Rex v. Purley*, 16 East, 126. To gain a settlement by tenancy, the yearly value must continue during the whole forty days of residence of 10*l.*: it is not sufficient that, being of that value at the first, it fell short of it before the forty days expired. *Rex v. the Inhabitants of Bowness*, 4 M. & S. 210. If the value of land is increased by cultivation previous to the occupation, and by reason of an agreement to that effect, it confers a settlement. *Rex v. Ringwood*, 1 id. 381. The value of the tenement is estimated by what it will produce by a letting for the whole year. *Rex v. Hellingly*, 10 East, 41. So the value of the tenement may be calculated without deducting taxes, rates, and charges, usually deemed tenants' taxes. *Rex v. St. Paul's, Deptford*, 13 id. 320. In the case of renting a dairy the value of the cows cannot be taken into consideration, as forming part of the value of the tenement. *Rex v. Minworth*, 2 id. 198. A pauper agrees to take land, ready ploughed and manured, at 10*l.* and upwards per annum. The value of the land without ploughing and manuring is under 10*l.*, but with it of the required amount:—*Held*, that as no part of the sum was agreed to be paid for the labour, the whole was referable to the land itself. The lease was of land of such a value, no matter by what means it was raised to that value. *Rex v. Inhabitants of West Cramore*, 2 M. & S. 132. *See* also *Rex v. Llandverras*, Burr. S. C. 571. *Rex v. Kniveton*, id. 499. *Rex v. Bethnal Green*, id. 574. *Rex v. Framlingham*, id. 748. *Rex v. Marden*, id. 311.

[2] Before a party can be said to come to settle on a tenement, there must be a taking of it as a tenant. *Rex v. Inhabitants of Seacroft*, 2 M. & S. 472. Hence a residence under a parol agreement as tenant, with a treaty for purchase, which goes off from defect of title, is a coming to settle. *Rex v. Culmstock*, 6 T. R. 730. So, renting a tenement, though the lessor has no title, confers a settlement. *Rex v. the Inhabitants of Old Alresford*, 1 T. R. 358. And taking a tenement at will of the requisite value, for which the pauper is to pay nothing, for want of ability to pay, is a coming to settle within the stat. 13 & 14 Car. 2, c. 12. *Rex v. the Inhabitants of Fillongley*, 1 T. R. 458. It is immaterial that, having contracted to pay rent, he is unable to pay it. *Rex v. Denbigh*, 5 East, 333; 1 Smith, 506. *Rex v. Hooe*, 4 East, 361, n. So it is immaterial that the payment of the rent is guaranteed to the landlord by some other person. (Id. 362.) And it is immaterial that the tenement is jointly occupied by more tenants than one, provided it be sufficient in value. *Rex v. Seamer*, 6 T. R. 554. The number and connexion of the tenants forms no consideration in the question of settlement. *Rex v. Dorstone*, 1 East, 296. *R. v. the Inhabitants of Kelsturn*, 5 M. & S. 336.

The executor of a tenant from year to year of a tenement under 10*l.* per annum, gains a settlement by residence. *Rex v. Stone*, 6 T. R. 295.

A house consisted of two separate tenements, one of which the tenant occupied with his family, together with a barn, stable, and yard, appurtenant; he never paid any rent to his relation in respect of them, but the relation had all the manure made by

(*a* 5) *As to the Residence.*[1]

(*a* 6) „ *Evidence of.*[2]

(2) *Between 2d July*, 1819, *and 22d June*, 1825.

(*b* 1) *Statutory Enactments*[3] (59 *Geo.* 3, *c.* 50).

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the pauper's cattle, and threw it upon his lands in an adjoining parish. This person occupied a tenement within the statute. *Rex v. Fritwell*, 7 T. R. 197.

Residence by the owner of a freehold estate, with his tenant as a lodger, to conduct alterations in the premises, confers on him a settlement. *Rex v. Houghton-le-Spring*, 1 East, 247.

[1] A residence of forty days is absolutely necessary (*Rex v. Llbedergoch*, 7 T. R. 105. *Rex v. St. George the Martyr*, id. 466), and must be within a year's compass. *Rex v. Denham*, 1 M. & S. 221. To gain a settlement there must be a residence either upon the premises, or at least in the parish where some of the premises lie. *Rex v. the Inhabitants of Knighton*, 2 T. R. 48. It is enough if he dwell where part of the tenement lies. *Rex v. Fritwell*, 7 id. 197. He need not reside upon any part of what he takes. *Rex v. Llandverras*, Burr. S. C. 572.

In order to gain a settlement by residing on a tenement of the yearly value of 10*l.*, the party must stand in the relation of tenant to the property for forty days. *Rex v. South Lynn*, 5 T. R. 667.

If the party has a tenement or tenements of sufficient value, situated in different parishes, and has resided in both, he is settled where he slept the last night of his occupation, provided he has slept there forty nights in all, and it makes no difference that the tenement in that parish is of the lesser value, or only an occasional residence taken for a particular purpose, and that the party's regular home and the residence of his family is in the other parish. *Rex v. St. Mary, Lambeth*, 8 T. R. 240.

A pauper does not gain a settlement by having hired a tenement of more than 10*l.* a-year value, and having resided therein more than forty days altogether; but less than forty days before the passing of the 59 Geo. 3, c. 50, by which a residence for twelve months is necessary in order to confer a settlement. *Rex v. St. Marylebone*, 4 B. & A. 681.

[2] It will be necessary to prove—1. The nature of the tenement. 2. The lawful occupation (*Rex v. Culmstock*). 3. The actual payment of the rent of 10*l.* for one whole year. 4. Forty days' residence in the parish while he occupies: this proof may depend partly upon written evidence and partly upon parol testimony. Where the pauper took a tenement by a written agreement, which was unstamped, being lost, parol evidence of its contents was inadmissible to prove the value of the tenement, for the contract is the very essence of the case, and could not be received without the proper stamp. On an appeal against an order of removal of a female pauper, it was shown that the father of the pauper's husband had occupied and paid rent for a tenement in the appellant's parish: in order to prove the amount of that rent, the respondent's counsel endeavoured to show, that whilst in occupation of that tenement the father said to his son that he occupied the same as tenant, at an annual rent of 20*l.*:—*Held*, that the evidence was admissible. *Reg. v. Birmingham* (*Overseers*), 1 B. & S. 763; 8 Jur. N. S. 37; 31 L. J. M. C. 63; 10 W. R. 41; 5 L. T. (N. S.) 309, Q. B.

[3] The 59 Geo. 3, c. 50, was passed on the 2d July, 1819, and was repealed on the 22d June, 1825. All settlements, therefore, acquired in this interval, by renting a tenement, must be governed by the former statute. It is as follows:—

"Whereas many disputes and controversies have arisen respecting the settling of the poor people in parishes in England, by the renting of tenements, be it enacted, That from and after the passing of this act, no person shall acquire a settlement in any parish or township maintaining its own poor, in England, by, or by reason of, his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building within such parish or township, or of both, *bonâ fide* hired by such person at and for the sum of ten pounds a-year at the least, for the term of one whole year; nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid for the term of one whole year at the least, by the person hiring the same; nor unless the whole of such land shall be situate within the same parish or township as the house wherein the person hiring such land shall dwell and inhabit; anything in any act or acts, or any construction of, or implication from, any act or acts, or any usage or custom to the contrary, in any wise notwithstanding."

If the pauper has not resided for forty days before the passing of this act, it operates upon the case as if there had been no previous residence. *R. v. St. Marylebone*, 4 B. & A. 681. Thus, though the pauper took a tenement on the 21st May, under a written agreement, and paid rent from that time, yet as he did not actually take possession till the 4th June, between which and the passing of the act only twenty-eight days elapsed, he gained no settlement under the old law, and consequently, as the case fell within this statute, a year's occupation became necessary. *R. v. Brighton*, 1 D. & R. 313.

(*b* 2) *Kind of Tenement.*[1]

(*b* 3) *Rent of the Tenement.*[2]

(*b* 4) *Hiring and Occupation.*[3]

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[1] The holding of a house or building is sufficient; and therefore, where the pauper occupied together a house and garden, and paid rent during the year, though taken at different times, and of different persons, the house at six guineas, and the garden at 3*l.* 15*s.* per annum, and he underlet one room at 30*s.* a-year, by which he actually occupied less, though he held more than to the amount of 10*l.*, yet this was considered sufficient to give a settlement under this act. *R. v. North Collingham*, 1 B. & C. 578; 2 D. & R. 743.

Land must have been occupied for a whole year. S. C.; and see *R. v. Great Bolton*, 8 B. & C. 71. *R. v. Ockley*, 1 B. & Adol. 818. And the holding must be for a year. *R. v. Crayford*, 6 B. & C. 68; 9 D. & R. 80. Where, however, a man hired a house for a year, and occupied it till within a few weeks of the end of the year, when he removed, and it was occupied by another, but the tenant paid the rent for the whole year, it was held that it must be presumed he held the house for the whole year, though actually occupied by another, and that he gained a settlement. *R. v. Stow Bardolph*, 1 B. & Adol. 219.

The statute did not require that the holding or occupation should be for the same year as the hiring, but only that such holding or occupation should be for the term of one whole year. *R. v. Stow*, 4 B. & C. 87.

Where a tenant of land from year to year underlets the whole to another party, at so much per week, whose tenancy was to commence at the ensuing Lady-day, but no time was specified for which the land was to be taken, this was considered a good contract of yearly hiring of the land by the undertenant, the tenant having received no notice.

[2] The statute expressly requires that the tenement or tenements must be hired "at and for the sum of 10*l.* a-year at the least," and the rent for the same actually paid for the term of one whole year at the least, by the person hiring the same; but the rent need not also be of the actual value of 10*l.* See *R. v. Ampthill*, 2 B. & C. 847. But in a case where, after the passing of stat. 59 Geo. 3, c. 50, and before the stat. 6 Geo. 4, c. 57, a man hired a tenement for a year at a rent exceeding 10*l.*, and occupied it and paid the rent for the year, but it was not in fact of the yearly value of 10*l.*, the court held that he thereby gained a settlement; that if the tenement be *bonâ fide* hired for 10*l.* a-year, the real annual value is immaterial within stat. 59 Geo. 3, c. 50. *R. v. Ashfield-cum-Thorpe*, 9 B. & C. 939. *R. v. Thurmaston, South End*, 1 B. & Adol. 731. And in a more recent case, where a tenement was offered to be let, either for 9*l.* a-year, the tenant paying taxes, &c., or at 10*l.* a-year, the landlord paying taxes, &c.; and a man preferring the latter terms took the tenement for a year at 10*l.*, the court held that he thereby gained a settlement. *R. v. St. John's in Bedwardine*, 8 Ad. & E. 192. If two persons jointly rent such a tenement, even although one be in fact a surety for the other, yet each will be holden to rent a moiety only; and if the entire rent do not amount to 20*l.*, neither of them will gain a settlement under this statute. See *R. v. Great Wakering*, 5 B. & Adol. 971. *R. v. Tonbridge*, 6 B. & C. 88.

The rent must have been actually paid for the term of one whole year at the least. And where the rent was 15*l.*, of which the tenant paid 6*l.* 15*s.*, and the landlord levied 4*l.* 17*s.* 6*d.* by distress, the court held that the tenant gained no settlement, because the whole of the year's rent had not been paid. By this act, the whole of the year's rent must have been paid, otherwise the party could not gain a settlement. *R. v. Ramsgate*, 6 B. & C. 712. So, where a man took a tenement for a year from Lady-day, 1824, at the rent of 14*l.*, and resided in it until July, 1825, when he died, and in his lifetime he had paid only 25*s.* of the rent, but after his death the landlord levied the residue of the rent by distress, the court held, that as the rent had not been paid in the lifetime of the tenant, he gained no settlement by renting the tenement. *R. v. Carshalton*, 6 B. & C. 93. *R. v. Ampthill*, 2 id. 847. But see *R. v. Barham*, 8 id. 99. *R. v. Tillingham*, 1 B. & Adol. 180.

[3] The house, building, or land must be hired *bonâ fide*, and for the sum of 10*l.* a-year at the least, for the term of one whole year. Where a woman rented seven acres of land, as tenant from year to year, at 8*l.* 1*s.* 6*d.* a-year, and her son, in 1812, agreed to give her the same rent and 3*s.* a-week for it; no time was specified for the continuance of the holding, but the son occupied it for three years, and paid the rents as they became due, the court held, that as the hiring of the land was general, and the son occupied it for a year or more, the presumption was that it was hired for a year, and that the son therefore gained a settlement. *R. v. Wainfleet, All Saints*, 8 B. & C. 227.

The house or building must be holden, and the land occupied, for the term of one whole year at the least, by the person hiring the same. *R. v. Stow Bardolph*, 1 B. & Adol. 219.

Where a man, renting a house at 7*l.* a-year, took at Michaelmas, 1824, the grass growing on ten acres of meadow in the same parish for 17*l.* a-year; he occupied them until the April following, when he underlet to one Hill the grass for the remainder of the year, Hill undertaking to pay the landlord the

(*b* 5) *Residence.*[1]

(3) *Between the 22d June, 1825, and 30th March, 1831.*

(*c* 1) *Statutory Enactments.*[2]

(*c* 2) *Kind of Tenement.*[3]

(*c* 3) *Locality of Tenement.*[4]

(*c* 4) *Hiring and Occupation.*[5]

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rent. Hill, at the end of the year, tendered the rent, but the landlord refusing to receive it, the tenant then accompanied Hill to the landlord, who received the rent, and gave the tenant a receipt. The court held that the tenant did not thereby gain a settlement, as he did not occupy the land during the whole of the year, as required by this statute. *R. v. Ockley*, 1 B. & Adol. 818.

The house or building, we have seen, must be holden, or the land occupied, for the space of one whole year at the least. And therefore, where the tenant died three days before the expiration of the year, the court held that he gained no settlement under this statute, although his body remained in the house until after the year had expired, and the widow remained in it for three months afterwards. *R. v. Crayford*, 6 B. & C. 68.

[1] A settlement might be gained under this statute, by a residence of forty days in a parish, provided the party complied with the other conditions mentioned in the act; and, therefore, where a pauper hired land for a year at the sum of 10*l.*, paid the rent, and occupied for the whole year, but resided only forty days in the parish, though not upon the land, it was held that he gained a settlement. *R. v. Wainfleet*, 8 B. & C. 227.

[2] By sect. 1, 6 Geo. 4, c. 57, the 59 Geo. 3, c. 50, is repealed from 22d June, 1825. By sect. 2 no settlement by renting a tenement shall be acquired since that date, except upon the condition which follows:— "No person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* rented by such person, in such parish or township, at and for the sum of 10*l.* a-year at the least, for the term of one whole year; nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.*, actually paid for the term of one whole year at the least: Provided always, that it shall not be necessary to prove the actual value of such tenement, anything in any act or acts, or any construction of, or implication from any act or acts, or any usage or custom to the contrary notwithstanding."

The operation of sect. 1 is prospective only. Thus, where the year's tenancy commenced before the passing of this act, and had not expired when it came into operation, it was held a settlement gained, although the rent had not been paid by the party hiring the tenement as required by this act (*R. v. Ruthin*, 5 B. & Adol. 215); but it must be complied with by any person who completed a settlement after the time when it came into operation. *R. v. St. Nicholas, Colchester*, 2 Ad. & E. 599. But the 2nd section is retrospective. Thus where the pauper, settled in D., had taken a house in A., in March, 1829, at a yearly rent of 36*l.*, and resided in and occupied it till August, 1830, and paid during such occupation 29*l.* on account of rent, it was held that as there had been payment to the amount of 10*l.* a settlement was gained. *R. v. Dursley*, 3 B. & Adol. 465.

A holding before the 22d June, when the 6 Geo. 4, c. 57, was passed, and the holding subsequent to that period, may be connected, provided the occupation before the 22d June be such as will justify the requisites of the 6 Geo. 4, c. 57; and therefore, if a party, before this act began to operate, was in possession of a yearly tenement, and held it under such circumstances as that statute says shall be requisite in order to gain a settlement, a settlement will be conferred. There are no words in the act which import that the taking shall be subsequent to the time when the act came into effect. *R. v. Ditcheat*, 9 B. & C. 183.

[3] The same construction applies to 6 Geo. 4, c. 57, as to the repealed act. See *R. v. Little Asworth*, 5 Ad. & E. 261. *R. v. Iver*, 1 Ad. & El. 228. *R. v. Macclesfield*, id. 870.

[4] Where the tenant rented and occupied in two parishes, evidence is admissible to show that the rent paid for the part situate in one of the parishes is sufficient to confer a settlement. *R. v. Pickering*, 2 B. & Adol. 267.

[5] There must be an actual and *bonâ fide* hiring for the term of an entire year.

Where a house was taken "for six months from the 1st January, and so on for six months to six months, until one of the parties shall give to the other six calendar months' notice in writing to determine the tenancy, at the rent of 13*l.* for six months," this was holden to be a tenancy for a year at least, within the meaning of the statute, it appearing clearly that the months here spoken of were calendar months. *R. v. Chawton*, 10 L. J. M. C. 55; 1 Q. B. 247. But where a man hired a tenement at 21*l.* a-year, the rent to be paid weekly, and either party to be at liberty to determine the tenancy by a quarter's notice from any quarter-day, and he occupied the premises more than a year,

(*c* 5) *Residence.*[1]

(*c* 6) *Rent, and Payment of.*[2]

(4) *Between 30th March*, 1831, *and 14th August*, 1834.

(*d* 1) *Statutory Enactments.*[3]

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and paid a year's rent, the court held that he thereby gained a settlement: notwithstanding the rent was payable weekly, it was a tenancy for a year within the meaning of this statute; and its being defeasible by notice was immaterial, as no notice had been given, and it was not in fact defeated. *R. v. Herstmonceaux*, 7 B. & C. 551. And see *R. v. Ditcheat*, *infra*. *See* also *R. v. Wootton*, 1 Ad. & E. 232. *R. v. Henley-on-Thames*, 6 id. 294. *R. v. Ormesby*, 4 B. & Adol. 214. So also, as the statute requires the tenement to be "separate and distinct," it has been holden that a tenement rented by joint-tenants, or tenants in common, will no longer confer a settlement; for it is not a separate and distinct tenement as to each of the tenants. *R. v. Caverswall*, 10 Ad. & E. 270; 1 Per. & D. 426.

Where a cottage and land were hired for a year, at the rent of 11*l.* 10s., but the land was to be entered on at Lady-day, 1827, and the cottage at May-day, 1827, the pauper entered the land and house on those days respectively, and quitted the former at Lady-day, and the latter at May-day, 1828, it was held that a settlement was gained, for each was occupied for the term of one whole year. *R. v. Ormsby*, *supra*.

In *R. v. Ditcheat*, the occupation of part by the person hiring the tenement, though the other part was for nearly the whole period underlet to another person, was held sufficient. The statute "does not require the payment of rent or occupation by the person hiring the same, but occupation under the yearly hiring;" and these words may be satisfied by the continuance of the term and occupation by a sub-tenant or assignee, during the continuance of the term. In this case, however, it was not necessary to decide whether occupation by an assignee would suffice. (9 B. & C. 181.) And in *R. v. Great Bentley* (10 id. 520), where the pauper had not occupied the whole of the premises himself, *Lord Tenterden* observed, "the 59 Geo. 3, c. 50, provided in terms, which for the present may be considered as substantially the same as those of the 6 Geo. 4, except that it also contained the words 'by the person hiring the same,' after the words which provided for the occupation and payment of rent. Now these words are omitted in the present act. We must understand the legislature to have had under their consideration the terms of the very act which they were repealing, and so understanding, we must consider that they left out the words for some particular purpose. Then, were the premises held by the pauper? It is not denied they were. That being the case, all which is required by the terms of the statute has been complied with, the pauper has gained the settlement in dispute." *R. v. Iver*, 1 Ad. & E. 228. *R. v. Stoke Damerel*, 6 id. 308.

[1] A residence of forty days is essential to complete the settlement.

[2] The former act required that the house should be held, and the land occupied, and the rent paid, by the person hiring the same. The act is silent as to the occupation or payment of rent by the person hiring, and it has therefore been decided in *Rex v. Kibworth Harcourt*, 7 B. & C. 790, 1 M. & R. 691, that, according to the true construction of the statute, the payment need not be made by the party hiring. The words, "by the person hiring the same," are to be considered, therefore, as struck out of this statute, and the law so far altered, that it is now sufficient if it be paid either by the person hiring or by any other person. *R. v. Ditcheat*, 9 B. & C. 181. Still, if the tenant were to die before the rent were actually paid, he could not be considered as having acquired a settlement by the rent being afterwards paid out of his effects. *R. v. Carshalton*, 6 id. 93. *R. v. Gt. Wakering*, 5 B. & Adol. 971.

Under this statute the whole year's rent must be actually paid, whatever be its amount, and the payment for a portion of a year, though the sum so paid exceed 10*l.*, will not suffice. *R. v. Ramsgate*, 6 B. & C. 712. *R. v. Ashley Hay*, 8 id. 27. See *R. v. Ruthin*, 5 B. & Adol. 215. *R. v. Hockworthy*, 7 Ad. & E. 492. *R. v. St. Sepulchre*, 1 B. & Adol. 924.

[3] By 1 Wm. 4, reciting the 6 Geo. 4, c. 57, and that doubts had arisen with respect to the occupation of such house, or building, or land, by the person hiring the same, and concerning the amount of rent, and the person paying the same, it is enacted, "that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house, or building, or of land, or of both, as in the said act expressed, unless such house, or building, or land, shall be actually occupied under such yearly hiring in the same parish or township, by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same."

By sect. 2 it is provided, that where the yearly rent shall exceed 10*l.*, payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the said recited act.

The operation of sect. 1 is prospective only. Thus, where the year's tenancy commenced before the passing of this act, and

(*d* 2) *Kind of Tenement.*[1]
(*d* 3) *Locality of Tenement.*[2]
(*d* 4) *Hiring and Occupation.*[3]
(*d* 5) *Residence.*[4]
(*d* 6) *Rent, and Payment of.*[5]

(5) *Since 14th August*, 1834.[6]

(*f*) *By Paying Parochial Taxes or Rates.*

(1) *Statutory Enactments.*[7]

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had not expired when it came into operation, it was held that a settlement was gained although the rent had not been paid by the party hiring the tenement as required by the act (*R. v. Ruthin, supra*); but the act must be complied with by any person who completes a settlement after its passing. *R. v. St. Nicholas, Colchester*, 2 Ad. & E. 599. But the second section is retrospective. 6 id. 282.

[1] The tenement may consist of a house, building, or land, any or all of them, in the same manner as under stat. 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57. *See ante*, pp. 396–398. *See* also *R. v. Berkswell*, 6 Ad. & E. 282.

[2] The tenement or tenements must be situate in the parish or township in which it is intended to acquire the settlement, as under stat. 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57.

[3] The tenement must be hired for a year, either expressly or impliedly, in the same manner as under stat. 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57. *See ante*, pp. 396–398. *R. v. Banbury, infra.*

It must be occupied for the term of one year, under the yearly hiring, by the person hiring the same. In this, the present statute differs from stat. 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57. By stat. 59 Geo. 3, c. 50, a house or building was to be holden, and land occupied, by the person hiring the same (*see ante*, p. 396); by stat. 6 Geo. 4, c. 57, both house, building, and land, were to be occupied under the yearly hiring, but it was not required that it should be occupied by the person hiring the same; but by this act both house, building, and land, shall be occupied under the yearly hiring, and by the person hiring the same. *R. v. St. Nicholas*, 5 B. & Adol. 219; 2 Ad. & E. 599. *R. v. Banbury*, 1 Ad. & E. 136. *R. v. St. Giles's*, 4 id. 495. *R. v. Pakefield*, id. 612.

A pauper rented a ground-floor of a house, consisting of a shop and two rooms; the shop opened into a passage, at one end of which was a front entrance into the street, and at the other end a back entrance into a yard; the shop and rooms communicated internally with each other. The upper floor of the house was let to another tenant, and was entered by an outside staircase leading from the back-yard. The tenant of the upper floor had the right of using the passage on the ground floor, and had a key of the front door:—*Held*, that the pauper did not gain a settlement by renting a separate and distinct dwelling-house within 6 Geo. 4, c. 57, s. 2. *Reg. v. Elswick (Township)*, 7 Jur. N. S. 45; 30 L. J. M. C. 66, Q. B.

[4] There must be a residence of forty days in the parish under this act, in the same manner as under stats. 59 Geo. 3, c. 50; 6 Geo. 4, c. 57; and 13 & 14 Car. 2, c. 12, s. 1. *See ante*, p. 399.

[5] The rent, to the amount of 10*l.* at the least, must be paid by the person hiring; no constructive payment will suffice. Thus, where the pauper took a house and land for a year, at Old Michaelmas, 1832, and on the 17th of July, 1833, assigned the whole of his property to a trustee for his creditors: the trustee paid the rent, but the pauper resided and carried on the business, it was held, that no settlement was gained, for he had not an exclusive right, and the payment could not be said to be made by him. *R. v. Pakefield, supra. R. v. Melsonby*, 12 id. 687. See *Reg. v. Cranbrook*, 1 New Sess. Ca. 5.

[6] By the 4 & 5 Wm. 4, c. 76, s. 66, no settlement can be acquired or completed since the 14th Aug. 1834, by occupying a tenement, unless the person occupying the same has been assessed to the poor-rates, and has paid the same in respect of such tenement for one year. Where the rate is imposed on the tenement, but the name of the party is not mentioned in the rate, and it is demanded of and paid by the occupier, it is a sufficient assessment of him. *R. v. Hulme*, 4 Q. B. 538; 12 L. J. M. C. 100. Payment of rates by one joint-tenant is a payment by both. *Reg. v. Husthwaite*, 18 Q. B. 447; 21 L. J. M. C. 189. *R. v. St. Mary's*, 9 Ad. & E. 622. *R. v. Stoke Damerel*, 6 id. 308.

[7] By the 3 Wm. & M. c. 11, s. 6, it is enacted, "that if any person who comes to inhabit in any town or parish is charged with and pays his share towards the public taxes or levies of the said town or parish, he shall be deemed to have a legal settlement there, though no notice in writing has been given to the parish."

By operation of this statute, any one, except a certificated person (9 & 10 Wm. 3, c. 11), by residing forty days in the parish after such payment, might in this manner gain a settlement, whatever were the value of the tenement, up to June 22, 1795. From that day, by the 35 Geo. 3, c. 101, to June 22, 1825, the condition was added, that the tenement must be of the yearly value of 10*l.* (*See* sect. 4.) And from this last-mentioned day, by the 6 Geo. 4, c. 57, to acquire a

(2) *As to the Rate,*[1] *being Rated,*[2] *and Rating.*[3]
(3) ,, *Payment of Rate.*[4]

settlement by paying rates, all the conditions must be observed which are required to give a settlement by renting a tenement of 10*l.* a-year. *R. v. Penryn*, 5 M. & S. 443. S. C. 4 B. & Adol. 224. *R. v. St. Pancras*, 2 B. & C. 122. *R. v. St. Dunstan*, 4 id. 686. *R. v. Gt. Wakering*, 5 B. & Adol. 971.

Further provisions were added by the 1 Wm. 4, c. 18, s. 1, by which a settlement, void as a settlement by renting for want of a compliance with the provisions of the act, may still be good as a settlement by payment of rates. Thus, where a pauper rented a tenement by the year for upwards of 80*l.*, but underlet a part, and paid a portion of his rent, amounting to 10*l.*, it was held, that though there could be no settlement by renting, in consequence of the underletting, yet that he gained a settlement by payment of rates; for though the 1 Wm. 4, c. 18, is confined to settlement by renting, the proviso in sect. 2, applies to both kinds of settlement (*R. v. Brighthelmstone*, 1 Q. B. 674; 1 Gale & D. 54. *R. v. St. Mary Kallendar*, 1 Per. & D. 497); and see *R. v. Stoke Damerel*, 6 Ad. & E. 308, in which case it was said that the enactments of 1 Wm. 4, c. 18, were confined to settlements by renting, but the effect of both cases is the same.

And the 4 & 5 Wm. 4, c. 76, s. 66, has reference only to settlements by renting, and not to settlements by rating and payment of parochial taxes. *R. v. St. Mary Kallendar, supra.*

[1] The settlement may be gained, not only by payment of taxes and rates strictly parochial, but also of such other public tax which is charged and payable within a parochial limit (*R. v. Blood*, Comb. 410); such as the church-rate (*R. v. St. Bees*, 9 East, 203), watch-rate, &c., borough watch-rate, *supra*, the land-tax, and other queen's taxes. *Anon.* Comb. 282. But he must pay in quality of a parishioner, therefore payment towards a county bridge gives no settlement. *Cases of Sett.* 1. Payment for less time than a year is sufficient. *R. v. Bramley*, Burr. S. C. 75. There are, however, statutory exceptions, as the scavengers' rate for the repairs of the highway, by 9 Geo. 1, c. 7, s. 6; duties on houses worth 5*l.* yearly rent and upwards, by 18 Geo. 3, c. 26; duties on houses by 21 Geo. 2, c. 10, s. 13; or any of the assessed taxes, by 43 Geo. 3, c. 161, s. 59. And a party does not gain any settlement by reason of his having been assessed to and paid the watch-rate in the city of London. *R. v. Christ Church*, 8 B. & C. 660. See *R. v. Uffculme*, Burr. S. C. 430. *R. v. Worth*, id. 90.

[2] The party must be rated (*Borough Watch-rate*, 29 L. J. M. C. 165; 5 Q. B. 912); he must be rated before payment; he must make payment; the rating may be in any manner which notifies to the parish that he is rated (*R. v. Walsall*, Cald. 35. *R. v. Marylebone*, 19 L. J. M. C. 201); if the rate itself be void, his right is not thereby prejudiced; the rate need not be strictly, though it must be in the nature of, a parochial assessment; and the individual must have resided forty days in the parish. See *R. v. Bramshaw*, Burr. S. C. 98. *R. v. Edgbaston*, 6 T. R. 546. *R. v. Sarratt*, Burr. S. C. 73; 2 Stra. 1023.

[3] Though the rate be in form or in the manner of making it void, yet if the party be rated and pay the rate he gains a settlement (*R. v. St. Bees*, 9 East, 203. *R. v. St. Giles, Cripplegate*, and *St. Mary, Newington*, 19 Vin. Abr. 386); but his name must be inserted in the rate before he pays it, for he gains no settlement by its being inserted afterwards (*R. v. Warblington, R. v. St. Olaves*, Burr. S. C. 787); though he need not be expressly named, if he be otherwise described, so as to show that the parish knows he is an inhabitant (*R. v. Painswick*, id. 465): thus, "Thomas Clifford, *or* tenant," was held a sufficient rating of a succeeding tenant (*R. v. Walsall*, Cald. 37); but where the landlord's and tenant's names are in the rate, if it be stated in the rate itself that the landlord is the person rated, the tenant cannot be considered the person assessed although he pay the rate. *R. v. St. John's, Southwark*, id. 62. But as the poor-rate is an occupier's tax, the tenant was held to be rated, although it appeared that the landlord's name was also in the rate, without declaring which of them was assessed; and it was proved that the landlord had been formerly rated, and that the tenant, after paying four years, had his name taken off the rate at his own request, on account of his poverty, and no one paid afterwards. *R. v. Endon*, id. 374. The land-tax being also a tenant's tax, falls within the same rule (*R. v. St. Lawrence, Winchester*, id. 379); but where, in addition, the receipt given to the tenant stated that the sum was assessed upon the landlord, it was held that the tenant did not acquire a settlement. *R. v. Bury St. Edmund's*, id. 385. But rating the farm or house is insufficient where the landlord pays the rate and the tenant pays him again, if it is expressly proved that the parish (the overseer) does not know who is the occupier. *R. v. Llangammarch*, 2 T. R. 628.

[4] It is necessary that the person rated should pay the tax (*R. v. Overseers of Everton*, 29 L. J. M. C. 165); but if it be wrongfully imposed for premises occupied by another it will suffice, for rating and paying are facts of recognisation of his inhabiting in the parish. *R. v. Stapleton*, Burr. S. C. 649. So, if the rate be afterwards repaid him by agreement with the landlord. *R. v. Bramley*, id. 75. So a custom-house officer, rated to and paying the land-tax, although the amount is given him beforehand, or allowed him afterwards by the collector of the customs. *R. v. Axmouth*, 8 East, 383. And it

is enough if the money be paid through the intervention of an agent or other person for him. *R. v. Bridgewater*, 3 T. R. 550. It is sufficient, likewise, if the money be paid *bonâ fide* by a pauper, although it may have been received by the overseer through a mistake, and be afterwards returned to him. *R. v. Corhampton*, Cald. 108; Dougl. 621. But where an exciseman was rated to the land-tax for his salary, but never paid the rate, it being paid by the collector, and not deducted out of the pauper's salary, no settlement was gained. *R. v. Weobly*, 2 East, 68. So, where the landlord pays them under an agreement. *R. v. South Kilvington*, 13 L. J. M. C. 3. The entry of the payment of a rate by a deceased clerk of a collector, who was duly appointed, is evidence of the payment. *R. v. Bengeworth*, 23 id. 124. *R. v. St. Mary's*, 22 id. 109.

W. was minister of a Wesleyan congregation, the practice of which was, that certain members were appointed circuit stewards, whose duty it was to take houses for their ministers officiating within such circuit, and to furnish the same: sometimes they paid the rent, and sometimes the minister, but in the latter case the amount paid by the minister was repaid to him by the circuit stewards; also the rates and taxes paid by the minister were repaid to him by the circuit stewards. It is the custom of the Wesleyans to appoint their ministers in a given place for one year certain. W. occupied for more than a year a house which had been taken for him in accordance with the practice, and paid the rent, and was rated to and paid the poor-rate; the rent and poor-rate were repaid to him: —*Held*, that he did not gain a settlement either by renting a tenement or by payment of rates under 6 Geo. 4, c. 57, s. 2, and 1 Wm. 4, c. 18, s. 1. *Tiverton (Overseers) v. Mangotsfield (Overseers)*, 7 Jur. N. S. 209; 30 L. J. M. C. 79; 3 L. T. (N. S.) 696, Q. B.

In 1833 a pauper's wife came to reside in the respondent parish, apart from her husband. In November, 1841, she became owner of a house by devise in that parish, and occupied and was rated for it in her married name. In June, 1842, the pauper came to the respondent parish, and cohabited with his wife until October, and a rate which had been made in April was paid by his wife while he was living with her. He then left, and never returned, but was supported by his wife, who continued to be rated in her own name, and paid the rates up to the time of his becoming a lunatic, and chargeable to the appellant parish. The pauper was never dealt with or recognised by the officers of the respondent parish as a ratepayer: —*Held*, that the pauper had not gained a settlement in the respondent parish, as he was not charged to the rate within sect. 6 of 3 & 4 Wm. & M. c. 11, notwithstanding 35 Geo. 3, c. 101, s. 3, abolished settlements by notice. *Reg. v. St. Anne, Westminster*, 6 Jur. N. S. 249; 29 L. J. M. C. 78; 8 W. R. 180, Q. B.

W. became tenant and occupier of premises in a township on the 28th September, 1857, and continued until November, 1858. The overseers are in the habit of making only one rate for the relief of the poor in each year; and on the 10th April, 1858, they made a rate, in which W. was charged with and assessed in 1*l.* 4*s.*, which was duly demanded of him, but of which he paid 14*s.* only, being the proportion for the period during which he was in occupation subsequently to the making of the rate, and being the whole amount which, at the time of such payment, was demanded of him. The premises remained empty, so that there was no tenant from whom the balance of that rate could be recovered under 17 Geo. 2, c. 38, s. 12. The township is within a municipal borough, which also comprises the parish and portions of other townships. The watch-rate is levied on the occupiers of all rateable property in the parts of the townships within the borough, except such parts of the townships as are more than 200 yards distant from any street; and the overseers are the proper officers, under the statutes relating to the levying of watch-rates in boroughs, to make and levy the watch-rate. W., whose premises were in a part of the township within the borough, paid the rate: —*Held*, that W. did not acquire a settlement in the township by payment of poor-rate, as he did not pay his share of the rate to which he was charged; but that he acquired a settlement by payment of watch-rate, as it was a parochial tax within 3 Wm. & M. c. 11, s. 6. *Everton (Overseers) v. South Stoneham (Churchwardens and Overseers)*, 6 Jur. N. S. 606; 29 L. J. M. C. 165; 8 W. R. 523, Q. B.

[1] The person must reside in the parish; for if he inhabit in one and be rated in another he gains no settlement in either. *R. v. St. Michael*, 6 T. R. 536.

[2] The principle upon which these settlements are founded, viz. that the party shall not be removed from his own property, goes beyond estates in land, and seems to extend to all interest in things immovable situate within the parish. 2 N. P. L. 69. *R. v. Aythorpe Rooding*, Burr. S. C. 412.

The 9 Geo. 1, c. 7, introduced a modification of the general right of settlement by estate, that no settlement can be gained by an estate of which the party has become the owner by purchase for a less sum than 30*l.*

Since the passing of this statute, a person may be irremovable on account of residing on his own estate and yet not gain a settlement by such residence, however long it continues; or, in other words, living upon an estate irremovable for forty days, and

(1) *As to the Kind of Estate.*[1]

gaining a settlement, have not been deemed convertible terms in all cases. See *R. v. Brington*, 7 B. & C. 550.

[1] To confer this kind of settlement the party must have a legal or an equitable title to an interest in possession. *R. v. St. Mary*, 21 L. J. M. C. 106. *Rex v. Chailey*, 6 T. R. 755. *Rex v. South Lynn*, 5 id. 667. The interest in the estate need not be beneficial. *Rex v. Stone*, 6 id. 295. One entitled by estoppel to possession of land gains a settlement by residence thereon. *Rex v. the Inhabitants of Lopen*, 2 id. 577. Occupation by leave of the tenant in possession gives a settlement. *Rex v. Aldborough*, 1 East, 597. *Semble*, that residence acquiesced in by all interested in disputing the possession with the pauper gives a settlement. *Rex v. Culmstock*, 6 T. R. 730. A right of common suffices. *R. v. Warkworth*, 1 M. & S. 873. An estate to which the party is entitled by descent will always confer a settlement, without regard either to the nominal or the total value of the interest. *Rex v. Great Farringdon*, id. 679. A *sole* next of kin has such an equitable interest in an intestate's leasehold property as will confer a settlement before administration granted. *Rex v. Horsley*, 8 East, 405. *See* 6 M. & S. 355; 1 B. & Adol. 254; 1 B. & C. 542. A guardian in socage acquires a settlement, and also a subsequent husband, in her right. *Rex v. Oakley*, 11 id. 491. A mortgagor may gain a settlement whether the conveyance be in the form of an absolute disposition in trust or of a mortgage. *Rex v. Eddington*, 1 id. 288; Dougl. 632.

A., previous to her marriage with B., who was seised of a copyhold for his life, by which, by the custom of the manor, his widow will be entitled to a free bench, executes a bond to give up to C. part of the premises to which she will be entitled, on her surviving her husband; she survives, and gives up possession in pursuance of the bond:—*Held*, that C. had only an equitable title under the bond, but a right of possession of which the widow could not divest him by ejectment; and, therefore, that he gained a settlement by residence upon the premises. *Rex v. the Inhabitants of Lopen, supra.*

J. F. being seised in fee of a cottage, demised the same to the overseers of the poor for 1000 years, reserving a peppercorn rent, and continued to reside there. Being sick, his daughter and her husband came, by permission of the parish-officers, to reside with and take care of him; after his death, the daughter being his heir, they continued to reside there above forty days, claiming a right to the possession:—*Held*, that they thereby gained a settlement, being entitled to the reversion, and the residence not being fraudulent. *Rex v. Staplegrove*, 2 B. & A. 527.

The pauper was entitled to the equity of redemption of several houses, mortgaged by his father, of which the mortgagee had recovered possession in an ejectment brought against the pauper. He afterwards obtained leave to inhabit one of the houses, which was untenanted, for the purpose of overlooking some repairs which he proposed to do upon the estate, with an intention to sell the same and pay off the mortgage. He resided three months, and did nothing either towards the repairs or the sale. He gained no settlement, for he had neither *jus in re* nor *ad rem*. *Rex v. Houghton le-Spring*, 1 East, 247.

An interest acquired by devise confers a settlement; as, where a father devised a house and premises worth 40*s.* a-year to his daughter, who was married, for life; and after her decease to her son, paying 5*l.* to his sister, and died. The daughter's husband gained a settlement by residence thereon during his wife's life. So, where a father being possessed of a cottage, &c., demised to him for ninety-nine years, at 5*s.* per annum (being the most full and improved rack-rent) devised it to his son, and made him sole executor, and the son proved the will, it was holden to confer a settlement; for, though a leasehold, it was the pauper's own estate, as he came into it under his father's will. *Rex v. Sundrish*, Burr. S. C. 7. *Rex v. Uttoxeter*, id. 538. *Rex v. Woburn*, id. 785. And undisturbed possession for twenty years is in itself sufficient to acquire a settlement; and the mode how the occupier came into possession is not material (id. 45), whether by right or by wrong.

A cottage was built on the waste by the pauper's father above seventy years back, the pauper resided there upon his father's death, and paid an acknowledgment of 2*s.* 6*d.* to the lord of the manor for the last thirty years; but it did not appear that the father had paid any. He gained a settlement. Burr. S. C. 632. But the grant by court-roll of a license by the lord of a manor to build a cottage upon land, and enclose land, paying so much per annum as a quit-rent, does not pass any interest in the land; it amounts neither to a grant nor to a lease, but merely to a license revocable at will. Such license, therefore, with residence for the prescribed time, does not confer a settlement. *Rex v. Inhabitants of Horndon-on-the-Hill*, 4 M. & S. 562. A son agrees to purchase a piece of land, his father advances his part of the purchase-money, upon a parol condition that the son should build a house upon the land, which the father and mother were to have *gratis*, for their lives, and the life of the survivor, and afterwards to go to the son, but the father and mother were not to dispose of it, nor take any other family into the house; the land is conveyed to the son in fee, who builds a house the father and mother reside in:—*Held*, that no settlement could be

gained by residence under this agreement, since, being by parol, the father had no interest in the house, but resided therein under a mere license. *Rex v. Inhabitants of Standon*, 2 M. & S. 461. Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; and if he does, the grantee acquires thereby no settlement by estate:—*Held*, also, that a grant by the lord of copyhold land, paying a yearly rent of 2*s.* 6*d.*, which rent in a subsequent part was called a quit-rent, is a purchase within 9 Geo. 1, c. 7, and being under 30*l.* confers no settlement. *Rex v. Hornchurch*, 2 B. & A. 189. Persons entitled to dower, who reside on the estate without dower assigned, do not gain a settlement. Dougl. 631.

A person, though solely entitled to administration, if the whole would not thereby have vested in him for his own use, does not gain a settlement by a residence of forty days on premises held for a term of years, determinable on lives. *Rex v. North Curry*, Dougl. 770, n. So, an estate in fee descended to a married woman, who died without either herself or husband making an entry on the premises, or receiving the rents or profits. The husband gained no settlement by residence after her death, for the heiress did not reduce the estate into possession; in order to make the husband tenant by the curtesy, there must be a seisin in fact in the wife. *Rex v. Great Farringdon*, 6 T. R. 679.

Devise to the use of trustees in fee, in trust, after payment of debts, to receive the rents for the benefit of her brother, M. S., his wife and children, or any of them, during his life, as they should think proper; and, after his decease, in trust for her nephew, &c.:—*Held*, that M. S., who, after the death of testatrix, by permission of the trustees, occupied until his death a cottage in the township where the lands devised were situate, did not acquire a settlement thereby, the rents and profits of the said lands having been insufficient to pay testatrix's debts, and and M. S., at the testatrix's decease, and from that time until his own decease, being an uncertificated bankrupt. *Rex v. Darlington*, 5 M. & S. 493. And an annuity charged by will on personal estate gives no settlement. *Rex v. Stockley Pomroy*, Burr. S. C. 762. So, an annuity charged on real estates to a charity school, to be paid to the vicar, is not an interest to the person officiating as schoolmaster, which gives a settlement. *Rex v. Melbourne*, id. 244.

An estate in remainder or reversion confers no settlement (*Rex v. Eatington*, 4 T. R. 177), though an equitable interest in land does. *Rex v. Inhabitants of Lopen*, 2 id. 577. As where the title is in trustees, or by a residence on such an estate, settled to the wife's separate use, the husband gains a settlement. *Rex v. Inhabitants of Offchurch*, 3 id. 114. An estate being devised to trustees, to be sold to pay debts, and divide the surplus, if any, between A., B., and C., A. has an equitable interest in the estate, and, by residing on it forty days, gains a settlement. *Rex v. Wivelingham*, Dougl. 767. The pauper's father purchased a cottage and land for less than 30*l.*, and died, having devised by will this estate, being under the annual value of 10*l.*, to a trustee, to let it to farm during the pauper's natural life, and pays the rents thereof to her, deducting the expenses; and, after her death, in trust for the use of her right heir. The pauper gained a settlement by residence after her father's death, the trustee never having interfered. *Rex v. Holm, East Waver Quarter*, 16 East, 127.

Where the pauper agreed for the purchase of a copyhold tenement for 150*l.*, and paid 34*l.*, but there was no surrender ever made, nor agreement in writing, and the pauper, after having been half a year in possession, upon a dispute as to the payment of the residue, agreed to rescind the contract upon receiving back 14*l.* of the sum he had paid:—*Held*, that it could not be considered a purchase within the 9 Geo. 1, c. 7, s. 5, which requires that the entire consideration should be paid, or at least be ready to be satisfied; and, in a case of doubtful equity, whether the party were entitled to have a performance of the purchase decreed, the court of quarter sessions were not bound to enter into or discuss it. *Rex v. Inhabitants of Long Bennington*, 6 M. & S. 403. See *Rex v. Inhabitants of South Newton*, 10 B. & C. 838. And where a corporation was seised of certain lands, which were let, and the rents apportioned amongst the burgesses, as the corporation might think fit to allow them:—*Held*, that the burgesses having no right to enter on the land or occupy it, no settlement was gained in respect of such interest. *Rex v. Inhabitants of Belford*, id. 54. *Rex v. Inhabitants of Piddlehinton*, 3 B. & Ad. 460.

Where a father in his lifetime gave up copyhold premises to the pauper, his heir, in his lifetime, in consideration of his paying off a debt of 15*l.*, and permitting the father and mother to reside thereon during their lives, and the son was duly admitted:—*Held*, not a pecuniary purchase within the statute. *Rex v. Inhabitants of Hatfield Broad Oak*, 3 B. & Ad. 566. A payment of expenses to the pauper's attorney forms no part of the sum within the 9 Geo. 1, c. 7. *Rex v. Inhabitants of Cottingham*, 7 B. & C. 603; S. C. 1 M. & R. 469. To confer a settlement by estate, it must not be an estate acquired by purchase. *Rex v. Inhabitants of Great Driffield*, 8 B. & C. 684, distinguishing the cases of *Burdear v. Eastwoodhay*, 1 Stra. 163, and Burr. S. C. 221. *Rex v. Cold Ashton*, 2 Bott, 530; and *Rex v. Ufton*, 3 T. R. 251; and overruling *Rex v. Stansfield*, Burr. S. C. 205. *Rex v. Deddington*, id. 220. *Rex v. Long Wittenham*, 2 Bott, 531. *Rex v. Warblington*, 1 T. R. 241. An equitable estate is sufficient to confer a settlement, but the purchase must be complete. *Rex v. Inhabitants of Llantillio Grossenny*, 5 B. & C. 461; S. C. 8 D. & R. 320. And the pauper must have an immediate interest. *Rex v. Inhabitants of Ringstead*, 9 B. & C. 218. An

(2) *As to Estates by Purchase under* 9 *Geo.* 1.[1]

(3) „ *the Residence.*[2]

estate in remainder, we have seen, will not confer a settlement. *Rex v. Inhabitants of Willoughby*, 10 id. 62. But where the pauper takes an estate for life defeasible, residence upon the premises for forty days after the death of the testator confers a settlement. *Rex v. Inhabitants of Cassington*, 2 B. & Adol. 874. *Rex v. Inhabitants of Aslackby*, 6 Nev. & M. 582; 2 Ad. & E. 200. *Rex v. Inhabitants of Ardleigh*, 2 Nev. & P. 240.

When it is the duty of a party to take out letters of administration, his settlement in A., where the estate of the intestate lies, is not vitiated by showing that administration was taken out at the sole instance of the parish-officers of B., for the purpose of transferring the settlement of the party from B. to A. *Rex v. Inhabitants of Great Glenn*, 2 Nev. & M. 91; S. C. 5 B. & Adol. 188. And where a pauper, having a fourth share in an equity of redemption of certain leasehold property, had, before residing in the parish, verbally agreed to assign all his interest to another; and, by subsequent assignment, the different parties who were entitled to a share (among them the pauper), in consideration of 30*l.* assigned to the person to whom the pauper had before by parol conveyed his share, and no money passed from that person to the pauper:—*Held*, that he had parted with his equity of redemption before he came to reside in the parish, and gained no settlement. *Rex v. Inhabitants of Cregrina*, 4 Nev. & M. 455. So, a devisee of a copyhold has, before admittance, such an equitable interest in the copyhold property as to be irremovable, and if he reside forty days within the parish will gain a settlement: *Parke, J., dissentiente. Rex v. Inhabitants of Thruscross*, 3 Nev. & M. 284; S. C. 1 Ad. & E. 126. Where the pauper, having a cottage originally built on the waste, conveyed to him from the lord for a small sum, sold it for 40*l.*, and a lease to him and his wife for their joint lives at a yearly rent of 40*s.*, which, being unable to pay, the lessor took possession of it, and the lease was destroyed, but the pauper's furniture and his former lodger continued in the cottage:—*Held*, that the life-interest never having been legally put an end to, and the wife never consenting, they continued irremovable, and he obtained a settlement, although he had actually become chargeable. *Rex v. Inhabitants of Matlock*, 1 Ad. & E. 124.

Where M. was tenant of and residing in a cottage, at a weekly rent of 1*s.*, she married W. From and after the marriage he resided with her, and occupied the cottage for seven years, during which he paid the weekly rent:—*Held*, that the residence of W. for forty days, without a determination of the weekly tenancy, conferred a settlement by estate upon him. *Reg. v. Thornton* (*Township*), 6 Jur. N. S. 799; 29 L. J. M. C. 162; 8 W. R. 435, Q. B.

It is sufficient if the interest continues during a residence of forty days. *Rex v. Dorstone*, 1 East, 296.

[1] The 9 Geo. 1, c. 7, s. 5, enacts, that after 25th March, 1723, no person or persons shall be deemed, adjudged, or taken to acquire or gain any settlement in any parish or place, for or by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.*, *bonâ fide* paid, for any longer or further time than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled before the said purchase and inhabitancy therein.

To constitute a purchase on the 9 Geo. 1, the sum of 30*l.* must be actually and *bonâ fide* paid. *Rex v. Inhabitants of Mattingley*, 2 T. R. 12. Therefore, that is not a purchase within the statute where less than 30*l.* is paid down, and the premises mortgaged to the vendor for the residue. *Rex v. Olney*, 1 M. & S. 387.

The consideration of 30*l.* must be *bonâ fide* paid to the vendor (*R. v. Belford*, 32 L. J. M. C. 150); but if he receives the amount, it is immaterial whether the purchaser pay it out of his own funds or borrow it on credit (*Rex v. Chailley*, 6 T. R. 755); or whether the consideration is a debt due to him from the vendor (*Rex v. Stockland*, Burr. S. C. 169); and though part of the money is given to him, if done without fraud, it is sufficient to satisfy the words of the statute.

The act makes the criterion of the settlement 30*l.* *bonâ fide* paid, without reference to the real value of the interest; it takes the value of the purchase from the purchase-money actually paid. If, therefore, an estate is purchased for less than 30*l.*, and the purchaser renders it of greater value by subsequent improvements, he does not acquire a settlement. *Rex v. Dunchurch*, Burr. S. C. 553; 1 Black. Rep. 596, 598. *Rex v. Benyal*, 2 Bott, 515. But if the original consideration be less than 30*l.*, and the purchaser improve the premises, and afterwards sell them, and then re-purchase them for more than 30*l.*, it will confer a settlement, and avoid a certificate. *Rex v. Stansfield*, Burr. S. C. 205.

[2] The residence must be while the estate continues vested in the person claiming a settlement (*Rex v. Horsley*, 8 East, 410), and within ten miles thereof. 4 & 5 Wm. 4, c. 76, s. 68. *See* 2 Q. B. 446; 9 id. 76; 2 E. & B. 455; 5 id. 92. No one can be removed from the place in which their freehold is situated within the first forty days of residence. But if a party quits it voluntarily, and becomes indigent, he cannot be removed thither unless he has re-

(4) *Evidence of.*[1]

(*h*) *By Serving an Office prior to 14th August*, 1834.[2]

(1) *As to the Kind of Office.*[3]

sided forty days. The mere circumstance of being irremovable from a place is not a conclusive criterion of a settlement there. In many situations besides that already stated persons cannot be removed, although they have not acquired settlements. The true criterion of settlement in any district maintaining its own poor is, whether the party be removable thither on the ground of requiring parochial relief. This depends in all cases of acquired settlement, that is, where residence is necessary, upon the statute of 13 & 14 Car. 2, c. 12, which directs the sending a pauper to the place where he was last legally settled for the space of forty days. *Rex v. St. Nyotts*, Burr. S. C. 132. In order, therefore, to acquire a settlement by estate, the party must reside forty days in the parish in which his estate lies, and while his interest continues. Residence for twenty-eight days has been held insufficient. *Rex v. West Shefford*, id. 307. *Wookey v. Hinton Blewet*, 1 Stra. 576. But the days need not be continuous; it is enough if he reside forty in the whole. *Rex v. St. Nyotts*, *supra*. *Rex v. Sowton*, Burr. S. C. 125. And it makes no difference whether he resides on his own estate, or at another person's, or in an alehouse. See *R. v. Inhabitants of Thornton*, 29 L. J. M. C. 162.

[1] The same strictness of proof is not required to ascertain a title to an estate in cases of settlement as would be necessary to support an ejectment. *Rex v. Butterton*, 6 T. R. 554. Consequently if a father resides in a house as owner for twenty years, the settlement thereby gained is communicated to his children, though they quitted home in the intermediate time. *Rex v. Inhabitants of Calow*, 3 M. & S. 22.

It is necessary to prove, 1st, that the party had either a legal or equitable interest in possession in lands or tenements situate within the parish or town where it is sought to settle him; 2d, a residence of forty days. First, proof of the party's title to any estate. The most usual method of deriving title in cases likely to occur in questions of settlement are, 1. If by descent, as heir to the person last seised of a freehold estate; 2. By copy of court roll, when it is a copyhold; 3. By marriage; 4. By will; 5. As executor; 6. As administrator; 7. By direct conveyance to the party for whom the settlement is claimed; 8. By long peaceable possession.

[2] By 4 & 5 Wm. 4, c. 76, s. 64, from and after the passing of the act, 14th August, 1834, no settlement shall be gained by serving an office. With regard to this settlement before that period, "If any person who shall come to inhabit in any town or parish shall for himself, and on his own account, execute any public annual office or charge in the said town or parish during one whole year," he thereby gains a settlement. 3 & 4 Wm. & M. c. 11, s. 6.

[3] The charge or office must be a public institution, and not merely a private one. *Rex v. Whittlesea*, 4 T. R. 807. As it is unnecessary that the office should be of a parochial nature, it is equally so that the appointment should be in the parishioners. Thus, the collector of duties on births and burials appointed by the Crown, a constable put in by the leet, a tithing-man by the steward of the leet or by the jurors, the clerks of the parish appointed by the parson (*Rex v. St. Maurice*, *Winchester*, Burr. S. C. 27), a sexton elected at a vestry by the proprietors of seats in the church or chapel (*Rex v. Liverpool*), have been held to acquire settlements by serving these offices. The office must be annual; that is, the person appointed into it must be liable to execute his duties for a year at least. *Cold Ashton v. Woodchester*, Burr. S. C. 444. *Rex v. Bow*, 8 T. R. 445. The office must exist within the parish where the party resides, but it may extend beyond it. Thus, a constable of a city consisting of several parishes, the duties of the office being to be executed through all parts of the city, gains a settlement in the parish where he resides.

Not only those of parish-clerk (2 Salk. 536; 1 B. & Adol. 795; 5 Ad. & E. 682; 20 L.J.M.C. 206), and churchwarden (2 Const. 138), but also a warden for the borough (10 Mod. 13), a tithing-man (1 Stra. 544), constable (*R. v. Middlewich*, 3 Ad. & E. 156); petty constable (Cald. 252), or borsholder (2 Stra. 1299), collector of the land-tax (*Rex v. Hammond*, 2 Bott, 156), and registrar of births and burials, created by 6 & 7 Wm. 3, c. 6, are offices within the act; likewise the office of bailiff or ale-taster for a borough, which consists in inspecting weights and measures within the borough, and warning the jury to serve at a court-leet there (*Rex v. Whitchurch*, Burr. S. C. 365); and a hog-ringer for the parish, the duty being to attend the open commons, to see that all hogs turned thereupon are rung, and to impound such as are not, the officer receiving one penny for impounding and sixpence for ringing each hog, being an office of great antiquity, and seviceable to the inhabitants of the parish (*Rex v. Whittlesea*, *supra*); and the street-driver of a borough, chosen at the manor court-leet (*Rex v. Yalding*, 3 D. & R. 352), or crier and bellman of a town (10 B. & C. 832), have been adjudged to confer settlements when duly executed.

And the 3 Wm. 3, is confined to inferior officers, such as constable (*Rex v. Wantage*, 2 East, 65), or sexton (*Rex v. Inhabitants of Liverpool*, 3 T. R. 118); and to the office of ale-taster in a borough, so as to confer a settlement (*Rex v. Bow*, 8 id. 445); but not to a master of a workhouse appointed

(2) *As to the Service, &c.*[1]
(3) „ *Residence.*[2]
(4) *Evidence of.*[3]
(*i*) *By Parentage.*
(1) *Legitimate Children.*[4]

in vestry. *Rex v. Mersham*, 3 Smith, 151; S. C. 7 East, 167.

[1] The 9 & 10 Wm. 3, c. 11, expressly requires that a person residing under a certificate shall be legally placed in the office to gain a settlement; while the 3 & 4 Wm. 3, c. 11, refers merely to the party's executing the office in fact, and is silent as to the manner in which he may obtain possession.

The party must be duly installed into the office. *R. v. Wingham*, Burr. S. C. 223. And where presentment is necessary, unless done, no settlement is conferred. *Rex v. Winterbourn*, id. 520. So, the service must be for one whole year, and in the parish where the party resides. *R. v. Woodledge*, 4 B. & Adol. 711. *R. v. Hereford*, 10 B. & C. 832.

When the officer is properly appointed, the actual service performed in the parish seems immaterial under either statute; it is sufficient if he is ready to do his duty when called upon. But a great difference seems to exist between the statutes 3 & 4 Wm. 3, c. 11, and 9 & 10 Wm. 3, c. 11, as to the service which is to confer a settlement.

Under 3 & 4 Wm. 3, a deputy gains no settlement by serving the office (*Lothsome v. Sheriff Hales*, 19 Vin. Abr. 377. *St. Maurice v. St. Mary Kallendar*, Burr. S. C. 34); for the act requires that he shall execute it for himself and on his own account. Even where the person is appointed to the office as principal, and not as deputy, he gains no settlement if he is placed there and serves for and on account of another. *Rex v. All Cannings*, Burr. S. C. 634. But, on the other hand, where a certificated man serves an office by deputy, he gains a settlement under 9 & 10 Wm. 3, c. 3. *St. Maurice v. St. Mary Kallendar, supra.* A certificated person was chosen and sworn in petty constable of the parish certified to; after being sworn in he declared he would not serve it himself, and he employed a deputy to serve it for him, to whom he gave half-a-guinea for his trouble: he was held thereby to gain a settlement. *Rex v. Hope Mansell*, Cald. 252.

Where a pauper was legally sworn in borsholder at a court-leet, and after executing the office for a few days, he was by two magistrates discharged, and another person appointed, but he acquiesced in this, and did not in fact afterwards execute the office:—*Held*, that this was not executing an annual office within the parish, so as to confer a settlement. *Rex v. Holy Cross, Westgate*, 4 B. & A. 619.

[2] It seems as if there must be a residence of forty days at least, in the parish in which the office is executed and the settlement claimed.

[3] It will be necessary to prove,—1st. That the office is annual, of a public nature, and to be executed in the parish. 2d. That the party was placed therein. 3d. That he served for the whole year. 4th. The residence.

The appointment must have been a valid one. *Rex v. Inhabitants of Hambledon*, 4 B. & C. 459; 6 D. & R. 554. And under the 3 & 4 Wm. & M. c. 11, the person must be legally placed in the office according to the 9 & 10 Wm. 3, c. 11 (although he be not residing in the parish under a certificate), the two statutes being considered as *in pari materiâ*. *Rex v. Inhabitants of Corfe*, 1 B. & Adol. 211. And there must be a residence in a parish to which the duty of the office refers. *Rex v. Woodbridge*, 1 Nev. & M. 457. *Rex v. Inhabitants of Clixby*, id. 118; 4 B. & Adol. 153.

Where a person performed the duties of the office of parish clerk, and received a yearly salary for several years, not having been chosen to the office by the vicar, nor appointed in any manner whatever:—*Held*, that he had not executed the office so as to gain a settlement. *Rex v. Inhabitants of Stogursey*, 1 B. & Adol. 795. *Rex v. Inhabitants of St. Mary, Newmarket*, 4 Nev. & M. 693. And where, under a local act (Cheshire Constabulary Act, 10 Geo. 4, c. 97), the duration of the office of an assistant petty constable for certain districts was in the discretion of the justices who appointed the pauper, without specifying for what time he was appointed:—*Held*, that the office not being in its nature annual, no settlement was gained by serving it. *Rex v. Inhabitants of Middlewich*, 4 Nev. & M. 682. So, an organist appointed during the pleasure of the vestry has not a public annual office conferring a settlement. *Rex v. Inhabitants of St. George's, Hanover Square*, 2 Nev. & M. 505; 5 B. & Adol. 571. But the office of clerk and sexton of a chapel in an extra-parochial vill gives a settlement in the parish. *Rex v. Inhabitants of Amlwch*, 4 B. & C. 757; 6 D. & R. 624. *Rex v. Inhabitants of Bodding*, 1 Nev. & P. 166. So, the office of town-crier and bellman is a public annual office within the 3 Wm. & M. c. 11, s. 6, by the execution of which a settlement may be gained; and if the town comprises several parishes, we have before noticed, the settlement will be gained in that parish in which such officer has last resided forty days. *Rex v. Inhabitants of St. Peter's, Hereford*, 10 B. & C. 832.

[4] *As to Father's Settlement.*—If the father have a settlement, his legitimate children are all entitled to it, as long as they continue members of his family, or, in other words, until they become emancipated. *Coxwell v. Shillingford*, Fort. 313. *Hard's case*, 2 Salk. 427. *R. v. Ironacton*, Burr. S. C. 153. See *St. Giles, Reading, v. Eversley*,

Blackwater, 1 Stra. 580; 2 Ld. Raym. 1332. Proof of the father's settlement is deemed in all cases good *primâ facie* evidence of the settlement of his son, though emancipated, and even of the son's wife and family. *R. v. Stone*, 6 T. R. 56. Even a child, born after his father's death, is entitled thus to his father's settlement. *R. v. Clifton*, 19 Vin. Abr. 382. Even where a man who resided upon his estate, and thereby gained a settlement, afterwards removed to a distance of more than ten miles from the parish in which it was situate, and so lost his settlement, it was holden that his son, who had become emancipated after the father had acquired the settlement, and before he removed from the estate, retained the settlement which he had derived from the father at the time of his emancipation, although the father had lost it. *R. v. Hendon*, 2 Ad. & E. (N. C.) 455; 12 L. J. M. C. 1. The pauper cannot in such a case derive any right of settlement from his mother; for his mother's own settlement is merged in that of his father, and she cannot acquire any settlement in her own right, independently of her husband, during the husband's lifetime. *Berkhampstead v. St. Mary, Northchurch*, 2 Bott, 33. And a child may derive a settlement thus from his father, although the latter be attainted of felony. *R. v. St. Mary, Cardigan*, 6 T. R. 116. *R. v. Haddenham*, 15 East, 463.

As to the Mother's Settlement.—If the father have no settlement, his children will be entitled to their mother's settlement. *R. v. St. Paul's, Shadwell*, 2 Sess. Ca. 113. *Tynton v. King's Norton*, 2 Bott, 31. *St. Botolph's without Bishopsgate v. St. John's, Wapping*, Burr. S. C. 367. And the same if the husband's settlement be unknown. *R. v. St. Giles-in-the-Fields*, Burr. S. C. 2. *R. v. St. Matthew's, Bethnal Green*, id. 482. *R. v. St. Mary, Leicester*, 3 Ad. & E. 644.

If the father die, all the children afterwards residing with their mother, as long as they form part of her family, unemancipated, will derive from the mother any settlement she may gain in her own right; and this whether the father, at the time of his death, had a settlement (*St. George's v. St. Catherine's*, 2 Ld. Raym. 1474. *R. v. Woodend*, id. 1473; 2 Stra. 746. *R. v. Barton Turfe*, Burr. S. C. 49. *R. v. Long Wittenham*, 2 Bott, 38, 530. *R. v. Oulton*, Burr. S. C. 64), or not. *See*, as to birth in workhouse, *R. v. St. Clement Danes*, 32 L. J. M. C. 25. But if the mother marry a second time, her children by her first husband do not derive from her any settlement she may have acquired by her second marriage, but retain that which she had at the time of such marriage, until they acquire some other settlement in their own right. *Wangford v. Brandon*, Carth. 449. *R. v. St. Giles-in-the-Fields*, Burr. S. C. 2. *R. v. Saxmundham*, 2 Bott, 22.

By stat. 4 & 5 Wm. 4, c. 76, s. 57, every man who, from and after the passing of this act (14 Aug. 1834), shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family. See *R. v. Wendron*, 8 Ad. & E. 819. But it has been decided that this section has not the effect of conferring upon the children the settlement which the mother acquires by the marriage. *Rex v. Walthamstow*, 8 Ad. & E. 301.

[1] An illegitimate child, born on or before the 14th August, 1834, being *nullius filius*, had no settlement by parentage; its place of birth, as we have already seen, was its place of settlement. But by stat. 4 & 5 Wm. 4, c. 76, s. 71, every child which shall be born a bastard after 14th August, 1834, shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right. And if the mother marry before that time, her illegitimate children will derive from her any settlement she may acquire by her marriage. *R. v. St. Mary, Newington*, 12 L. J. M. C. 68; S. C., MS. E., 29 April, 1843.

[2] The right of children to take the parents' settlement is at an end by their obtaining a settlement in their own right (*R. v. Bleasby*, 3 B. & A. 377); or assuming a relation which wholly and permanently excludes the parental control. (*Rex v. Wilmington*, 5 id. 525); as by marriage (*Rex v. Everton*, 1 East, 526), or by living away from parents. *Rex v. Uckfield*, 5 M. & S. 214.

A child may be emancipated by living separately from, and independently of, the parents, after twenty-one years of age, whether the separation commence before or after full age, provided the means of support are not derived from, but are obtained independently of, the parents. *Rex v. Roach*, 6 T. R. 247. And where the pauper, while he was under age, quitted his parents, and went to sea, serving sometimes in a king's ship, at other times in trading vessels, and remained in such service, and so separated from his father's family when he attained the age of twenty-one years, it was held that he was then emancipated, and that his settlement did not afterwards shift with that of his father (*Rex v. Lawford*, 8 B. & C. 271); or by enlisting as a soldier, &c. (*R. v. Woburn*, 8 T. R. 479. *R. v. Lytchet Maltravers*, 7 B. & C. 226. *Rex v. Rotherfield Greys*, 1 id. 345; 2 D. & R. 628); but if the son enlist only into the militia, he places himself under the government or control of others

(*j*) *By Acknowledgment.*[1]
(1) *By Relief.*[2]
(2) „ *Certificate.*[3]
(3) „ *Neglecting to Appeal from an Order of Removal.*[4]

for only that part of the year for which the militia is called out; and the parental control not being thereby entirely excluded, he is not emancipated. *Rex v. Woburn*, 8 T. R. 479. The emancipation must be complete. Thus, if a son who was bound apprentice to a master, by serving whom he could gain no settlement, as to a certificated person (*Rex v. Hardwicke*, 11 East, 578); or who was bound by a void indenture (*Rex v. Edgeworth*, 3 T. R. 353); or who has served under a hiring and service in an extra-parochial place (*Rex v. Collingbourn Ducis*, 4 id. 199), returns, during his minority, to reside with his parent, he is thereby re-incorporated with the family, and is not emancipated. So, as has already been seen, if he enlist for a soldier, and, being discharged, resume his home with his father, before he is of age. And it is not sufficient to be of age and have an independent business of his own; for if he remains under the parent's roof he thereby makes his election to remain a member of his father's family, and is not emancipated (*Rex v. Sowerby*, 2 East, 276); or if he be living separate from his parents, but either of the other requisites be wanting, that is, full age, or support from a source independent of his parent, the result is the same. *Rex v. Witton-cum-Twambrookes*, 3 T. R. 355. *Rex v. Uckfield*, 5 M. & S. 214.

In the case of emancipation by gaining a settlement, it is accomplished when the settlement is completed. *Rex v. New Forest*, 5 T. R. 478. When it results from a marriage, it commences immediately upon the marriage, though the wife never lived in the place. *Rex v. Pincehorton*, 4 Burn. 333.

A father who is a widower is competent to acquire a fresh settlement, by hiring and service, after all his children are emancipated. *Rex v. Cowhoneybourne*, 10 East, 88.

[1] A town or parish having the management of its own poor may confer a settlement by acknowledging that a particular person has acquired a settlement there, which, in most cases, estops them from afterwards controverting the fact, either as to the party himself or those who claim settlements through him. But this acknowledgment must, to affect the parish, be made by certain prescribed modes; for the parish officers have no power to settle a person in their parish by other acts or declarations. *Rex v. Abbotts-Langley*, 2 Bott, 2d edit. 125.

[2] The fact of a pauper having been relieved in a particular instance by a parish is no proof of his being settled there. *Rex v. Chadderton*, 2 East, 27. And the same rule holds if he has been relieved several times, because he might be relieved as casual poor. *Rex v. Chatham*, 8 id. 498. *Aliter* where the circumstances exclude the supposition of its having been given to the party as casual poor. *Rex v. Wakefield*, 5 id. 335. As, where the pauper residing in one parish is relieved by another. *Rex v. Stanley-cum-Wrenthorpe*, 15 id. 350. But since relief is only *primâ facie* evidence of settlement, as it amounts to no more than showing the opinion of the parish that the pauper was settled with them (12 East, 553), the parish may rebut it therefore by proving that the person so relieved was settled at that time in some other place. *Rex v. Ufton*, 3 T. R. 251. *See* 1 M. & S. 377; 8 B. & C. 671; 9 id. 894; 12 Ad. & E. 697; 2 Q. B. 331; 7 id. 158; 8 id. 566; 15 L. J. M. C. 117; 16 id. 70, 75; 19 id. 18.

[3] This settlement in practice is now scarcely ever sought to be established. *See* stat. 8 & 9 Wm. 3, c. 30; *post*, p. 411. A certificated person can only obtain a settlement by serving an office, renting a tenement, or by estate.

A certificate is an acknowledgment that the parties are legally settled inhabitants in the parish granting it. *Rex v. Headcorn*, Burr. S. C. 253. And it estops that parish from controverting any fact therein set forth (*All Saints v. St. Giles*, 2 Salk. 530), at least up to the time when granted. *Rex v. Ufton*, 3 T. R. 251.

The parish cannot, therefore, dispute the marriage of persons whom it has thereby acknowledged to be man and wife. They admit it legal in all its consequences, and are bound to maintain the subsequent issue of the parties, as if one had actually taken place. It may also bind a parish to admit the legitimacy of a spurious child born previously; and although the certificate is obtained by the desire of that parish where the party was then resident, and where the child was born, it is equally conclusive, provided the latter is not guilty of fraud, and has not misled the parish to grant it by false information respecting the child's legitimacy. Burr. S. C. 737.

A parish certificate, dated 1748, must be signed by all the churchwardens to make it evidence. *Rex v. Inhabitants of Upton Gray*, 10 B. & C. 807. A seal must be affixed to each name. *Rex v. Inhabitants of Austrey*, 6 M. & S. 319. A certificate fifty-nine years old is evidence. *Rex v. Inhabitants of Slaithwaite*, 2 Nev. & M. 347. The settlement remains in the certifying parish. *Rex v. Inhabitants of Rustington*, 6 M. & S. 396. On a question of fact decided by the sessions the Queen's Bench will not interfere. *Rex v. Earl Shilton*, 6 D. & R. 184. The certificate cannot be retrospective. *Rex v. Inhabitants of Queenborough*, 2 B. & Adol. 219. A certificate signed by an overseer *de facto* is sufficient. *Rex v. Inhabitants of Whitchurch*, 7 B. & C. 573; 1 M. & Ry. 472.

[4] An order of removal unappealed against is conclusive of the pauper's settlement against all the world. *Rex v. Kenilworth*, 2 T. R. 598. *Rex v. St. Mary, Lambeth*, 6 id. 615. *Rex v. Corsham*, 11 East, 388. *Rex*

II. As to the Removal of.

(A) *Statutory Enactments.*[1]

(B) *Who Chargeable, or not, within* 35 *Geo.* 3, *c.* 101.[2]

v. Chalbury, 2 Salk. 488. *Rex v. Ealing*, Cald. 472; but *see* 8 E. & B. 720. Therefore, where a man and woman have been removed as husband and wife, and the parish to which the removal is made has not appealed against the order, they are estopped from controverting the marriage. *Rex v. St. Mary, Lambeth*, 6 T. R. 615. *Rex v. Silchester*, Burr. S. C. 551. *Rex v. Wallsfeatherton*, 1 Sess. Ca. 154. *Rex v. Woodchester*, Burr. S. C. 191. But an order unappealed from is only conclusive of the settlement of persons mentioned in it and their families. A man and his wife were removed from H. to N.; they had a son at the time of the removal, who lived in a dwelling-house in N., which he rented separate and independent of his father, and he was not removed by, nor mentioned in, the order, nor was he then any part of his father's family. *Per Cur:* The order of removal unappealed from is conclusive as to the father and mother, but not as to the son, because he is not mentioned in it, and the sessions have expressly found that he was settled at H. *Rex v. Southowam*, 1 T. R. 353.

An order to be conclusive must be *bonâ fide* obtained and prosecuted. If a parish obtain an order of removal and then abandon it, consenting to take the pauper back, without giving the parish to whom it is directed the trouble of appealing, it concludes nothing.

[1] The power of justices to remove paupers is derived from the 13 & 14 Car. 2, by which poor persons might be removed within forty days after their coming to settle in any parish, by an order of two justices, upon complaint made by the churchwardens or overseers that such poor persons were likely to become chargeable. This authority of removal in anticipation of chargeability is taken away, and since 22d June, 1795, no poor person can be removed by an order of justices till such person has become *actually chargeable* to the parish or place where such poor person shall be inhabiting. 35 Geo. 3, c. 101, s. 1.

By 11 & 12 Vic. c. 31, s. 2, no person is to be removed under any order of removal until twenty-one days after notice in writing of his becoming chargeable, or relieved, with a copy of the order and statement of the grounds of removal, and particulars of the settlements relied upon. This should be done within a reasonable time after the order is made. 3 B. & C. 454. By 9 & 10 Vic. c. 66, s. 4, no person becoming chargeable by sickness or accident shall be removed unless illness of permanent character. 12 Q. B. 111, 168, 172.

[2] Where a man having furniture in his house to the value of 15*l.* or 16*l.* became distressed, and applied to the overseers for relief, who were compelled by order to relieve him, it was contended that he was not thereby chargeable to the parish within the meaning of this statute, as he had property sufficient, if sold, to maintain him: but the court held, that by applying for and receiving relief he became actually chargeable within the meaning of the act. *R. v. Ampthill*, 2 B. & C. 847. And where the pauper having been committed to the gaol at Bury, charged with having gotten a girl, resident at Woolpit, with child, the father of the girl became surety for him, took a lodging for him at Woolpit, where he came to reside, and in a week afterwards he married the girl; he then became chargeable to Woolpit, and was removed to his place of settlement: the sessions on appeal quashed the order, holding that he did not come to Woolpit to settle, within the meaning of stat. 13 & 14 Car. 2, c. 12, s. 1, and therefore was not removable; and that it sufficiently appeared that he came to inhabit within the meaning of that act, for the act does not require an intention to reside permanently, and they quashed the order of sessions. *R. v. Woolpit*, 4 Ad. & E. 205; Arch. *Poor-Laws*, 673.

By 4 & 5 Wm. 4, c. 76, s. 69, so much of any acts as render an unmarried woman with child liable as such to be removed, is to be deemed repealed from the passing of that act.

A person residing on his own estate, or in the same parish where such estate is situated, cannot be removed from it (*R. v. Aythorpe Rooding*, Burr. S. C. 412), even though it would not confer a settlement, as when purchased for less than 30*l.* *R. v. Salford*, 1 W. Black. 433.

A wife becoming chargeable in the absence of her husband may be removed to his settlement, or if he have none, to her maiden settlement. *R. v. Harberton*, 13 East, 311. *R. v. Cottingham*, 7 B. & C. 615. *R. v. Brington*, id. 546. But not if it appear that her husband has a settlement, though the place of such settlement is not ascertained. *R. v. St. Mary, Beverley*, 1 B. & Ad. 201. But if it appear by the order that the wife was residing with the husband, she cannot be removed: the court, however, will not presume this. *St. Michael, Bath, v. Munney*, cited in Burr. S.C. 815; 1 Stra. 544.

A wife cannot be removed from her husband, though she is chargeable to a parish in which he is confined in gaol. *R. v. Stogumber*, 1 Per. & D. 409. Nor can children under the age of seven be removed from the parent, even though they have not the same settlement as the parent (*Anon.* 2 Salk. 482. *R. v. Saxmundham*, 2 Bott, 18), but the parish where they are resident must relieve them, and may then procure an order upon the parish where the settlement of the children is to reimburse themselves. *R. v. Hemlington*, 2 Bott, 7. *Shermanbury v. Bolney*, Carth. 279. And see *R. v. Justices of Middlesex*, 4 B. & A. 298. *Rex v. Bucklebury*, 1 T. R. 164. And where a married woman and her children were removed to the place of her maiden settlement, her hus-

(C) *To what Place to be Removed.*[1]

band being a lunatic and having no settlement, it was held that the order was not bad for omitting to state that she had been deserted by her husband: the court will not presume any fact to vitiate an order of removal. *R. v. Stockton*, 5 B. & Adol. 546. See *Rex v. Bucklebury*, 1 T. R. 164.

Casual poor, detained by illness, are not removable to their settlements. *R. v. St. James, in Bury St. Edmunds*, 10 East, 25. *R. v. St. Lawrence, Ludlow*, 4 B. & A. 660.

By sect. 3 of the same statute, no child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with its father or mother, stepfather or stepmother, or reputed father, is to be removed, nor is any warrant to be granted for its removal from such parish in any case where such father, &c. may not be lawfully removed from such parish. An unemancipated child cannot acquire irremovability under this section by residence after sixteen in a parish from which his father is removable, although the father was irremovable up to the time of the child attaining sixteen. *Reg. v. St. Ann, Blackfriars*, 2 E. & B. 440.

By the 9 & 10 Vic. c. 66, s. 2, no woman residing in any parish with her husband at the time of his death is to be removed, nor is any warrant to be granted for her removal from such parish for twelve months next after his death, if she so long continue his widow. This section applies to the removal of widows who had become such before the act passed. *Reg. v. St. Mary, Whitechapel*, 12 Q. B. 120. *Reg. v. St. Pancras*, id. 129.

A pauper is never casual poor in a parish where he resides. *R. v. Oldland*, 4 Ad. & E. 929. See *R. v. St. James, Bury St. Edmunds*, 10 East, 25. *R. v. Birmingham*, 14 id. 251.

By 35 Geo. 3, c. 101, s. 5, persons convicted of felony, or being deemed by law rogues, vagabonds, idle or disorderly persons, or who shall appear to two justices of the division where they reside, upon the oath of one or more witnesses, to be persons of evil fame, or reputed thieves, will be considered actually chargeable. And by 5 Geo. 4, c. 83, s. 20, every person convicted under that act as an idle or disorderly person, or as a rogue and vagabond, shall be deemed actually chargeable.

Formerly, a servant hired for a year, could not be removed from the service of his master during the year, so as to prevent his gaining a settlement (*Farringdon v. Witty*, 2 Salk. 527. *R. v. Ozleworth*, Burr. S. C. 302. *R. v. Alveley*, 3 East, 563), even although he became chargeable. But as a settlement can no longer be gained by hiring and service, it should seem that the fact of a person being in the service of another would not at present be any hindrance to his removal, if he became chargeable.

By stat. 4 & 5 Wm. 4, c. 76, s. 69, so much of any act or acts of parliament as renders an unmarried woman with child liable as such to be removed, was from and after the 14th August, 1834, to be deemed repealed. This statute, of course, only abrogates the statutable chargeability above mentioned; but if such a woman become really chargeable by seeking relief, she is of course as much removable as any other pauper. See *R. v. Huddersfield*, 7 E. & B. 794; 26 L. J. M. C. 169.

By stat. 8 & 9 Wm. 3, c. 30, s. 1, after stating the cases in which a certificate shall be granted, and the manner in which it shall be allowed and subscribed by the justices, and attested, it is enacted that every such certificate, "having been allowed of and subscribed by two or more of the justices of the peace of the county, city, &c. wherein the parish or place from whence any such certificate shall come doth lie, shall oblige the said parish or place to receive and provide for the person mentioned in the said certificate, together with his family, whenever he shall happen to become chargeable to, or be forced to ask relief of the parish, &c. to which such certificate was given; and then, and not before, it shall be lawful for any such person, and his children, though born in that parish, not having otherwise acquired a legal settlement there, to be removed in the parish from whence such certificate was brought."

If the certificate-man himself became actually chargeable, not only he, but his wife, and such of his children as were not emancipated, were all removable. But if any other member of the family became chargeable, then that member only was to be removed, and not the certificate-man himself, or the rest of his family. *R. v. St. Mary, Westport*, 3 T. R. 44. The 3 Geo. 2, c. 29, s. 9, provides for the repayment of the expense the certificated parish might be at in relieving and removing the certificate-man.

[1] The removal must be to the place of the pauper's last legal settlement. But if that place has, since the pauper acquired a settlement there, ceased to have overseers and to maintain its own poor, as where the houses within it were taken down, and there were no residents remaining capable of being appointed overseers, no removal to it can take place; and the pauper must remain to be supported as casual poor in the place where he became chargeable; and the justices have no power to remove him to any prior settlement, for the last-acquired settlement extinguished all the former, though the effect be to leave the pauper without any settlement at all. *R. v. Saighton-on the-Hill*, 2 B. & A. 162.

In like manner, where a district previously extra-parochial was by act of parliament made a township, and it was provided that from thenceforth it should maintain its own poor, &c., and have the same privileges and immunities, and be subject to the same regulations as other townships within the county; it was held that this provision was prospective only, and that a bastard born within the district previously to passing the act was not settled there. *R. v. Oakmere*, 5 B. & A. 775.

Where two justices made an order of re-

(D) *When Irremovable after Five Years' Residence, under 9 & 10 Vic. c. 66, s. 1.*[1]

moval to the parish of Tamworth, adjudging the pauper's settlement to be at Sirescote in the said parish of Tamworth, and ordering the overseers of the said parish of Tamworth to receive and provide for the pauper, it was held a good order, as it appeared that there never had been any overseers for the hamlet of Sirescote, which consisted of one house only, which was not assessed to the poor of Tamworth, though it always had been to the church. *R. v. Tamworth*, Cald. 28. *Spitalfields v. Bromley*, 2 Bott, 890. *R. v. Kirkby Stephen*, 3 Burr. S. C. 664. See *R. v. Bishopwearmouth*, 5 B. & Adol. 942. But in *R. v. Swalcliffe*, Cald. 248, it was held that the removal of a pauper to Ascott, a large populous village, part of the parish of Whichford, but maintaining its poor, in common with Whichford, and not separately, was a mere nullity, and not conclusive, although unappealed against.

[1] By stat. 9 & 10 Vic. c. 66, s. 1 (26th August, 1846), no person is to be removed, nor is any warrant to be granted for the removal of any person, from any parish in which he has resided for five years next before the application for the warrant. But it is expressly provided by sect. 5 that no person exempted from liability to be removed is hereby to acquire any settlement in such parish. This clause applies to render irremovable such paupers only as have a known settlement. *Reg. v. Bennett*, 3 E. & B. 341. It has no retrospective operation. *R. v. Sepulchre*, 28 L. J. M. C. 187.

By 24 & 25 Vic. c. 55, s. 1, after the 25th of March, 1862, the period of three years shall be substituted for that of five years specified in sect. 1 of 9 & 10 Vic. c. 66, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of that section, as a residence in any parish. See *Overseers of Salford v. Overseers of Manchester*, *post*, p. 416. *Overseers of Preston v. Blackburn*, 32 L. J. M. C. 180.

By sect. 2, where a child under the age of sixteen years, residing with its surviving parent, shall be left an orphan, and such parent shall, at the time of death, have required an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner, and to the same extent, as if it had then acquired for itself an exemption from removal by residence.

As to Deserted Wives.—By sect. 3, where a married woman shall have been, or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her. See *R. v. Cudham*, 5 Jur. 269; 28 L. J. M. C. 105; 32 L. T. 253.

Settlement and Maintenance of Lunatic Paupers.—*See* Lunacy, vol. v. p. 406; and *Guardians of Droitwich v. Worcester Union*, *infra*. The removal of a pauper lunatic to a lunatic asylum under the provisions of any act relating to the maintenance and care of pauper lunatics, is not to be deemed a removal within the meaning of this act. 9 & 10 Vic. c. 66, s. 1. The residence must have been in the same parish or place from which the removal would, but for the statute, be made. *Reg. v. Forncett St. Mary*, 12 Q. B. 160.

There must have been a residence in the parish from which the party is sought to be removed for five years continuously up to the time of the application for the warrant, in order to give the *status* of irremovability. But it is immaterial whether part of the five years was prior to the act passing (*Reg. v. Harrow-on-the-Hill*, 12 Q. B. 103); and the period may be made up of residence partly as widow and partly as wife. *Reg. v. Glossop*, 12 Q. B. 117. If there be a break in the residence, the privilege of irremovability ceases. *R. v. Tacolnestone*, 12 Q. B. 157. *Reg. v. Brighthelmstone*, 4 E. & B. 236. *Reg. v. Stapleton*, 1 id. 766. *Reg. v. Llanelly*, 17 Q. B. 40. *R. v. Potterhouseworth*, E. & E. 262. *R. v. Cudhorn*, id. 409. *R. v. Manchester*, 4 Jur. 9.

Any removal of the pauper under an order of removal, for however short a period, is a disruption of the prior residence, as he has in that case no right to return to the parish from which he was removed. *Reg. v. Halifax*, 12 Q. B. 111. *Reg. v. Seend*, id. 133. *Reg. v. Burnsley*, id. 193. And this is so even where the pauper, in fact, returns on the same day on which he was removed, under an agreement with the officers of his parish of settlement that he should do so, and that they should maintain him. *Reg. v. Caldecote*, 17 Q. B. 52. But where the removal is fraudulent, as if the pauper were sent to his place of settlement by the parish officers of the place where he resided for the purpose of rendering him chargeable, it will not operate as a breach of residence. *Reg. v. St. Marylebone*, 16 Q. B. 299. Imprisonment, whether it be in or out of the parish where the pauper has resided for five years, and whether it be upon a criminal charge or for a civil debt, does not operate as a breach of that residence. *Reg. v. Holbeck*, 16 Q. B. 404. *Hartfield v. Rotherfield*, 17 Q. B. 746. *Reg. v. St. Andrews, Holborn*, id. 753. *R. v. Potterhanworth*, 4 Jur. 1277; and *supra*. But transportation will, it seems, be a break. See *Reg. v. Salford*, 12 Q. B. 106. *Reg. v. Pott Shirgley*, id. 143. The five years' residence must be next before the application for the warrant. And by the 12 & 13 Vic. c. 103, s. 4, the removal of any lunatic pauper to an asylum, licensed house, or registered hospital, under the statutes in that behalf, or of any pauper otherwise than under an order of removal from his place of abode to any parish of a union to the workhouse of such union, is not to be deemed to be an interruption of the residence of such pauper within the meaning of the above act;

(E) *Removal of Pauper not having Settlement under 8 & 9 Vic. c. 117.*[1]
(F) *Examination of Pauper; Service of Copy; Statement of Grounds, &c.*[2]

but the time spent in such lunatic asylum, &c., or workhouse, and the time during which any person is relieved at the charge of the common fund of the union, are to be wholly excluded from the computation of the time of residence which exempts a pauper from being removed. *Reg. v. Leaden Roothing*, 12 Q. B. 181. See *Guardians of Droitwich v. Worcester Union*, 32 L. J. M. C. 196.

Any lawful imprisonment in or out of the parish, either for debt or crime, is to be excluded. As to service as a marine, &c., see *Reg. v. East Stonehouse*, 12 Q. B. 72; 4 E. & B. 901. A militiaman is a soldier within this clause. *Horton v. Leeds*, 5 E. & B. 595. Relief given to a parent on account of his children is relief given to the children, and operates to prevent their gaining the *status* of irremovability, unless they have resided five years exclusively of the period during which such relief was received. *Reg. v. Skewington-cum-Gressy*, 17 Q. B. 48.

[1] By stat. 8 & 9 Vic. c. 117, s. 2, "if any person born in Scotland or Ireland, or in the Isle of Man, or Scilly, or Jersey, or Guernsey, not settled in England, become chargeable to any parish in England by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child,—such person, his wife, and any child so chargeable, shall be liable to be removed respectively to Scotland, Ireland, the Isle of Man, Scilly, Jersey, or Guernsey; and if the guardians of such parish, or of any union in which the same may be comprised, or, where there are no such guardians, if the overseers of such parish complain thereof to any one justice of the peace, such justice may, if such person do not attend voluntarily, summon him to come before any two justices of the peace, at any time and place to be named in the summons; and at such time and place, or on the attendance of such person, any two justices may hear and examine into the matter of such complaint; and if it be made to appear to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant under their hands and seals to remove such person forthwith at the expense of such union or parish." *See* ss. 2, 3, 4, and 15, as to expense; s. 6 as to appeals. 24 & 25 Vic. c. 76, amends the law of removal of persons to Ireland; and 25 & 26 id. c. 113, as to England, Scotland, and Ireland.

The wife and unemancipated children born in England of an Irishman or Scotchman, who has not gained a settlement in this country, may be removed under this statute. See *R. v. Mile-End Old Town*, 4 Ad. & E. 196. *R. v. Leeds*, 4 B. & A. 498. But where the person born in Scotland, &c. cannot be himself removed, as where he has absconded or does not reside in the parish, or is dead, his wife and children born in England cannot be sent without him to Scotland, &c., but must be removed to their place of settlement in England. *R. v. Great Clacton*, 3 B. & A. 410. *Reg. v. All Saints, Derby*, 14 Q. B. 270. *Reg. v. St. Giles Without, Cripplegate*, 17 id. 636. *Much Hoole, Preston*, id. 548. And it is the same as to any of the children who are emancipated. *Reg. v. Preston*, 12 Ad. & E. 822. Where a Scotchman, having no settlement, sailed on a voyage to Calcutta, leaving his wife chargeable to the parish, this was held to amount to a desertion, and justified her removal to her maiden settlement. *Reg. v. St. Marylebone*, 16 Q. B. 352.

[2] Before the removal of a pauper, he and such witnesses as will be necessary to prove the settlement ought be examined before two justices of the peace of the county in which the removing parish is situate, and taken down in writing (11 & 12 Vic. c. 31, s. 1); and the examination so taken must be kept, and a copy, on application, granted to overseers of the parish to which the pauper is to be removed. It is not essential that the pauper himself should be examined *R. v. Tavistock*, 3 D. & R. 427. *R. v. Bagworth*, Cald. 179. After the examination, a statement in writing by the overseers or guardians is to be served, setting forth the grounds of the removal, and the particulars of the settlement or settlements relied upon. 11 & 12 Vic. c. 31, s. 2. The overseers, &c. may agree to submit to such order, and to receive the pauper, although the twenty-one days have not elapsed. *See ante*, p. 410.

Upon application of "any party to such proceedings," any justice may summon persons to appear and give evidence; and if they refuse, they may be committed for any term not exceeding fourteen days. 7 & 8 Vic. c. 101, s. 70.

The written examination was required to comprise the whole of the evidence given before the justices relative to the settlement. *R. v. Outwell*, 8 L. J. M. C. 27; 9 Ad. & E. 836.

The following cases, as to the examination, may be useful in forming the grounds of removal and conducting the inquiry: Where it appears upon the face of the examination that illegal evidence has been received, as where the pauper in his examination stated that he was born in the appellant parish, as he had heard and believed (*R. v. Lydeard St. Lawrence*, 11 Ad. & E. 616); or that he was born illegitimate at S. (*R. v. Rishworth*, 11 L. J. M. C. 34; 2 Ad. & E. N. C. 476); or that the place of his father's settlement was at E., as he had heard say and believed, or as he heard his father say, and as he believed (*R. v. Ecclesall Bierlow*, 11 Ad. & E. 607; 10 L. J. M. C. 90): these are good objections to the examination, upon the trial of the appeal. *R. v. Alternun*, 10 Ad. & E. 699; 10 L. J. M. C. 46. So, if the examinations together do not contain proof of all the facts necessary to constitute the settlement intended,—as if, in proof of a settlement by apprenticeship, the examination state a service with a person other than the

(G) *Order of Removal.*[1]

master, but do not state the master's consent to it (*R. v. Lydeard St. Lawrence, ante*); or if, in proof of a settlement by renting a tenement, the examination state a renting of a tenement of the yearly rent of 10*l.*, but do not state for what time, or that the rent was paid (*R. v. Middleton in Teesdale*, 10 Ad. & E. 688), or who was the landlord (*R. v. Recorder of Pontefract*, 2 Ad. & E. N. C. 548; 12 L. J. M. C. 81); or in proof of a settlement by renting a tenement under stat. 59 Geo. 3, c. 50, which required the whole year's rent to be paid, if the pauper, after stating that he became tenant of a house in K. for a year, at the rent of 19*l.*, in May 1820, and resided in it from that time until October, 1821, and that he paid rent for the whole time of his tenancy, but not showing what rent he paid, or that he paid the whole of a year's rent (*R. v. Leeds*, 13 L. J. M. C. 88); or if, in proof of a settlement by hiring and service, the examination state a hiring and service, but do not state that the servant was unmarried and without child or children at the time of the hiring (*R. v. Wymondham*, 2 Ad. & E. N. C. 541; 12 L. J. M. C. 74. *R. v. Sherburn*, 2 Ad. & E. N. C. 545, n. *R. v. Recorder of Leeds*, id. 547); or if, in any case of settlement, the examinations do not show a residence in the parish for forty days (*R. v. Old Stratford*, 2 Ad. & E. N. C. 513. *R. v. Stoneleigh*, id. 530; 12 L. J. M. C. 38. *R. v. St. Margaret, Rochester*, 2 Ad. & E. N. C. 533; 12 L. J. M. C. 77. *R. v. Flockton*, 2 Ad. & E. N. C. 535; 12 L. J. M. C. 70. *R. v. Justices of West Riding of Yorkshire*, 12 L. J. M. C. 37); or if they do not, either expressly or by fair and reasonable intendment, contain evidence of every other fact necessary to give the justices jurisdiction. So, if the examinations do not contain sufficient evidence of the chargeability, they will be bad, and it would have been good matter of objection upon appeal. *R. v. High Bickington*, 13 L. J. M. C. 74.

Care also should be taken that the grounds embrace all the settlements (if more than one) that it is intended to insist upon, and that they be stated correctly. *R. v. Misterton*, 6 Ad. & E. 878. *Ex parte Broseley*, id. 423. Also, it should contain a statement showing that the pauper was chargeable before and at the time of the making of the order. The order, notice of chargeability, and grounds of removal, should be served within a reasonable time after the order is made (3 B. & C. 454); until the notice of chargeability is sent there is no basis for an appeal. 1 E. & B. 711. *See* 8 Ad. & E. 375. Service of these documents by post suffices, and they will be deemed to be served at the time in which the ordinary post is delivered. 18 Q. B. 388. Service on one of the overseers of the appellant parish is good. 6 Ad. & E. 873.

A statement of the grounds, together with a copy or counterpart of the order of removal, and a notice of chargeability, must be sent, by post or otherwise, by the churchwardens and overseers or guardians of the parish obtaining the order, or any three or more of such guardians, to the churchwardens and overseers of the parish to whom such order shall be directed; and the pauper shall not be removed until twenty-one days after the same shall be so sent. 4 & 5 Wm. 4, c. 76, s. 79. And a copy of the whole examination must formerly have been sent. *R. v. Outwell*, 9 Ad. & E. 836; 8 L. J. M. C. 27. *See* 11 & 12 Vic. c. 31, ss. 3, 9. *R. v. St. Alkmund*, 32 L. J. M. C. 99.

[1] The complaint may be made to one justice, though two are necessary to adjudge and remove. *R. v. Llanwinio*, 4 T. R. 473. And if the merely ministerial act of signing be performed separately, the order is only voidable, and not void. *R. v. Stotfold*, 4 id. 596. *R. v. Hamstall, Ridware*, 2 Bott, 503. But an order of removal made by two justices, one of whom at the time was churchwarden of the removing parish, is bad. *R. v. Great Yarmouth*, 6 B. & C. 646.

The order of removal should state the justices to be justices of the peace, and not merely justices of the county. 4 Burn's *Justice*, 799. *R. v. Owlton*, 2 Sess. Ca. 76; 2 Salk. 474. But it is not essential that it should appear that they are justices of the division. *Anon.* 2 Salk. 473.

Where the order, being addressed to parish officers in two different counties, described the justices as justices, &c., in and for the said county, so that it was not expressed in terms, on the face of the order, for which county they were acting, this was held a fatal defect. *R. v. Moor Critchell*, 2 East, 66; but see *Rex v. St. Mary's, Leicester*, 1 B. & A. 327. And if the language employed leaves no doubt upon the point, when reasonably construed, it is sufficient.

By the 26 Geo. 2, c. 27, it is enacted, that no order shall be set aside for not setting forth that one of the justices is of the quorum.

The name of the pauper must be inserted in the order, or if it is unknown, it must be so stated; and this rule applies where a whole family is removed, and an order to remove a man and his family, or, "and his then children," is bad, being too general, and may include persons not removable. *Johnson's case*, 2 Salk. 485. *Beaston v. Scisson*, 1 Stra. 114. See *R. v. All Saints, Newcastle-on-Tyne*, 10 L. J. R. M. C. 89.

In every order where children are directed to be removed to their father's settlement the ages of the children must be set out (to show that they are of such tender years as not to have gained a settlement for themselves), or there must be an express adjudication of their having gained no other settlement. *Rex v. Bowling*, Burr. S. C. 177. Seven years is an age that the court will presume a child could gain a settlement at, in his own right. *R. v. Trinity in Chester*, 2 Bott, 867. There must also be an adjudication that the pauper has become chargeable to

the parish from whence he is removed, and that the parish, &c., to which he is removed is the place where he was last legally settled. 2 Nol. P. L. 224, 226.

The examination ought to be taken before two justices. If the order state, "It appears, upon examination before us, or one of us," it is bad, because both are to unite in the judgment of removal. *Ware v. Stanstead*, 2 Salk. 488. But now, by 49 Geo. 3, c. 124, s. 4, if the pauper be, from age or other infirmity, unable to be brought up to be examined as to his settlement, one magistrate may take his examination, and report it to another, who together, upon such report, may adjudge the settlement. And the order thus made need not state the special circumstances of taking the examination, as the statute does not require any alteration to be made in the form of the order. *Rex v. South Lynn, All Saints*, 4 M. & S. 354. When proceedings are pending at sessions, the Queen's Bench cannot order his examination to be taken for the purpose of being used in such proceedings. 5 L. T. (N. S.) 347.

Justices are not warranted in removing a pauper on hearsay evidence. *R. v. Lydeard St. Laurence*, 10 L. J. M. C. 147; 11 Ad. & E. 616. The order may be amended by the court. 12 & 13 Vic. c. 45, s. 7; 28 L. J. M. C. 167; 5 Jur. 626.

By 4 & 5 Wm. 4, c. 76, s. 79, no poor person shall be removed or removable, under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and a copy of the examination upon which such order was made shall have been sent, by post or otherwise. See *R. v. Brixham*, 8 Ad. & E. 375.

Where notice of appeal has been given within twenty-one days after notice of the order of removal, the appellants may abandon it and take their remedy after the actual removal; for they are aggrieved as well by the removal as the order. *R. v. Justices of Middlesex*, 9 Dowl. P. C. 163. *R. v. Justices of Cheshire*, 1 id. N. S. 570. And the whole examination must have been sent, whether material or not. *R. v. Outwell*, 1 Per. & D. 610; 10 Ad. & E. 836.

By 59 Geo. 3, c. 12, s. 28, any justice of the peace may take, in writing, the examination on oath, of any person having a wife or child who shall be a prisoner in any gaol or house of correction, or in the custody of the keeper of any such gaol or house of correction, or who shall be in the custody of any constable or other peace officer, by virtue of any warrant of commitment, touching the place of his or her last legal settlement; and such examination shall be signed by such justice, and shall be admitted in evidence as to such settlement before any justices, for the purpose of any order of removal, so long only as the person so examined shall continue a prisoner.

The adjudication must be certain and positive; as, "We do adjudge," which is the most unexceptionable form; or, "It appears to us," &c., which has been held sufficient. 2 Nol. P. L. 224.

As the complaint, since 35 Geo. 3, c. 101, must state, so must the order adjudge, that the party is actually chargeable to the parish complaining (*Ufculm v. Clysthydon*, Burr. S. C. 138), and that he is legally settled in the parish to which the order directs he shall be conveyed, unless it be a removal back to a parish giving a certificate; in which case the justices need not adjudge it to be his settlement. *Malden v. Fletwick*, 2 Salk. 530.

The order should be directed to the officers of both parishes, and should require those of the complaining parish to remove the pauper, and those of the parish in which the settlement is adjudged to be to receive and provide for him. If, therefore, it do not state which is to convey, and which to receive, it is bad. *Binfield v. Banstead*, 11 Mod. 268.

A mistake in the name of the parish does not vitiate the order, if that used be sufficiently descriptive to a common intendment, especially if the parish, by appealing, or otherwise recognising the order, acknowledge the sufficiency of the name. *Rex v. Topsham*, 7 East, 466; 2 Nol. P. L. 231. And it seems no objection to the direction of an order, that it is to the churchwardens and overseers of the parish, township, or division of U. (*Rex v. Ulverstone*, 7 T. R. 565); or to the churchwardens and overseers of the township of H. *Rex v. Holbeck in Leeds*, Burr, S. C. 198. Chapelwardens are not joined with overseers as managers of the poor in townships by 13 & 14 Car. 2, c. 12, s. 21. *R. v. Justices of Yorkshire*, 6 Ad. & E. 863.

Where an order was directed to the township of Binstead, of the parish of B.; the parish was divided into several townships, which did not support their own poor, and overseers were appointed for the parish only, the court held this to be an informality which the session might amend, and sent the order back to them for that purpose. *R. v. Bingley*, 4 B. & Adol. 567. *R. v. Cartmel*, 2 Ad. & E. 562. *R. v. Justices of Carmarthenshire*, 4 B. & Adol. 563. *See* also *R. v. Bishopwearmouth*, 5 id. 942.

Orders of removal may be abandoned, even after the pauper has been removed (Burr. S. C. 638; 12 East, 359); or subsequent to notice and grounds of appeal being served, but not after an appeal has been entered at the session (11 Ad. & E. 809), unless by consent (3 Q. B. 342); and the costs incurred could formerly only be obtained by entering the appeal (2 id. 705; 3 id. 357), which was often done for the mere purpose of getting costs: but by 11 & 12 Vic. c. 31, s. 8, this is remedied, and the party obtaining the order may give at any time notice of abandoning it, which will operate as a stay of proceedings, subject to the right of the appellants to costs up to the time of the service of the notice. *R. v. St. Michael's*, 21 L. J. M. C. 79. Justices may

(H) *Suspending Order of Removal.*[1]
(I) *Of the Removal of the Pauper.*[2]

III. Appeal against Orders of Removal.

(A) *Of the Appeal.*[3]

make a second order of removal before a prior order for the removal of the same person is superseded or abandoned. 3 Q. B. 347; 2 id. 705.

An order of removal is, in effect, a judgment. If it be unappealed from, or be affirmed upon appeal, it concludes the parish to which the removal is made, as against all the world. *R. v. Corsham*, 11 East, 388. But if quashed, it only concludes the litigating parishes. *Rex v. Bradenham*, Burr. S. C. 397. So long, therefore, as these judgments are in force the justices cannot make a fresh order repugnant to them.

[1] If the immediate execution of the order might prove dangerous to the pauper, or any of his family, the justices have power to suspend the execution of it; but in the meantime no settlement can be gained by the pauper. 49 Geo. 3, c. 124, s. 3; 35 Geo. 3, c. 101, s. 2. See *Rex v. Chagford*, 4 B. & A. 235. The suspension must be made at the time question of removal is being inquired into. 29 L. J. M. C. 102.

When the order is suspended, no charges of relief are recoverable unless notice of the order, with a copy (4 & 5 Wm. 4, c. 76, s. 84), and notice of chargeability and grounds, be given within ten days of the order. 11 & 12 Vic. c. 31, ss. 2–10; 15 Q. B. 1637. *Rex v. Alnwick*, 5 B. & A. 184.

The charges incurred during the suspension to be paid by the parish to which the pauper is removed, to be levied, &c. If they exceed 20*l.*, power of appeal is given. 35 Geo. 3, c. 101, s. 2; 49 Geo. 3, c. 124, s. 4. See *Overseers of Salford v. Overseers of Manchester*, 32 L. J. M. C. 107; and 4 & 5 Wm. 4, c. 76, s. 84.

[2] The churchwardens and overseers of the removing parish, or any one of them, may remove the pauper or paupers named in the order of removal. Or, by stat. 54 Geo. 3, c. 170, s. 10, the churchwardens, &c. having the control, ordering, or management of the poor, may employ any proper person to carry, remove, and deliver any pauper or paupers ordered to be removed by any justice of the peace; and that the delivery by such person so ordered to be removed shall be as valid and effectual as if the same was or were delivered by any churchwarden or overseer whatsoever.

The pauper cannot be removed until twenty-one days after the notice of chargeability, and a copy or counterpart of the order of removal, with a copy of the examination, have been sent to the overseers of the opposite parish, unless such overseers agree to submit to the order: and if notice of appeal be given, then not until after the appeal shall have been determined. 4 & 5 Wm. 4, c. 76, s. 79; 11 & 12 Vic. c. 31, s. 2. See *R. v. Llanwinio*, 4 T. R. 473.

The pauper must be removed to some parish, township, or place maintaining its own poor, for which overseers are appointed, and not to an extra-parochial place. *Bridewell v. Clerkenwell*, 2 Salk. 486. *R. v. Denham*, Burr. S. C. 35. *R. v. Tamworth*, Cald. 28. *R. v. Saighton-on-the-Hill*, 2 B. & A. 162. *R. v. Crowland*, 8 B. & C. 711.

Where the pauper was born at Oakmere, at a time when it was extra-parochial, and no overseer appointed; afterwards it was made a township by act of parliament, and overseers appointed for it; and the pauper, becoming chargeable, was removed to it: the court held that he could not be removed to it as to the place of his settlement, for it was no township at the time of his birth, and the statute had not the effect of conferring any settlement upon him. *R. v. Oakmere*, 5 B. & A. 575. On the other hand, where the parish of Hales Owen, which consisted of thirteen townships, and formerly supported its poor in common, was in the year 1832 separated, and overseers appointed for each of the townships respectively; and a pauper, who before this separation had been born in the parish workhouse, which was situated in the township of Hales Owen (one of the townships of which the parish of the same name consisted), was removed to that township, as to the place of her birth settlement: the court held that this could not legally be done, as she had, in fact, no longer any settlement by birth. *R. v. Tipton*, 3 Ad. & E. N. C. 215; 11 L. J. M. C. 89. *R. v. Hunnington*, 13 L. J. M. C. 24.

By stat. 3 Wm. & M. c. 11, s. 10, "where any person is removed by virtue of the act, the churchwardens or overseers of the poor of the parish or town to which the person shall be so removed are hereby required to receive the said person; and if they shall refuse so to do, shall forfeit for each offence the sum of five pounds, to the use of the poor of the parish." Or, instead of proceeding in this summary manner, an indictment may be preferred against the party, at the option of the prosecutors. *R. v. Davis*, Say. 163.

"Every person returning to and becoming chargable to any parish from whence he or she shall have been legally removed, unless he or she shall produce a certificate of the churchwardens or overseers of the poor of some other parish, thereby acknowledging him to be settled in such other parish, shall be deemed an idle and disorderly person; and upon being convicted thereof, any justice of the peace may commit him or her to the house of correction, there to be kept to hard labour for a time not exceeding one calendar month." 5 Geo. 4, c. 83, s. 3. See *Mann v. Davers*, 3 B. & A. 103. *Baldwin v. Blackmore*, 1 Burr. 595.

[3] The manner of commencing and conducting all appeals is nearly similar; the general rules and principles of law, there-

(B) *Of the Notice.*[1]

(C) *Of the Hearing.*[2]

fore, as stated under the head of Quarter Sessions (*ante*, p. 296), will be applicable.

The several statutes authorising the removal gave a right of appeal to the parish to which the removal was made; but now, by 11 & 12 Vic. c. 31, no appeal is to be allowed against an order of removal, if notice of appeal be not given as required by law, within twenty-one days after the notice of *chargeability, and statement of grounds* of removal, have been sent by the overseers or guardians of the removing parish. The effect of this is to make the service of a copy of the order and notice of chargeability the only grievance against which an appeal will lie. 1 E. & B. 711. The twenty-one days are reckoned from the day on which it reaches the party to whom sent. 27 L. J. M. C. 197. Transmission by post suffices. (Id.) *See* 36 L. J. M. C. 193; 6 L. T. 422. As the grounds of appeal are now to be stated under the hands of the churchwardens and overseers, or the guardians, they alone can appeal. *R. v. Colbeck*, 9 L. J. M. C. 61; 3 Per. & D. 488.

By 4 & 5 Wm. 4, c. 76, s. 80, the overseers or guardians of the parish, giving notice of appeal, shall have free access to the pauper for examination.

The 35 Geo. 3, c. 101, s. 2, enables justices to suspend orders of removal on account of the sickness of the pauper, and to give the costs of such suspension, with an appeal against such costs, if they amount to 20*l.* *See* also 49 Geo. 3, c. 124, s. 3. *R. v. St. Marylebone*, 13 East, 51. *R. v. Bradford*, 9 id. 97. Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant, on the trial of another appeal, may show by evidence the distinct ground on which the former order was quashed. *R. v. Wheelock*, 5 B. & C. 511.

By 8 & 9 Wm. 3, c. 30, s. 6, the appeal must be to the sessions for the county, division, or riding, from which the removal was made, and not to the sessions of a corporate town, &c. *R. v. Wendover*, 2 Salk. 490. *R. v. East Donyland*, Burr. S. C. 592.

Any person or party aggrieved had a right to appeal—the pauper himself, as well as the parish to which he was removed (13 & 14 Car. 2, c. 12, s. 2. *Rex v. Hartfield*, Carth. 222), before the 11 & 12 Vic.

The appeal must be to the next practicable general or quarter sessions of the county, division, or riding in which the parish is situate, and from which the removal was made, although situate within a corporate borough or other exclusive jurisdiction. *Rex v. Carmarthen*, 4 B. & A. 291. *Rex v. East Donyland, supra. Rex v. Wendover*, Salk. 490; 8 & 9 Wm. 3, c. 30, s. 3. *R. v. Peterborough*, 7 E. & B. 643; 26 L. J. M. C. 153; 28 id. 224; 5 Jur. 17. The proper time as to the "practicability" of the next session, is governed by the service of the order of removal.

In Middlesex an appeal to the general sessions is *coram non judice;* it ought to be to the general quarter sessions. *Rex v. London*, 15 East, 632.

By "the next general or quarter sessions" is meant the next sessions after the service of the order at which the party might, with due diligence, make the necessary inquiries as to the sufficiency of the grounds of appeal, and cause the same to be entered (*Rex v. Coode*, 1 Bott, 290. *Rex v. East Riding*, Dougl. 102. *Rex v. Sussex*, 15 East, 207. *Rex v. Essex*, 1 B. & A. 210. *Rex v. Justices of Kent*, 8 B. & C. 639. *Rex v. Surrey*, 1 M. & S. 479. *Rex v. Flintshire*, 7 T. R. 200. *Rex v. Wilts*, 2 Bott, 960. *Rex v. Devonshire*, Cald. 32. *Rex v. Wiltshire*, 1 East, 683; *see* 13 id. 51. *Rex v. Devon*, 8 B. & C. 640. *Rex v. Southampton*, id. 641); and if the sessions refuse to try the appeal because it was not entered and respited at the first sessions, the Court of Queen's Bench will grant a *mandamus* to compel them. *Rex v. Justices of Devon*, 8 B. & C. 641. *Rex v. Justices of Southampton*, id. 641.

[1] The appellants must give notice of appeal to the respondent parish. They are entitled to the twenty-one and fourteen days before giving it. 27 L. J. M. C. 269. And if reasonable notice has not been given the justices may adjourn the appeal to the next quarter sessions, and then finally determine the same. 9 Geo. 1, c. 7, s. 8. 11 & 12 Vic. c. 31, s. 9. *Rex v. Wiltshire*, 10 East, 404. *See* 3 D. & R. 142; 6 id. 142; 4 B. & A. 626. *R. v. Alkmand*, 32 L. J. M. C. 99.

The quarter sessions have a discretionary power to make rules for the governance of the practice of the sessions, and what is or is not a reasonable notice is in many counties ascertained by a general rule, but the Court of Queen's Bench will, in certain cases, control that discretion. *Rex v. Lancashire*, 7 B. & C. 691. *Rex v. Wiltshire*, 10 East, 404. After an adjournment, fresh grounds of appeal may be served. 5 Jur. N. S. 545; 28 L. J. M. C. 110.

The justices are bound to receive and adjourn an appeal made to the next sessions, after the order of removal, where no notice has been given to the respondents, though they should be of opinion that the order was served a sufficient time before the sessions to have enabled the appellants to give reasonable notice of their appeal. *Rex v. Justices of Shropshire*, 7 East, 549; 3 id. 342; 1 Stra. 315; Fol. 251; 4 B. & C. 62; 5 M. & S. 457; Cald. 283; Dougl. 191; 3 T. R. 504; *sed contrà*, 3 T. R. 150. See *R. v. Peterborough, supra.* Where an appeal is respited in consequence of an equal division of the bench, no fresh notice of trial is necessary. *Rex v. Justices of Bucks*, 6 D. & R. 142.

[2] The appellants first prove the notice of appeal, and the order of removal served on the officers of the respondent parish; the respondents then prove the pauper's settlement in the appellant parish, if denied; if not, the appellant's begin. 7 Ad. & E. 492; 1 Q. B. 252. No objection can be made to the order for mere want of form (*See* 5

(D) *Of the Judgment.*[1]
(E) *Certiorari.*[2]
(F) *Special Case.*[3]
(G) *Of the Costs of Maintenance.*[4]

SEVERAL Counts. *See* vol. v. p. 116.

Covenant or Contract. *See* vol. iii. p. 193.

Fishery. *See* vol. iv. p. 471.

Pleas. *See* vol. v. p. 120.

SEVERALTY.[5]

SEVERANCE in Pleading.[6]

of Fixtures. *See* vol. iv. p. 474.

SEWERS.[7] *See* Abatement of Nuisance, vol. i. p. 4; Negligence, vol. v. p. 522; Nuisance, *ante*, p. 10; Public Health Act, id. p. 290; *post*, Towns.

I. Statutes relating to Sewers, p. 419.
(A) *General*, p. 419.
(B) *Metropolitan*, p. 419.

II. Commissioners, p. 419.
(A) *Jurisdiction and Powers of*, p. 419.
(B) *Vesting of Property in*, p. 420.
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IV. Rates, p. 422.
(A) *Generally*, p. 422.
(B) *Liability to*, p. 422.
(C) *Apportionment*, p. 423.
(D) *Inspection of*, p. 423.

V. Compensation for Injuries, p. 423.

VI. Duty and Liability to Cleanse and Repair, p. 423.

VII. User of Sewer, p. 424.

Geo. 2, c. 19, 2 Sess. Cas. 90; 2 Stra. 1158; Burr. 163; 2 East, 66; 8 T. R. 178; 4 B. & C. 764; 2 Bott, 933); or to matters not stated in the grounds. 12 Q. B. 55; 8 id. 561; 6 Ad. & E. 273; 10 id. 417. The counsel for the appellant then remarks upon the case proved by the respondents, and, if necessary, calls witnesses to prove that the pauper was subsequently settled elsewhere. If the counsel for the appellant call witnesses, the counsel for the respondent may reply. No bill of exceptions will lie. *Rex v. Preston*, Burr. S. C. 77.

[1] The sessions must either quash or affirm the order, or affirm it as to some of the persons named or described, and quash it as to others. *Rex v. Bond*, 2 Show. 503; S. C. 2 Bott, 922; 2 Salk. 472, 475. *See* Carth. 221. They cannot make an original order (*Rex v. Bond, supra*), but they may alter their judgment any time during the continuance of the same sessions, even after adjournment; but a subsequent quarter sessions cannot reverse the judgment of a former sessions, or in anywise supersede it (*Rex v. Oswell*, 2 Salk. 472, 607; 12 Mod. 10. *Rex v. Weelock*, 5 B. & C. 511); not even if the former sessions had entered the judgment contrary to the votes of the majority, &c.: nor can the Court of Queen's Bench interfere. *Rex v. Leicestershire*, 1 M. & S. 442. *See* 4 B. & C. 844. The justices are not bound to state the grounds on which their adjudication proceeds (*South Cadbury v. Braddon*, 2 Salk. 607), but the Court of Queen's Bench will examine their tenability in point of law. *Rex v. Coln*, Burr. 136. If an order be good on the face of it, the justice is bound to enforce it by warrant of distress. 31 L. J. M. C. 189.

[2] The appellants may sue out a writ of *certiorari*, to bring under the consideration of the Court of Queen's Bench any defects appearing on the face of the order of justices in sessions, on giving six days' notice thereof in writing to any two of the justices (if so many there be) who made the order, provided that the *certiorari* be moved for within six calendar months next after the order made. 13 Geo. 2, c. 18, s. 5.

[3] If the sessions entertain any reasonable doubt upon the law of a case, they may get the opinion of the Court of Queen's Bench upon it by stating a special case, but the sessions are not bound to do so. *Rex v. Oulton*, Burr. 64. *Rex v. Preston*, id. 77. *See* 2 Nolan, 558; 1 M. & S. 631, 734; 4 T. R. 479; 14 East, 285. *R. v. Rugton*, 1 B. & S. 534. *See post*, Special Case, p. 472.

[4] The sessions have power to award to the party in whose behalf such appeal shall be determined, or to whom notice of appeal had been given (though the appeal was not further prosecuted), such costs and charges in the law as should be thought reasonable. 8 & 9 Wm. 3, c. 30, s. 3; 12 & 13 Vic. c. 45, s. 5. The sessions must decide on the amount. 13 East, 57, n.; 1 Q. B. 726; 7 id. 459.

If the justices determine in favour of the appellant that the pauper was unduly removed, the justices shall, at the same quarter sessions, order and award to such appellant the money reasonably paid by the appellant towards the relief of the pauper, between the time of such order of removal and the determination of the appeal. 9 Geo. 1, c. 7, s. 9. *See* 11 & 12 Vic c. 43, s. 19; 15 Q. B. 1037. A *mandamus* to enter continuances and hear an appeal, must be applied for in the term following the sessions at which the refusal occurred (Reg. Gen. Q. B., E. T. 1850. 27 L. J. M. C. 197; 4 Jur. 456), unless the delay be accounted for by affidavit.

[5] An estate in severalty is one; that is, held by a person in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. 2 Bl. Com. 179.

[6] The adoption by several defendants of separate pleas, instead of joining in the same plea. Steph. Pl. 257.

[7] *See* Callis on Sewers, by Broderip.

I. Statutes relating to Sewers.

(A) *General.*[1] (B) *Metropolitan.*[2]

II. Commissioners.

(A) *Jurisdiction and Powers of.*[3]

[1] 23 Hen. 8, c. 5: "A Generall Acte concerninge Commissions of Sewers, to be directed in all parts within this Natione," made perpetual by 3 & 4 Edw. 6, c. 8, and explained by 3 Jas. 1, c. 14.

By 13 Eliz. c 9, after the expiration of a commission of sewers, the justices of the county, &c., or any six of them, may execute the powers for one year.

7 Anne, c. 9: "An Act for giving the Commissioners of Sewers for the City of London the same powers as the Commissioners of Sewers for counties have."

7 Anne, c. 10: "An Act for rendering more effectual the Laws concerning Commissioners of Sewers."

7 Geo. 4, c. 64, s. 18: as to how, in indictments for offences committed on sewers, the property may be laid. *See* Indictment, vol. v. p. 113.

3 & 4 Wm. 4, c. 22: "An Act to amend the laws relating to Sewers." This act is amended by the 4 & 5 Vic. c. 45, and 12 & 13 Vic. c. 50.

23 & 24 Vic. c. 51. By this act the amount of sewers'-rates, &c. must be returned annually to the Secretary of State.

For provisions respecting the regulations of sewers in towns under the jurisdiction of Towns Improvement Act (10 & 11 Vic. c. 34), *see post*, Town.

As to sewers in districts subject to Public Health Acts, *see* 11 & 12 Vic. c. 63.

[2] 11 & 12 Vic. c. 112, consolidated and continued for two years the Metropolitan Commissions of Sewers; and that act was amended by 12 & 13 Vic. c. 93; further amended and continued for one year by 14 & 15 Vic. c. 75; further continued and amended by 15 & 16 Vic. c. 64, and 16 & 17 Vic. c. 125; and further amended and continued by 17 & 18 Vic. c. 111, to 31st of August, 1855.

The Metropolitan Commissioners of Sewers, by 11 & 12 Vic. c. 112, s. 125, may sue and be sued in the name of their clerk; and by 12 & 13 Vic. c. 93, s. 16, their chief clerk shall be called "the secretary;" and the word "clerk," in the first act, shall include "secretary:"—*Held*, that their district clerk, acting for the district where a cause of action arose against them was not the proper officer to be sued as representing the commissioners. *Clements v. Pollard*, 3 C. L. R. 120.

The kings of England used to grant commissions of sewers long before any statute was enacted in parliament for the purpose, and during the reigns of King Henry VI., Edward IV., and Henry VII., several statutes were made for appointing commissions of sewers in all parts of the realm where needful, some to endure ten years, some fifteen, and others five years, &c., with certain powers to the commissioners; which commissions, by stat. 23 Hen. 8, c. 5, are to be settled by the Lord Chancellor, Lord Treasurer, and the two chief justices, or any three of them, whereof the Lord Chancellor to be one.

The said stat. 23 Hen. 8, c. 5, s. 17, directs that laws and ordinances made by commissioners of sewers shall stand good, and be put in execution, so long time as their commission endureth. The ordinances must be engrossed on parchment, and certified under the seals of the commissioners, and have the royal assent; and the stat. 13 Eliz. c. 9, directs that all commissions of sewers shall continue in force for ten years, unless sooner determined by *supersedeas* or any new commission; and that all laws and ordinances made by force of such commission shall continue in force, notwithstanding the determination of the commission by *supersedeas*, until repealed or altered by new commissions; and that all laws without certificate or royal assent be in force for one year after the determination of such commission. *See* 9 East, Rep. 109.

The business of the Commissioners of Sewers is to repair sea-banks and walls, survey rivers, public streams, ditches, marsh land, &c. (*Poplar Board of Works v. Knight*, 27 L. J. M. C. 37), and make orders for that purpose; and the acts extend to all waters, whether navigable or not. *R. v. Parkinson*, 16 J. P. 729. They have authority to inquire of all nuisances and offences committed by the stopping of rivers, erecting mills, not repairing of banks and bridges, &c., and to tax and assess all whom it may concern for the amending of defaults which tend to the obstruction or hindrance of the free passage of the water through its ancient courses; and they may arrest carts and horses, and take trees, paying a reasonable price for them, for reparations, appoint workmen, officers, &c. Termes de Ley, 541; 4 Inst. 275; Callis's Laws' Sew. 86, 96.

The court of commissioners is classed by Blackstone among those whose jurisdiction is private and special, their jurisdiction being confined to such county or particular district as the commission expressly names. See *R. v. Warner*, *post*, p. 422; and 28 L. J. Ch. 400. The commissioners are a court of record, and may fine and imprison for contempt. (1 Sid. 145); and in the execution of their duty may proceed by a jury (who may amerce for neglect), or upon their own view; and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of the Romney Marsh, or otherwise, at their own discretion; but they may not imprison persons for disobedience to their orders, nor can they intermeddle where there is not a public prejudice. Callis' Law's Sew. 3; 3 Com. c. 6.

Upon the stat. 23 Hen. 8, c. 5, the com-

missioners decreed that a new river should be made out of another large river, through the main land, into another part of the old river, and laid a tax of a sum in gross upon several towns:—*Held*, that the commissioners have no power to make a new river, or any new invention to cast out water, &c. 10 Rep. 141. *See* 28 L. J. Ch. 909; 5 Jur. 1121.

If a sea-bank or wall which the owners of particular lands are bound to repair be destroyed by tempest, without any default of the owners, the commissioners may order a new one, even in a different form, if necessary, to be erected at the expense of the whole level. *R. v. Somerset Commissioners of Sewers*, 8 T. R. 312. But the commissioners will not in such case reimburse the owner, if the wall has previously been presented as being out of repair, and was out of repair at the time of the accident. *R. v. Essex Commissioners*, 2 D. & R. 700; 1 B. & C. 477.

Commissioners for the time being may sue upon a bond entered into by sureties for a collector, although the commissioners be not the actual obligees. *Saunders v. Taylor*, 9 B. & C. 35. An amerciament on a township generally, and a distress on one of the parties liable, by commissioners of sewers, for neglect to repair, is good. *Quære*, whether such distress could be sold independently of 3 & 4 Wm. 4, c. 22? *Ramsey v. Nornabell*, 3 Per. & D. 253. But the court will not, upon an application to discharge an amerciament, enter into a disputed question as to the validity of the practice of the Court of Sewers.

Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the court discharged the fine, it being admitted that it was not usual to re-swear the jury, except upon the issuing of a new commission. *Ex-parte Taylor*, 3 Y. & J. 91.

[1] The 44th sect. of the 3 & 4 Wm. 4, c. 22, ss. 47, 57, enacts, that "the property of and in all lands, tenements, hereditaments, buildings and erections, works and other things, which shall have been, or shall hereafter be purchased, obtained and erected, constructed or made, by or by order of, or which shall be within or under the view, cognisance, or management, of any commissioners of sewers, with the several conveniences, &c., shall be, and the same are hereby vested in the Commissioners of Sewers:—*Held*, that this section had not the effect of vesting in the Commissioners of Sewers the property in all lands under their view, cognisance, or management." *Stracey v. Nelson*, 12 Mee. & W. 535; 13 L. J. Ex. 97. Nor can the Commissioners of Sewers maintain an action of trespass against the commissioners of a harbour for breaking down a wall or dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as will enable them to maintain such action. *Newcastle (Duke) v. Clarke*, 2 Moore, 666.

[2] The commissioners are not liable for injury to the plaintiff's premises, unless neglect is clearly shown. *Grocers' Co. v. Donne*, 3 Bing. N. C. 34; 3 Scott, 356. And where the commissioners for the protection of lands, which it was their duty to protect, erected a groin, which had the effect of exposing adjoining lands to the inroads and force of the sea:—*Held*, that they were not liable to make compensation to such owners; but that, as against a common enemy, they must protect themselves. *Rex v. Commissioners of Pagham Sewers*, 8 B. & C. 355. So, contractors acting under the authority of the Metropolitan Commissioners of Sewers, and *bonâ fide* acting for the purpose of executing the 11 & 12 Vic. c. 112, by negligence injured the plaintiff's premises:—*Held*, that under sect. 128 they were exempted from all liability. *Ward v. Lee*, 7 E. & B. 426; 3 Jur. N. S. 557; 26 L. J. Q. B. 142.

By a local act commissioners were empowered to cause any "present or future sewers, ditches, &c., to be opened, altered, or cleansed;" and that in case any action should be brought against any person for anything done in pursuance of the act, the plaintiff should not recover if tender of amends should have been made by defendant before action brought; and in case of no such tender, that it should be lawful for the defendant, by leave of the court, to pay money into court; and if the matter should appear to have been done in pursuance of the act, and after sufficient satisfaction made or tendered, then that the jury should find for the defendant.

The commissioners, of whom the defendant was one, appointed a committee to inspect a ditch, with a view of widening the same, and to report thereon. The committee having reported thereon in favour of widening the ditch, the defendant took the plaintiff's land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the *bonâ fide* purpose of widening the drain. The defendant, before action, tendered 10*l.*, which the plaintiff refused: but no tender was pleaded, nor was the amount paid into court. The jury found the trespass, and that the damage amounted to 5*l.*:—*Held*, first, that although neither the defendant nor the commissioners were authorised to take plaintiff's land without his consent in writing, yet the defendant was entitled to the protection of the act. *Jones v. Gooday*, 9 Mee. & W. 736; 1 Dowl. N. S. 914:—*Held*, secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into court. (Id.)

The Commissioners of Sewers were the owners of, and had the control and repair of,

III. Presentments.[1]

an ancient, open, and unfenced sewer, which ran beside a public highway:—*Held*, that it was not the duty of the commissioners to fence the sewer, and that they were therefore not liable for an accident which happened from the want of a fence. *Cornwell v. Sewers* (*Metropolitan Commissioners*), 3 C. L. R. 417.

Where commissioners of sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they heaped rubbish, and a cabman, in the exercise of his calling, attempted to lead his horse over the rubbish, and the horse fell and was killed:—*Held*, that the plaintiff was not disentitled to recover, because he had at some hazard, created by the defendant, brought his horse out of the stable, and that the case was properly left to the jury on the question, whether or not the plaintiff had persisted, contrary to express warning at the time (as to which there was contradictory evidence), in running upon a great and obvious danger. *Clayards v. Dethick*, 12 Q. B. 439. But where bricklayers, employed by the Commissioners of Sewers to repair a public sewer, performed the work in such a manner as to occasion a damage to a neighbouring house:—*Held*, that they were liable to an action, although the work itself appeared to be performed in a skilful manner. *Jones v. Bird*, 1 D. & R. 497; S. C. 5 B. & A. 837.

[1] As to presentments, *see* 3 & 4 Wm. 4, c. 22, ss. 11, 12, 13, 17, 19, 46, and 12 & 13 Vic. c. 50, s. 6.

The jury ought to be summoned from the body of the county, and not from a particular district. *Birkitt v. Crosier*, 1 M. & M. 119. And a presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff at the commencement of every new commission of sewers, from certain parishes or districts, and only the foreman of whom was summoned by the sheriff on the particular occasion, who convened the other jurymen, is illegal and void, and the want of jurisdiction of such presenting jury cannot be waived by traversing their presentment, and going to trial upon another jury properly returned from the body of the county. *Rex v. Somerset*, 7 East, 71; 3 Smith, 105. See *Taylor v. Loft*, *infra*.

In *Rex v. Lewis* (W. W. & D. 60) a *certiorari* was granted to remove a presentment from before the Commissioners of Sewers in a case where the chairman confessed he was ignorant of the law applicable to the case. An objection to the jury is matter of plea in abatement, but no ground for quashing the presentment after verdict. *Reg. v. Participants of Hatfield*, 5 L. T. 181.

On a presentment to the commissioners, the party charged duly appeared in a court of sewers, and tendered his traverse in writing. The clerk to the commissioners (according to the alleged practice) filed a demurrer to this traverse, on the ground of informality. The party charged applied for leave to amend his traverse, which the court refused, and gave judgment against him on the demurrer. On this a rate was made. *Semble*, that the commissioners were wrong in admitting the demurrer to the traverse on the ground of informality; or, at all events, that they should have given the party leave to amend. *Reg. v. Tower Hamlets* (*Commissioners of Sewers*), 5 Q. B. 357. See *Taylor v. Loft*, 8 Ex. 269.

The confirmation of a special law of 1823, by an order of new commissioners in 1841, may render a presentment of 1819 operative and applicable to rates recently made. *Taylor v. Loft*, *supra*. *Semble*, that upon a representation of a change of circumstances arising since the presentment, it would be competent for the commissioners to inquire into the facts by a fresh presentment, the 17th sect. of the 3 & 4 Wm. 4, c. 22, being framed for that purpose (id.), and that it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of Calceworth. (Id.)

The commissioners can make no rate without a presentment. *Wingate v. Waite*, 6 Mee. & W. 739. If a person against whom a presentment is made by a court of sewers obtains a writ of *certiorari* to remove it into the Court of Queen's Bench, he must, before the allowance of the writ, enter into the recognisance required by the 5 & 6 Wm. 4, s. 33. *Reg. v. Baker*, 28 L. J. Q. B. 377; 7 W. R. 476; 32 L. T. 138.

Sect. 13 of 3 & 4 Wm. 4, c. 22, after reciting that doubts had arisen whether a presentment of a jury is not necessary on every occasion to repair defences within the jurisdiction of commissioners, enacts, "that whenever a jury shall have presented that any person, body politic, &c., is liable to repair or contribute to the repair of any defences, sea-walls, &c., within the jurisdiction of the commission, it shall not afterwards, during the continuance of the same commission, be necessary to obtain a presentment of a jury upon any subsequent want of reparation of the defences, walls, &c.; but such person, body politic, &c., so presented as aforesaid, and the owners and occupiers for the time being of lands, &c., shall be liable from time to time to repair such defences, walls, &c., according to such presentment; and it shall be lawful for the commissioners to decree, order, and direct the same to be repaired by such person, body politic, &c., during the continuance of such commission."

S. A., having been presented by a jury, to be liable to do certain repairs, it was held the section did not authorise the commissioners, during the continuance of the same commission, to make an order for the repairs upon a person who, it was alleged, had become owner of the lands since the presentment. *R. v. Warton*, *post*, p. 422.

IV. Rates.

(A) *Generally.*[1] (B) *Liability to.*[2]

It is questionable whether commissioners have jurisdiction to order repairs on the evidence of persons (neither of whom is their official surveyor) that the repairs are necessary, without the intervention of a jury, or a personal survey. *Reg. v. Warton*, 31 L. J. Q. B. 265.

[1] A sewers'-rate is not a parliamentary tax. *Palmer v. Earith*, 14 Mee. & W. 428; 14 L. J. Ex. 256. Nor can commissioners assess property out of their local jurisdiction. *R. v. Warner*, 27 L. J. M. C. 144; 4 Jur. 609. A return of the amount levied must be annually made to a secretary of state. 23 & 24 Vic. c. 51.

A. demised land to B. upon building lease, at the yearly rent of 60*l.*, clear of all rates and assessments, the sewers'-rate and land-tax only excepted, with the usual covenants for payment of rent; B. having, by building on the land, increased its rateable value to 800*l.* per annum:—*Held*, that he was only entitled to deduct the sewers'-rate and land-tax upon the original rent, and not in respect of the improved value. *Smith v. Humble*, 15 C. B. 321.

[2] All persons whose property derives any advantage from the works of the Commissioners of Sewers may be assessed to the sewers'-rate in respect of that property (*Soady v. Wilson*, 3 Ad. & E. 248. See *Netherton v. Ward*, 3 B. & A. 21. *Reg. v. Essex Commissioners*, 1 B. & C. 477), as well when the Crown is the owner as when it belongs to a subject. *Tracey v. Taylor*, 3 Q. B. 966; 3 Gale & D. 221. *Delanoy v. Cannon*, 10 East, 328. The benefit is not required to be immediate, nor do the cases on the commission itself, or the statutes, say anything of the nature or amount of the benefit. *Soady v. Wilson*, *supra*. See *St. Katherine Dock Co. v. Higgs*, 10 Q. B. 641. *R. Imperial Gas Co. post*, p. 423.

The Commissioners of Sewers cannot assess a person in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he be not, nor appears likely to be, benefited by the works done upon the sewers (*Masters v. Scroggs*, 3 M. & S. 447); and under the statutes of sewers, it is not alone sufficient, to justify an assessment to the rate, that the property should derive benefit from the drainage, but it is also essential that there should be an occupier of the property assessed. *Neave v. Wrather*, 7 Jur. 168; 12 L. J. Q. B. 32; 3 Gale & D. 221; 3 Q. B. 984. *Tracey v. Taylor*, 3 Q. B. 966; 3 Gale & D. 14; 7 Jur. 178; 12 L. J. Q. B. 26.

A clerk of the works of Chelsea Hospital dwelt in the hospital, in apartments in which he was permitted by the Commissioners of Woods, &c., to dwell, in respect of his office, and which were separately rated for the sewers by an undisputed rate. He was appointed by the Commissioners, and his duty was to see that the hospital was not out of repair, and, under their directions, to superintend any repairs of the buildings: he also superintended part of the land. The building and land received benefit from the sewers:—*Held*, that he was not an occupier of the land, or of any part of the building, except the apartments separately assigned to him (*Neave v. Wrather, supra*), and that he was not concluded from disputing his liability by a judgment of the Commissioners of Sewers, on a traverse by him before them of his liability to be rated. (Id.)—*Held*, also, that trespass would lie for a seizure of his goods, as a distress under the warrant of the commissioners to enforce a rate upon him in respect of the building and land which he did not occupy. (Id.) But a tenement in the king's dockyard deriving a benefit from public sewers, and occupied by an officer of government who pays no rent, is still liable to be rated to the sewers. *Netherton v. Ward, supra.*

Where a case stated that the bridewell or house of correction for the city and liberty of Westminster is a prison of our lady the queen, and is vested in the justices; that the part of the bridewell in question was merely used for the purpose of keeping prisoners therein, and that no persons resided therein except such prisoners, and the servants whose duty it was to guard and attend to the prisons:—*Held*, not liable to be assessed to the sewers'-rate. *Tracey v. Taylor, supra.* It is questionable whether a tithe rent-charge is liable to contribute to a sewers'-rate. *R. v. Goodchild*, 27 L. J. M. C. 251.

It is within the jurisdiction of the commissioners acting under the 3 & 4 Wm. 4, c. 42, to employ their clerk to oppose a bill in parliament at the costs of the commission. *Reg. v. Norfolk Commissioners of Sewers*, 15 Q. B. 549; 15 Jur. 121. An information of intrusion stated that the defendants intruded and made entry on a dwelling-house, parcel of the royal palace of Kensington, in the occupation of the queen, and which was in the possession of the queen in right of her crown. The defendants pleaded, in the form given by the 23 Hen. 8, c. 5, s. 11, that they committed the trespass under the authority of a commission of sewers for a tax assessed by the commissioners: — *Held*, on demurrer, that this form of plea was not allowable in such an information for intrusion. *Attorney-General v. Donaldson*, 10 Mee. & 117; 11 L.J.Ex. 338.

A distress cannot be levied for sewers'-rates within the precincts of a royal palace, occupied as the residence of the sovereign, and Kensington Palace is within this description. (Id.)

Commissioners of Sewers may make a rate to defray the expenses of works already done. And in order to justify such a rate, it is not necessary that there should have been a previous presentment by a jury of those

(C) *Apportionment.*[1]

(D) *Inspection of Rates.*[2]

V. Compensation for Injuries.[3]

VI. Duty and Liability to Cleanse and Repair.[4]

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works. It is no valid objection to such a rate that it is made to defray previous law expenses of the commission, *bonâ fide* incurred by the commissioners in the discharge of their duties; nor that the rate is, in the alternative, to defray the expenses of works done, or to be done; for the word *or* must read *and*. *Rex v. the Commissioners of Sewers for the Tower Hamlets*, 1 B. & Adol. 232.

A sewers'-rate, laid on an occupier by the Metropolitan Commissioners of Sewers, under the 11 & 12 Vic. c. 112, can be impeached only by appeal to the commissioners under sects. 95, 96. *Metropolitan Board of Works v. Vauxhall Bridge Co.* 7 El. & Bl. 964; 3 Jur. N. S. 1216; 26 L. J. Q. B. 253.

As to the liability of party using sewer to be assessed for new sewer for several districts, it appeared that, in the parish of H., four districts (M., M. S., H., and C.) were formed for the purpose of drainage under the Nuisances Removal Act, 1855. In the year 1855 sewers were made for draining the M. S. district, and the house of B. was assessed in respect of the expenses in making the sewers. B. compounded, and paid the sum at which he was charged. In the year 1856 the M. district was drained, and the result of the works made in the two districts was to increase a nuisance which before existed in the H. district. Accordingly, in 1859, it became necessary to make new sewers in that district, and that the four districts should be considered as one system. The works were made, and the house of B. was again assessed in respect of the expense of making the new works. It was held, the local authority had power to charge B., as his house might be said to use the sewer into which its refuse flowed, within the meaning of sect. 22 of 18 & 19 Vic. c. 121. *Reg. v. Bodkin and others, Justices of Middlesex*, 30 L. J. M. C. 38.

Fund primarily Liable to Expenses of Works. — Where sewers and works have been made by the local authority, under the powers given them by sect. 22 of 18 & 19 Vic. c. 121, they are bound to assess the houses, buildings, &c., using such sewers or works before they can resort to the highway-rates in the manner pointed out by sect. 7, in order to defray the expenses incurred. *Reg. v. Gosse and others, Justices of Sussex*, id. 41.

[1] The 3 & 4 Wm. 4, c. 22, s. 18, provides for the apportionment between an outgoing and incoming tenant. In assessing property to the rate under the Metropolis Act (18 & 19 Vic. c. 120, ss. 161, 163, 164), the old law must prevail, that property within the area benefited must contribute without reference to the amount of benefit at its full value, ascertained by the poor-rate. *R. v. Imperial Gas Co.* 32 L. J. M. C. 115.

[2] The Commissioners for the Tower Hamlets united two levels, which theretofore had separate drains and sewers, and had been separately rated, and then made a joint rate on the united levels. With the object of obtaining evidence in support of a motion to bring up the rate by *certiorari*, and quash it, an occupier of property within one of the levels applied to the commissioners for an inspection of all commissioners' plans, rates, presentments, &c., proceedings and minutes, relating to the Tower Hamlets. The commissioners gave inspection of all documents relating to the rates on the united level. A *mandamus* was refused to compel them to allow inspection of the other documents and proceedings. *Reg. v. Tower Hamlets (Commissioners of Sewers)*, 3 Gale & D. 92; 3 Q. B. 670; 6 Jur. 1059.

[3] By sect. 69 of the 11 & 12 Vic. c. 112, full compensation shall be made out of such rates as the commissioners shall direct, to all persons sustaining any damage by reason of the exercise of the powers of the act; and in case of dispute as to amount, the same shall be settled by arbitration. On *mandamus* to enforce the award of an arbitrator appointed by a party claiming compensation, the commissioners having failed to appoint one: — *Held*, that the mode of proceeding by arbitration was given by sect. 69, where the amount of compensation and not where the liability was disputed, and that, therefore, the award was invalid. *Reg. v. Sewers (Metropolitan Commissioners)*, 1 El. & Bl. 694; 17 Jur. 787; 22 L. J. Q. B. 234; 1 C. L. R. 46. *See ante*, p. 10.

[4] The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such. *Russell v. Shenton*, 3 Q. B. 449; 2 Gale & D. 573; 6 Jur. 1083.

A declaration alleged that it was the duty of the defendant, as owner and proprietor of drains and sewers in and upon premises belonging to the defendant, adjoining to the dwelling-house of the plaintiff, to have the same kept cleansed and repaired. *Breach*, that the defendant wrongfully suffered the drains and sewers to become foul, and in bad repair: — *Held* bad on general demurrer. (Id.)

If an owner of land, on which is a house, construct on the other part of the land a sewer, and let the house, and afterwards, by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed. *Alston v. Grant*, 3 El. & Bl. 128;

VII. User of Sewer.[1]

SHARES. *See* vol. v. p. 238; Shareholder, id.; and *post*, Stock-Broker and Stock Exchange.

SHEEP-Stealing. *See* Animals, vol. i. p. 358; Larceny, vol. v. p. 325.

SHELLY'S Case, Rule in.[2]

SHERIFFS.[3]

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II. Mode of Electing, and Fine for not Serving, p. 425.

III. Rights of Sheriff, p. 426.
- (A) *To Fees and Poundage*, p. 426.
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IV. Interpleader by Sheriff. *See* Interpleader Issue, vol. v. p. 228.

V. Duties of Sheriff as to Execution, and Return of Process, p. 427.
- (A) *In General*, p. 427.
- (B) *Imperative Duty to Execute*, p. 427.
- (C) *Mode of Executing*, p. 428.
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- (E) *Attachments.* *See* vol. i. p. 578.

V. Duties of Sheriff, &c. (*continued.*)
- (F) *Capias ad Respondendum.* *See* Arrest on Mesne Process, vol. i. p. 534; Bail Below, vol. ii. p. 75.
- (G) *Capias ad Satisfaciendum.* *See* vol. iii. p. 26.
- (H) *Elegit.* *See* vol. iv. p. 227.
- (I) *Extent.* *See* id. p. 414.
- (K) *Fieri Facias.* *See* id. p. 461.
- (L) *Habeas Corpus.* *See* id. p. 619.
- (M) *Habere Facias Possessionem.* *See* Ejectment, id. p. 179.
- (N) *Outlawry.* *See ante*, p. 27.

VI. Duties of the Sheriff at the Assizes, p. 428.

VII. Duties of Sheriff at Quarter Sessions. *See ante*, p. 296.

VIII. As to Juries. *See* Juror and Juries, vol. v. p. 279.

IX. As to Members of Parliament. *See* Elections, vol. iv. p. 202.

X. Coroner. *See* vol. iii. p. 257.

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2 C. L. R. 933; 18 Jur. 332; 23 L. J. Q. B. 163.

Declaration for keeping and continuing a sewer so improperly made and constructed that it burst, and thereby the plaintiff's cellar and goods therein were damaged. It appeared that the sewer was made by the defendant more than twenty years ago on his own land. In 1845, the defendant, who then owned and occupied all the adjoining premises, let a house, shop, and cellar to the plaintiff. The jury found that the sewer was not originally constructed with proper care and skill: — *Held*, that the action was maintainable, inasmuch as, upon the letting of the premises to the plaintiff, a duty arose which required the defendant to take care that that which was before rightful should not become wrongful, by reason of its being in derogation of his grant. (Id.)

[1] Lease of land by the plaintiff to the defendant, reserving to the plaintiff power to enter upon the land, and to dig and make a covered sewer and watercourse through it, in order to convey away any drainage from the plaintiff's premises. The plaintiff made a sewer accordingly; the defendant made a drain from his own premises, and carried it into the sewer: — *Held*, that the plaintiff was entitled to the exclusive use of the sewer, and that he could recover in an action against the defendant for so interfering with such exclusive use. *Lee v. Stevenson*, El. Bl. & El. 512.

[2] *Rule in Shelly's case.*—A rule propounded thus by Lord Coke:—That whenever a man, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word *heirs* is a word of limitation, and not of purchase. *Shelly's case*, 1 Co. 104, a. In other words, it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on the persons who may become his representatives (1 Steph. Com. 308); or, as may be more concisely expressed, the limitation to the heirs entitles the ancestor to the whole estate. Preston on Estates, 263; 4 Kent's Com. 215; Smith, R. & P. P. 151; Burton, s. 654.

Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming by its union with the estate for life one estate of inheritance in possession; but where such limitation and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of preceding mesne estate. *Doe v. Jones*, 1 B. & C. 243.

[3] From the Saxon *shire-reeve;* Lat. *vice-*

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(A) *In General*, p. 428.
(B) *For False Return.* *See* Execution, vol. iv. p. 359.
(C) *For Refusing to Accept Bail-Bond.* *See* Bail Below as to the Sheriff, vol. ii. p. 75.
(D) *For Refusing to Assign Bail-Bond.* *See* id. p. 77.
(E) *For an Escape.* *See* Capias ad Satisfaciendum, vol. iii. p. 26; Escape, vol. iv. p. 264.
(F) *For Extortion.* *See* vol. iv. p. 425.
(G) *For Amount Levied.* *See* Fieri Facias, vol. iv. p. 462.
(H) *For Invading a Franchise*, p. 428.
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XVIII. Liability of Sheriff as to Third Parties. *See* id.
XIX. Sheriffs' Accounts, p. 430.
XX. Writ of Inquiry Executed before. *See* Inquiry, vol. v. p. 162.
XXI. Trial before. *See post*, Trial.
XXII. Relief of in Adverse Claims. *See* Interpleader Issue, vol. v. p. 228.

I. Who may be Sheriff.[1]

II. Mode of Electing, and Fine for not Serving.[2]

comes; Fr. *viscount*. The chief civil officer in a county for the execution of the law and maintenance of the public peace. His powers now are principally ministerial. See Impey on Sheriff; Watson, id.; Atkinson, id.

[1] The statutes made 9 Edw. 2, *De Vice Commitibus*; 2 Edw. 3, c. 4; 4 Edw. 3, c. 9; and 5 Edw. 3, c. 4, have ordained that no man shall be sheriff in any county except he have sufficient land within the same county where he shall be sheriff whereof to answer the king and his people in case any man shall complain against him. At the present time the most opulent and respectable commoners in each county fill the office of sheriff. 1 Bl. Com. 346.

By stat. 9 Edw. 2, Lincoln, it is enacted, that no steward or bailiff to any great lord be made sheriff (except he be put forth of service); but such persons only shall be appointed as may wholly attend to the king and his people.

By the stat. 1 Rich. 2, c. 11, it is ordained, that none that hath been sheriff of any county by a whole year, shall be within three years next ensuing chosen again or put in the same office of sheriff, if there be other sufficient in the said county of possessions and goods to answer to the king and to his people. *Rex v. Woodrow*, 2 T. R. 731.

And by the stat. 23 Hen. 6, c. 8, whosoever shall take upon himself to have or occupy the office of sheriff, by any grant or patent, thereafter to be made for years, life, in fee, or in tail, shall stand for ever and at all times be disabled to be or bear the office of sheriff within any county of England, and liable to forfeit 200*l*. As the king has an interest in every subject, and a right to his service, no man can be exempt from the office of sheriff but by act of parliament or letters patent (*Earl of Shrewsbury's case*, 9 Rep. 46; Moor, 111; Saville, 43); but if a man is disabled by judgment to bear an office he is excused *nam judicium redditur in invitum*. *Rex v. Larwood*, 1 Salk. 169; 4 Neod. 273. Yet where he may remove the disability, he shall take no advantage of his disability. *Attorney-General v. Read*, 2 Mod. 299.

By 2 Geo. 3, c. 20, formerly no militia officer, during the time he was acting, was obliged to serve; but this is now repealed by 2 & 3 Vic. c. 59.

An attorney in practice is exempt (*Mayor of Norwich v. Berry*, 4 Burr. 2114); but not a barrister, though if he be in actual practice such fact might be allowed to be a good excuse with the judges and great officers of state. (Id.)

Members of Parliament are exempt. Atkinson on Sheriff Law, 13.

[2] Anciently sheriffs were chosen by the respective counties. By the stat 28 Edw. 1, cc. 8, 13, the people shall have the election of sheriffs in every shire when the shrievalty is not of inheritance. But the custom has been, at least, ever since Henry the Sixth, that all the judges, together with all the great officers and privy councillors, meet in the Exchequer, the morrow of All Souls (yearly), which day is now altered by 24 Geo. 2, c. 48, s. 12, to the morrow of St. Martin, and then and there the judges propose three persons to be reported, if approved of, to the queen, who afterwards appoints one of them sheriff. 1 Bl. Com. 340.

The sheriff of Durham is not appointed

III. Rights of Sheriff.

(A) *To Fees and Poundage.* *See* Execution, vol. iv. p. 355.
(B) „ *hold other Offices.*[1]
(C) „ *maintain Actions.*[2]
(D) *Against the Plaintiff in a Cause.*[3]

annually, but is appointed by the bishop during his pleasure; the power of appointing the sheriff of that county being claimed by the bishop by prescription.

The city of London claims by prescription the right to elect two sheriffs for the city. These are two officers, and are styled the Sheriffs of London. And by a charter of Hen. I., confirmed by King John, the shrievalty of Middlesex was granted to the citizens of London, with all customs belonging both within the city and without. The sheriffs of London are always sheriffs of Middlesex; but in Middlesex the two persons are styled sheriff; and although the same persons are sheriffs of Middlesex and sheriffs of London, yet, as sheriffs of London, on a writ directed to them, they have no authority to execute it in Middlesex, and so *e converso*. *Hammond v. Taylor*, 3 B. & A. 408.

The lord mayor may nominate to the Court of Aldermen, between the 14th of April and the 14th of June, in every year, one or more fit persons (not exceeding nine) being free of the city, to be publicly put in nomination; also any two or more liverymen at the day of election may nominate any freeman of the city as a proper person to be elected. Any person nominated by the lord mayor may discharge himself from such nomination and the serving of the office of sheriff for ever, unless he becomes an alderman, by paying, after six days' notice, 400*l.* and twenty marks to the chamberlain for certain purposes by that act of council declared.

Any person who has paid the fine, unless he afterwards become an alderman, is exempt from serving the office; and no person who has once served the office of sheriff of London or sheriff of Middlesex is again eligible.

By 22 & 23 Vic. c. 21, s. 42, the Crown's approval of the election of the sheriffs of London and Middlesex is to be signified by warrant under the great seal of the Exchequer, instead of their attending in the court of Exchequer as heretofore.

The nomination of the sheriffs for Wales is now vested in the judges and barons of the courts of Queen's Bench, Common Pleas, and Exchequer. 1 Wm. 4, c. 70, ss. 13, 31.

In case of the death of a sheriff the queen, by her prerogative, appoints the succeeding sheriff; but whether she can appoint one not on the nomination-list is a *vexata quæstio*. Dyer, 225; Jenk. 229; Dalt. 6.

In the city of Oxford, Berwick-upon-Tweed, Bristol, Canterbury, Chester, Coventry, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, York, Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council (that is, the mayor, aldermen, and councillors), are, on the ninth day of November in every year, at the quarterly meeting of the council, and immediately after the election of the mayor, to appoint a fit person to execute the office of sheriff. 5 & 6 Wm. 4, c. 76, s. 61, amended by 6 & 7 Wm. 4, c. 105, s. 5. The 8 & 9 Vic. c. 11, assimilates the appointer in Wales to those in England, and the appointer for Westmoreland is now vested in the Crown. 12 & 13 id. 42; 13 & 14 id. 30.

The nomination-list being complete, it is submitted to her majesty, who, taking a pin, lets it fall on one of the three names, and the person on whose name it chances to fall is the sheriff appointed. This operation is called "pricking for sheriffs."

By the 3 & 4 Wm. 4, c. 99, s. 3, a warrant in the form therein prescribed is made out and signed by the clerk of the Privy Council, and transmitted to the person appointed, who, on taking the oath of office as mentioned in the act, becomes entitled to exercise all the powers, &c., usually exercised and enjoyed by sheriffs.

Within six months from his election the sheriff is also to take the oaths of allegiance, supremacy, and abjuration (Atkinson on Sheriff Law, p. 20), except in the case of a Roman Catholic; when, in lieu of such oaths, he takes the one provided by the 10 Geo. 4, c. 7. If a person refuses to take the oaths he may be proceeded against by criminal information in the court of Queen's Bench. Dalt. 15. *Rex v. Woodrow*, 2 T. R. 713. A refusal to take the oaths is a refusal to serve the office. *Star v. Mayor of Exeter*, 3 Lev. 116.

[1] By the stat. 1 Mary 2, c. 8, s. 2, sheriffs are disqualified from acting as justices of the peace during the continuance of their office, and all acts done by them as justices of the peace are void. And it is holden, that the sheriff cannot be elected a knight of the shire for the county of which he is sheriff. 4 Inst. 48; Litt. Rep. 326.

[2] Any one having a *special* property in goods may support trover against a wrongdoer; so may a sheriff for goods seized under a *fi. fa.*, provided they are at the time of the conversion in his actual possession: if he abandons possession, the property and possession revert back to the original owner. 1 Vent. 52; 6 Mod. 292; 2 Saund. 47. *Blades v. Arundale*, 1 M. & S. 711. *See post*, Special Property, p. 474.

[3] Where the sheriff, upon the representation of the execution-creditor, took the goods of a stranger in execution, and afterwards was sued by him, and paid damages: —*Held*, that he was entitled to recover them

(E) *To Sue on Bond of Indemnity.*[1]

(F) „ *Retake in case of Escape.*[2]

V. Duties of Sheriff as to Execution, and Return of Process.

(A) *In General.*[3]

(B) *Imperative Duty to Execute.*[4]

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against the original plaintiff, and affirmed in Dom. Proc. *Humphreys v. Pratt*, Dom. Proc. 2 Dow & Clark, 288. But where the attorney of an execution-creditor in an action against W. F. caused a *fi. fa.* to be issued, and indorsed on the writ, "the defendant is a ——, and resides at Redcar;" the writ was delivered to the sheriff, who executed it against W. F., who resided at Redcar, and was son of the real defendant W. F., who resided at Coatham, near Redcar. The attorney and the sheriff both acted *bonâ fide:* —*Held*, that the indorsement on the writ was a mere statement by the attorney of the execution-creditor for the purpose of affording information to the sheriff, and left him to his own discretion as to how he should act, and that it was not a requirement to the sheriff which made him the agent of the attorney for the purpose of seizing the goods of the son. *Childers v. Wooler*, 6 Jur. N. S. 444; 29 L. J. Q. B. 129; 8 W. R. 321; 2 L. T. (N. S.) 49.

[1] The sheriff can also sue on a bond of indemnity given under the 1 & 2 Vic. c. 110, s. 12. It would also seem that a bond to the sheriff to pay the money into court at the return of the *fi. fa.*, or to indemnify the sheriff from any proceedings for his return to the writ, though a false return (1 Saund. 161, n. *Wright v. Lord Verney*, 3 Dougl. 240), or for any irregularity in executing it (*Rogers v. Reeves*, 1 T. R. 421), is valid, notwithstanding the statute (23 Hen. 6, c. 9) relative to bonds to sheriffs. See *Cubitt v. Thompson*, 5 Ex. 811; 20 L. J. Ex. 49.

Where an indemnity bond had been fraudulently obtained by the sheriff's officer: —*Held*, that it formed a good plea to an action on the bond by the sheriff. *Raphael v. Goodman*, 3 Nev. & P. 547.

[2] *See* Capias ad Satisfaciendum, vol. iii. p. 26; Escape, vol. iv. p. 263. If the escape be negligent, the sheriff may make fresh pursuit and retake the defendant (*Jones v. Pope*, 1 Saund. 35. *Filewood v. Clement*, 6 Dowl. 508), even on a Sunday (6 Mod. 231, 95; Barnes, 373. *Atkinson v. Jameson*, 3 T. R. 25), and even though defendant have been declared a bankrupt after his escape, and have obtained his protection from arrest. *Anderson v. Hampton*, 1 B. & A. 308. But if the escape be voluntary on the part of the sheriff, though by mistake, he can never retake the prisoner. *Filewood v. Clement, supra. Vintner v. Allen*, Carth. 212. *Ravenscroft v. Eyles*, 2 Wils. 295.

[3] 1st. He is the keeper of the queen's peace within the county, both by the common law and by special commission, and as such he is the highest officer in the county. Roll. Rep. 337. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it, and may bind any one in a recognisance to keep the queen's peace. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and rioters. He has also the custody and safe-keeping of the county gaol: he is to defend the same against rioters, and for this purpose, as well as for taking rioters and others breaking the peace, he may command all the people of his county to attend him, which is called the *posse comitatus*, or power of the county, and upon this summons every person above fifteen years old, and under the degree of a peer, is bound to attend, upon warning, under the pain of fine and imprisonment. *See* stat. 2 Hen. 5, c. 8.

2ndly. In his ministerial capacity the sheriff is bound to execute, within his county or bailiwick, all processes issuing from the queen's superior courts of justice. On mesne process he is to execute the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury, and when it is determined he must execute the judgment of the court. In criminal matters he also arrests and imprisons; he returns the jury: he has the custody of the delinquent; and he executes the sentence of the court, though it extends to death itself. Bl. Com. 444.

3dly. As the queen's bailiff, he must seize into the queen's hands all lands devolved to the Crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the queen's rents within his bailiwick, if commanded by process out of the Exchequer. Dalt. c. 9.

4thly. In his judicial capacity he was to hear and determine all causes of 40*s.* value and under, by plaint, or to any amount by writ of justices in his county court, and also to make, hear, and determine replevins and other suits in his county court. This duty, however, is entirely superseded by the courts established under the county-court acts. *See* County Courts, vol. iii. p. 330; and 19 & 20 Vic. c. 108, s. 63.

The sheriff has no power or authority out of his county, excepting where he is commanded by a writ of *habeas corpus* to convey a prisoner out of his county. So, he may do mere ministerial acts out of his county; as, making a panel, or any return (Dalt. 22); or assigning a bail-bond (*Gregson v. Heather*, 2 Ld. Raym. 1455; S. C. 2 Stra. 727; but it is said, that if the sheriff make a panel, or a return, when he is out of England, it is void, for he is an officer only in England.

[4] The sheriff is bound to execute all

(C) *Mode of Executing.*[1]

(D) *As to the Return to.*[2]

VI. Duties of the Sheriff at the Assizes.[3]

XI. Liabilities of Sheriff.

(A) *In General.*[4]

(H) *For Invading a Franchise.*[5]

(I) *For not Arresting when there was an Opportunity.*[6]

XII. Officers of the Sheriff.

(A) *Under-Sheriff.*[7]

(B) *Deputy.*[8]

(C) *Sheriff's Officers or Bailiffs.*[9]

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process without inquiry into its sufficiency; for he is a ministerial officer in the execution of writs, and is not to inquire into their legality. *Parsons v. Lloyd*, 3 Wils. 341; 2 Saund. 100. So, in an action for a false return, he cannot show that the writ was erroneously awarded. 6 Rep. 176, 54. But *aliter* where there is a total want of jurisdiction in the court; for the sheriff, in executing a process of a court not having jurisdiction over the cause, would be a trespasser. 10 Rep. 76.

[1] *See* Capias ad Satisfaciendum, vol. iii. p. 26; Elegit, vol. iv. p. 227; Execution, id. p. 354; Fieri Facias, id. p. 456.

[2] *See* Capias ad Satisfaciendum, vol. iii. p. 26; Execution, vol. iv. 358; Fieri Facias, id. p. 461.

[3] The sheriff's duty before and at the assizes consists of — 1st. Proclaiming the assize. 2dly. The summoning of the different juries, viz. the grand jury, the nisi prius jury, the crown jury, and also the special juries, if any, and granting views. 3dly. Making his returns to the assize precepts. 4thly. To make and deliver a list of the prisoners to the judges, and to attend the judges, provide lodgings, &c. The sheriff, as well as his under-sheriff, must be in constant attendance on the judges during the whole of the assizes.

[4] All actions for breach of duty in the office of sheriff must be brought against the high sheriff, though the default be committed by his officers. *Cameron v. Reynolds*, Cowp. 403. *Saunderson v. Baker*, 3 Wils. 317. But to charge him, he must be acting in a ministerial and not a judicial capacity (*Metcalfe v. Hodgson*, Hutt. 120), and his officer must be acting under his authority, express or implied. *Tinsley v. Nassau*, M. & M. 52; 2 C. & P. 582.

[5] The sheriff is bound to take notice of all the liberties within his county; and if he were to infringe on any of them, he would subject himself to an action by the owner of the franchise. *Boothman v. Earl of Surrey*, 2 T. R. 10.

[6] It is obligatory on the sheriff to execute process in the most effectual way. *Beckford v. Montague*, 2 Esp. 475. If he, therefore, have an opportunity of arresting the defendant, and neglect to do so, an action can be maintained against him; and express notice to the sheriff of defendant being in his bailiwick need not be shown. *Mason v. Paynter*, 1 Q. B. 974. *Hereford v. M'Namara*, 5 D. & R. 97. *Dyke v. Duke*, 1 Arn. 14. *Gibbon v. Coggon*, 2 Camp. 189. The sheriff is supposed to know every inhabitant in his bailiwick. 1 Arn. 13.

[7] By 3 & 4 Wm. 4, c. 99, s. 5, the sheriff must, within one month, appoint an under-sheriff, and transmit a duplicate of the appointment to the clerk of the peace. See *Williams v. Thomas*, 4 Ex. 479. The under-sheriff may be an attorney in practice, but he may not practise as such at any general or quarter sessions within the county, under a penalty of 50*l.* 22 Geo. 2, c. 46. The office may not be purchased. 3 Geo. 1, c. 15, s. 10.

[8] By 3 & 4 Wm. 4, c. 42, s. 20, it is enacted, "that from and after the 1st of June, 1833, the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff." Any negligence by the sheriff in omitting to appoint a deputy according to this act, would subject him to an action, if a party sustained damage thereby. *Brackenbury v. Laurie*, 3 Dowl. 180. A delivery of a writ to this deputy in London is a delivery to the sheriff; and in the case of a writ of *fi. fa.*, such delivery binds the goods of the defendant. *Harris v. Lloyd*, 5 Mee. & W. 436. *Woodland v. Fuller*, 11 Ad. & E. 859; 3 Per. & D. 570.

[9] The sheriff also appoints officers and bailiffs for the execution of writs directed to him; and as a security for their due performance of their office, and to indemnify him from any loss arising from their breach of it, he takes from them a bond with sure-

(D) *Liability of Sheriff for Acts of his Officers.*[1]

XIII. Special Bailiffs.[2]

(A) *Sheriff not Liable to Party appointing for Acts of.*[3]

XIV. Summary Power of Court over Sheriff.[4]

XVI. Old and New Sheriff.[5]

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ties. These officers are in no respect officers of the courts, and are not subject to the jurisdiction of the courts, as such, upon their undertakings, or otherwise (*Brown v. Gerrard*, 3 Dowl. 217; 1 C., M. & R. 595. *Harding v. Hall*, 10 Mee. & W. 42); though for extortion they may be so, under the 7 Wm. 4 & 1 Vic. c. 55.

[1] The sheriff is liable civilly for the tortious act, default, or misconduct, whether it be wilful or inadvertent, of his undersheriff or bailiff, where he is acting ministerially (*Pitcher v. King*, 9 Ad. & E. 288; 1 Per. & D. 297. *Brown v. Copley*, 2 D. & L. 332; 1 Scott, N. R. 350) in the course of the execution of their duties. *Woodgate v. Knatchbull*, 2 T. R. 151. *Peshall v. Layton*, id. 712. *Sturmy v. Smith*, 11 East, 25. *Crowder v. Long*, 8 B. & C. 602; 3 M. & R. 17. *Willett v. Sparrow*, 6 Taunt. 576. *Harding v. Hall*, 10 Mee. & W. 42. *Raphael v. Goodman*, 8 Ad. & E. 565. *Scarfe v. Halifax*, 7 Mee. & W. 290. *Wood v. Finnis*, 21 L. J. Ex. 138. Upon this principle the sheriff cannot recover upon a bond obtained by the fraud of his officer. *Raphael v. Goodman*, *supra*. So the sheriff is liable if the officer take a person in custody under a *fi. fa.* *Smart v. Hutton*, 8 Ad. & E. 568. *Wood v. Finnis*, *supra*. *Gregory v. Cotterell*, 5 E. & B. 571; 25 L. J. Q. B. 33. But if the act complained of be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority, the sheriff is not responsible. *Cook v. Palmer*, 6 B. & C. 739. *Crowder v. Long*, 8 id. 598. *Tompkinson v. Russell*, 9 Price, 287. *Bowden v. Waithman*, 5 Moore, 183. *Stewart v. Whittaker*, 1 R. & M. 310. Therefore, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment-debtor is in his custody, he will not be liable if his bailiff receives the amount of such debt from the debtor and misappropriates it, or neglects to pay it within a reasonable time to the creditor. *Wood v. Finnis*, *supra*. If an execution-creditor induce the bailiff to depart from the ordinary course of his duty, without the sheriff's knowledge (*Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723. *Crowder v. Long*, 8 id. 598; 3 M. & R. 17), or collude with the officer (*Raphael v. Goodman*, *supra*. *Crowder v. Long*, *supra*), it is not competent to such execution-creditor to fix the sheriff for the consequences.

[2] The sheriff, as he may do, at the request of the party suing out the writ, or his attorney, sometimes appoints a particular party to execute it. *Foster v. Blakelock*, 5 B. & C. 328. As to what amounts to a special bailiff, see *Ford v. Leche*, 1 Nev. & P. 737. *Balson v. Meggatt*, 4 Dowl. 557. *Doe v. Trye*, 7 Scott, 704. *Corbet v. Brown*, 6 Dowl. 794.

[3] The sheriff is not liable to a party appointing a special bailiff for the acts of that officer (*Ford v. Leche*, *supra*. *Taylor v. Richardson*, 8 T. R. 505); and such party cannot even rule the sheriff to return the writ, unless it be for the purpose of enabling him to issue other process. *Harding v. Holder*, 9 Dowl. 659. *Demoranda v. Dunkin*, 4 T.R.119. *Beckford v. Welby*, 2 Esp.591.

[4] The sheriff being an officer of the court, the court has power to punish him by attachment if he misbehave himself in his office. And it has been held, that the court has jurisdiction over him in respect of writs executed by him, notwithstanding his office has been abolished by act of parliament. *Warner v. Powell*, 2 Dowl. N. S. 531. But the officers of the sheriff are not, as we have seen, the officers of the court, nor punishable as such. But by statutes and rules of court the officers as well as the sheriffs are, in some instances, punishable by the court for misconduct. *See* 7 Wm. 4, and 1 Vic. c. 55, s. 3.

[5] By 3 & 4 Wm. 4, c. 99, s. 7, "every sheriff, &c. shall, at the expiration of his office, make out and deliver to the new or incoming sheriff a true and correct list and account, under his hand, of all prisoners in his custody, and of all writs and other process in his hands not wholly executed by him, with all such particulars as shall be necessary to explain to the said incoming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and transfer to the care and custody of the said incoming sheriff all such prisoners, writs, and process, and all records, books, and matters appertaining to the said office of sheriff; and the said incoming sheriff shall thereupon sign and give a duplicate of such list and accounts to the sheriff going out of office, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned and transferred to the said incoming sheriff, and the further charge of the execution of the writs, process, and other matters therein contained, without any writ of discharge or other writ whatsoever; and the said incoming sheriff shall thereupon stand and be charged with the said prisoners, and also with the execution and care of the said writs, process, and other matters contained in the said list and account," &c. Thus it will be seen that the old sheriff is not discharged, nor the new sheriff charged, till the receipt of the

XIX. Sheriffs' Accounts.[1]

SHIFTING Use.[2]

SHIP and SHIPPING.[3]

See also Average, vol. ii. p. 70; Bill of Lading, id. p. 490; Capture, vol. iii. p. 28; Charter-Party, id. p. 79; Demurrage, vol. iv. p. 36; Docks, vol. v. p. 526; Freight, vol. iv. p. 522; Harbour, vol. v. p. 16; Insurance, id. p. 179; Negligence, id. p. 524; Pilot, *ante*, p. 132; Respondentia, *ante*, p. 337; *post*, Stoppage in Transitu; Wharf.

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See Certificate of, *infra*.

warrant of appointment by the incoming sheriff, and the delivery to the outgoing sheriff of the signed duplicate list and account mentioned in the above section.

The new sheriff is not amenable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by the indenture. *Davidson v. Seymour*, 1 M. & M. 34. And writs wholly executed ought not to be transferred to the new sheriff, under 3 & 4 Wm. 4, c. 99, s. 7. And it has been held, that the balance of the proceeds of an execution constitutes a debt from the former sheriff to the debtor; and that the defendant (the new sheriff) was not rendered liable by having employed the same under-sheriff. *Harrison v. Paynter*, 8 Dowl. P. C. 349. Where the old sheriff, not having sold goods seized, is distrained upon, and a motion made to increase issues, the court will allow it to be for the whole amount, and further to cover the costs of such a rule the application is absolute in the first instance. *Nowell v. Underwood*, 5 id. 229. In an action against the late sheriff, the court, upon an affidavit of his being abroad, and the period of his return doubtful, allowed service of process upon his late under-sheriff to be good service upon him. *Batchelor v. Vyse*, 2 M. & Scott, 171. But the new sheriff would, it seems, be liable to an action for an escape of a party, if he became sheriff on the death of his predecessor; he is bound, at his peril, to take notice of all the executions against any persons whom he finds in the gaols. *Westby's case*, 3 Russ. 72, b; Cro. Eliz. 366.

[1] By 22 & 23 Vic. c. 21, s. 28, sect. 3 of 3 & 4 Wm. 4, c. 99, which requires sheriffs' accounts to be audited by commissioners of audit, is repealed, and in future they are to be audited by such persons and in such manner as the Commissioners of the Treasury may direct; and by sect. 29, they are to be transmitted to the Commissioners of the Treasury for that purpose.

[2] A use which is made to shift or change from one person to another by matter *ex post facto* ("of after occurrence"), as if an estate be limited to the use of A. and his heirs, with proviso that when B. returns from Rome the land shall be to the use of C. and his heirs, here, on the return of B., the use changes or shifts from A. to C., and is hence called a shifting use. *See* 1 Steph. Com. 503. These shifting uses are common in all settlements; and in marriage settlement, the first use is always to the owners in fee till the marriage, and then to other uses. The fee remains with the owner until the marriage, and then it shifts as uses arise. 4 Kent's Com. 297.

[3] *See* Abbott on Shipping, by Shee, MacLachlen, Maude, and Pollock; Atkinson's Shipping Laws; Dowdeswell's Merchant Shipping Acts; Wilkinson on the Building, Registry, and Sale, &c. of Ships; Greenhow's Shipping-Law Manual.

"Ship," in its general sense, as used in maritime law, is synonymous with "vessel," and is a generic term including all vessels. By the stat. 5 & 6 Wm. 4, the term "ship" is declared to comprehend every description of vessel navigating on the sea. In a stricter sense, a vessel with three complete masts, viz. lower, top, and top-gallant masts. Brande.

If a ship be sold with the tackle, apparel, furniture, and other instruments thereto belonging, the ship's boat is not conveyed by these words; and this is founded upon the authority of those parts of the Digest in which it is said that the boat is not part of the ship (Dig. 21, 2, 44; Dig. 6, 3, 1), or of its apparel. Roccus, n. 20; Str. de Nav. p. 2, n. 12; Molloy de Jure, M. & N. b. ii. c. 1, s. 8. The latter adds, that if a ship commit piracy the boat is not forfeited, and refers to a case in Roll's Ab. for his authority. Abbott on Shipping.

The law principally regulating the shipping interests is embodied in the Merchant Shipping Act, 1854 (17 & 18 Vic. c. 104), which came into operation 1st May, 1855; amended act (1855), 18 & 19 id. c. 91; further amended act (1862), 25 & 26 id. c. 63, came into operation 29th July, 1862; Pilotage, 16 & 17 id. c. 129; Coasting-trade, 17 & 18 id. c. 5; Lighthouses, 18 & 19 id. c. 91; Bills of Lading, id. c. 111 (1855); Passengers by Sea, id. c. 119, amended by 26 & 27 id. c. 90; Salvage and Wreck, 17 & 18 id. c. 104, and 25 & 26 id. c. 65; Lights, Rules of Navigation, &c., 25 & 26 Vic. c. 63, High Court of Admiralty, 24 id. c. 10.

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I. Characteristics of British Ships, and Ownership.

(A) *Characteristics of British Ships.*[1]

(B) *Who may be Owners.*[2]

[1] The term "British ship" formerly meant a ship which was registered and navigated according to the British registry enactments. The Navigation Acts having been repealed, the term now merely imports a ship belonging to persons entitled by statute to own British ships, and which is registered according to existing law.

The privilege of a British ship formerly conferred the exclusive right to import from foreign countries into this a vast variety of articles, except under peculiar conditions, as well as the whole coasting trade. But recently, so far as the foreign trade is concerned, they have been entirely abrogated by stat. 12 & 13 Vic. c. 29, superseding 8 & 9 Vic. c. 88; and as to the coasting trade, by stat. 17 & 18 Vic. c. 5. The right to assume the national flag and character, and the protection this affords, are the only peculiar privileges which a British ship now enjoys.

The Crown has power under sects. 324 and 325 of 16 & 17 Vic. c. 107, to issue orders in council in particular cases. M. & P. on Shipping, p. 2.

The proof of ownership is by the production of the register, or a copy, and by evidence of acts of ownership, or directions and interference with respect to the employment and concerns of the ship.

[2] By sect. 18 of 17 Vic. c. 104, part ii. (1st May, 1855), no ship shall be deemed a British ship unless she belongs wholly to owners of the following description: (that is to say):—

1. Natural-born subjects: provided that no natural-born subject who has taken the oath of allegiance to a foreign sovereign or state shall be entitled to be an owner, unless subsequently to taking the oath of alle-

(C) *How many may be Owners.*[1]

(D) „ *Ownership acquired.*

(*a*) *In General, by Building, &c.*[2]

(*b*) *By Sale and Delivery.*[3]

giance to her majesty, and is and continues during the whole period of his being owner, resident in some place within the British dominions; or if not so resident, member of a British factory, or partner in a house actually carrying on business in the United Kingdom, or in some other place within the British dominions.

2. Persons made denizen by letter of denization, or naturalized: provided that such persons are, and continue to be during the whole period of their being owners, resident in some place within the British dominions; or if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom, or in some other place within the British dominions, and have taken the oath of allegiance subsequently to their denization or naturalisation.

And 3. Bodies corporate established under the 8 & 9 Vic. c. 89, s. 12. *See* 17 & 18 id. c. 120. A corporation within the United Kingdom, some members of which were foreigners and persons residing abroad, might register ships which were the property of such corporation. *Reg. v. Arnaud*, 9 Q. B. 806; 11 Jur. 279; 16 L. J. Q. B. 50.

[1] By sect. 37 of 17 & 18 Vic. c. 104, the property in a ship shall be divided into sixty-four shares, subject to the provisions with respect to joint-owners or owners by transmission hereinafter contained: not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship: but this rule shall not affect the beneficial title of any number of persons, or of any company represented by or claiming under or through any registered owner or joint-owner. No person shall be entitled to be registered as owner of any fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint-owners of a ship, or of a share or shares therein.

These rules are subject to the provisions as to joint-owners and owners by transmission, and do not affect the beneficial title of any number of persons, or of companies represented by, or claiming under registered owners or joint-owners, and bodies corporate may be registered by their corporate name.

By sect. 100, all persons beneficially interested (not as mortgagees), whose names are not on the register, are made liable to all penalties to which owners are rendered, subject to the laws of, and having their principal place of business in, the United Kingdom, or some British possession.

The 8 & 9 Vic. c. 89, which contained nearly similar provisions, is repealed by 17 & 18 Vic. c. 120.

[2] One or more persons may acquire the property of a ship by building it at their expense, or by purchasing it, or by capture and condemnation. Upon the death of the owner his interest devolves upon his personal representatives; in the event of his bankruptcy it rests in his assignees. Although a sale of other chattels by the person who is in possession of them does in many cases vest the property in the buyers, even when the seller himself has neither property in them nor authority to dispose of them, this cannot take place with respect to ships (see *Dyer v. Pearson*, 3 B. & C. 42), as there is no open market for the sale of them.

[3] There being no market overt for ships (*see* vol. v. p. 442), a sale to confer a valid title must be from one who has a legal title, independently of the Registry Acts.

Ships exempt from registration may be sold and transferred, like any other chattel, by a verbal or written bargain and sale. (*Benyon v. Cresswell*, 12 Q. B. 899), though they be actually registered, or shall not be entitled to registry by reason of their being owned by foreigners, or persons not qualified to own British ships. The validity of the sale of a foreign vessel in a foreign country must depend upon its local laws, but if it were made in England there is no regulation in our law which positively requires that it should either be under seal, or even in writing, if there were a delivery or part payment. *Atkinson v. Maling*, 2 T. R. 462. The property in a ship would pass, though there were no actual or symbolical delivery of possession. Hence, in the case of an unregistered ship, and under certain circumstances, as will presently be observed in the case of a registered ship, upon the delivery of a bill of sale, the legal title to her becomes vested in the transferee.

The 8 & 9 Vic. c. 89, ss. 37–40 (applicable to ships conveyed anterior to 1st May, 1855), required that the transfer between British subjects of any registered vessel should be by bill of sale, or other instrument in writing, containing a recital of the certificate of registry, or its principal contents, otherwise it should not be valid at law or in equity. See *Duncan v. Tindal*, 13 C. B. 258. *M'Calmont v. Raskin*, 8 Hare, 1; 22 L. J. Ch. 564.

The 17 & 18 Vic. c. 104, s. 45 (applying to transfers since 1st May, 1855), directs, that every transfer of a registered ship to a person qualified to be an owner of a British ship shall be by bill of sale, according to a prescribed form, under seal, which specifies the number and date of the registry, the name, build, port, and nature of the ship,

(*c*) *By Mortgage.*[1]

with her full description and tonnage. This is to be executed in the presence of, and attested by, at least one witness.

Before he can be registered, each transferee must make a declaration in a prescribed form (*see* sched. F), corresponding in all material points with that to be made by an original owner; and if the purchaser be a corporation, a similar declaration is to be made by its secretary, as officer, as upon an original registry. (Sect. 56.) The bill of sale, together with the declaration, is to be produced. (Sect. 57.) In case of change of ownership the master is also required to produce the certificate of registry to the registrar of her port, or the next port she touches at, who is to indorse the change upon it. (S.45.) Dowdeswell, Shipping Acts.

When a ship is here, and a delivery of actual possession is possible, such delivery seems necessary to give a perfect title to the buyer, in case of a sale of the whole ship; for although, as between buyer and seller, the sale may be completed by a compliance with the provisions of the Registry Act, and payment of the price, without delivery of possession, yet if the buyer suffer the seller to remain in possession, and act as owner, and the seller in the meantime become bankrupt, the property, it seems, will be considered as remaining in him, to be disposed of for the benefit of his creditors, under the order and disposition clauses in 12 & 13 Vic. c. 106, s. 125 (vol. ii. p. 223). And where a ship was in the process of building, and by piecemeal, so to speak, vested in A., it was held that it did not pass to the builder's assignees, he having become bankrupt before the whole was completed. *Woods v. Russell*, 5 B. & A. 946. *Clarke v. Spence*, 4 Ad. & E. 465. *Goss v. Quinton*, 4 Scott, N. C. 482.

By 25 & 26 Vic. c. 63, s. 3, it is declared that the expression, "beneficial interest," whenever used in the second part of the principal act (17 & 18 Vic.), includes interests arising under contract and other equitable interests; and the intention of the said act is, that without prejudice to the provisions contained in the said act for preventing notice of trusts from being entered in the register-book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said act on registered owners and mortgagees, and without prejudice to the provisions contained in the said act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property. See *Hughes v. Morris*, 21 L. J. Ch. 761. *Liverpool Borough Bank v. Turner*, 29 id. 827; 30 id. 379. *Chapman v. Collis*, 9 C. B. 769; 30 L. J. C. P. 241. *Coombe v. Mansfield*, 24 L. J. Ch. 513.

Under 17 & 18 Vic. c. 104, sales of ships can only be made in the manner prescribed by the statute. *Liverpool Borough Bank v. Turner*, 1 Johns. & H. 159; 6 Jur. N. S. 935; 29 L. J. Ch. 872. Affirmed on appeal, 3 L. T. (N. S.) 494, b. A power of attorney to sell a ship may be substantially revoked by parol, and the attorney selling thereafter is guilty of a breach of trust. *The Margaret Mitchell*, 1 Swab. 382.

A contract by parol or by letter having been entered into for the sale of a ship with a warranty, a subsequent bill of sale not containing the warranty does not necessarily destroy the previous warranty, supposing there is no evidence that the parties did not intend that it should continue. *Storekey v. Bailey*, 3 F. & F. 1. The purchaser takes her with the liabilities attached by law — seamens' wages, bottomry bond, demand for salvage; and his remedy must be against the vendor. *The Nymph*, 1 Swab. 86.

Where A., who had contracted to buy a share of a ship in July (but did not execute a bill of sale till the September), by a memorandum of agreement dated Sept. 30, transferred his share, with all his liabilities, to B., and afterwards sued B. for expenses incurred by himself with respect of the ship after the contract for the purchase of the ship in July, but before the execution of the bill of sale in September: — *Held*, that as the memorandum showed nothing to make the defendant liable for expenses not incurred by the plaintiff as owner, the action, therefore, would not lie. *Chapman v. Callis*, 9 C. B. (N. S.) 769; 7 Jur. N. S. 995; 30 L. J. C. P. 241.

The effect of a transfer, which is in form absolute, but is in reality only intended as a security for an advance, is not altered by 17 & 18 Vic., and the provisions of sect. 66 do not prevent the owner, who has executed a bill of sale absolute in its terms, from showing that it was intended to operate as a security only. The 25 & 26 Vic. c. 63, s. 3, is a statutory declaration that this is the true interpretation of the act. *Ward v. Beck*, 32 L. J. C. P. 113.

[1] As regards any mortgage since 1st May, 1855, the 66th sect. 17 & 18 Vic. c. 104, enacts, that a registered ship or share may be made a security for a loan or other valuable consideration. The instrument creating such security, which is termed in the act a "mortgage," must be in a form prescribed by the act, and a court of equity can give no effect to an unregistered contract to assign a ship, or a security for money. *Liverpool Borough Bank*, 30 L. J. Ch. 379. *Lacon v. Liffen*, 32 id. 25. If the prescribed form is not adhered to, the registrars are not obliged to record the mortgage without an express order from the Commissioners of Customs (*see* 18 & 19 Vic. c. 91, s. 11), or as near thereto as circumstances permit, and on its production the

registrar of the port at which the ship is registered must record it in the register-book.

Upon the production of this the registrar is (sect. 67) to record it in the register-book in the order of time in which it is produced, and to notify on the instrument the date and hour of such record.

The Registry Acts do not apply to a mere deposit of the certificate to secure advances. *Mestaer v. Atkins*, 5 Taunt. 381. *Bowen v. Fox*, 10 B. & C. 41. *Qu.* since 17 & 18 Vic.? 30 L. J. Ch. 379; 7 Jur. 150.

To put an end to any question of mere notice, the statute (sect. 69) provides, that if there be more than one registered mortgage of the same ship or share, notwithstanding any express, implied, or constructive notice, the mortgagees are to be entitled to priority over one another according to the date at which each instrument is recorded in the register, and not according to the date of the instrument. As great inconveniences might ensue from his being regarded as owner, it is expressly declared (sect. 70) that he shall not be deemed to be the owner, nor shall the mortgagor be deemed to have ceased to be the owner, except so far as it may be necessary for making the ship or share available as a security for the mortgage-debt. For this latter purpose it is provided, that every registered mortgagee shall have power absolutely to dispose of the ship or share (sect. 71), and to give effectual receipts for the purchase-money. But in the case of several mortgagees of the same interest, a subsequent mortgagee shall not, except under the order of some court capable of taking cognisance of such matters, sell the ship or share without the concurrence of any prior mortgagee, the ship remaining in the possession of the owner (see *Hay v. Fairburn*, 2 B. & A. 193; 2 B. & B. 144); a clause (sect. 72) corresponding to one found in prior acts is inserted, that a registered mortgage shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding he may have in his possession and disposition, and be reputed owner of the ship or share, and the claim of the mortgagee is to be preferred to that of the assignee of the bankrupt. A special exception of this nature is contained in the Bankruptcy Law Act, 12 & 13 Vic. c. 106, s. 125, and in order to avail himself of this provision the mortgagee must have registered. See *Campbell v. Thompson*, 2 Hare, 140. *Douglas v. Russell*, 4 Sim. 524. The sect. 73 relates to transfer of mortgages. By this section a registered mortgage of a ship or share may be transferred to any person. The instrument creating the transfer must be in a form specified by the act. *See* form, sched. to stat. By sect. 74, if the interest of any mortgagee in a ship or share becomes transmitted in consequence of death, bankruptcy, or insolvency, or in consequence of the marriage of a female mortgagee, or by any lawful means other than by a transfer according to the provisions of the act, the transmission must be authenticated by a declaration of the person to whom such interest has been transmitted, made in the specified form. By sect. 75, the registrar, upon the receipt of this declaration, and the production of the evidence, must enter the name of the person or persons entitled under such transmission in the register-book as mortgagee.

The mortgagee having only a limited interest in the ship cannot, on his own account, insure for an amount beyond that interest. *Irving v. Richardson*, 2 B. & Adol. 193. The mortgagor has an insurable interest to the extent of the full value. *Alston v. Campbell*, 4 Bro. P. C. 476. The mortgagee is entitled to freight accruing subsequently to the mortgage if he take possession of the vessel during the voyage (*Dean v. M'Ghie*, 4 Bing. 45. *Kerswill v. Bishop*, 2 Tyr. 602; S. C. 2 C. & J. 529. *See* also *Brown v. North*, 8 Ex. 1), where the ship with all her freight and earnings was mortgaged (*Alexander v. Timms*, 5 De Gex, M. & G. 57), but not otherwise. *Gardener v. Cazenove*, 1 H. & N. 423. *Langton v. Horton*, 5 Beav. 22. The judgment-creditor of a mortgagor, who is the registered owner of a ship, cannot take her in execution as against the mortgagee, for this would defeat the right of the mortgagee to make the ship available as a security for his debt. *Irvine v. Kitchen*, 8 E. & B. 789; 28 L. J. Q. B. 46. *Williams v. Allsup*, 30 L. J. C. P. 353.

A mortgagee is not to be deemed owner of the ship or share, but the mortgagor is to continue so to be deemed, except so far as is necessary to enable the mortgagee to avail himself of his security. (Sect. 70.) And a mortgagee is not entitled to the earnings of the ship before taking possession of her (*Gardener v. Cazenove*, 1 H. & N. Ex. Rep. 423; 26 L. J. Rep. N. S. Ex. 17. *Willis v. Palmer*, 7 C. B. Rep. N. S. 340; 29 L. J. C. P. 194); but a mortgagee in possession is entitled to make use of her (*De Mattos v. Gibson*, 30 L. J. Ch. N. S. 145), and to receive her earnings. *Kerswill v. Bishop*, 2 C. & J. 529. *Dean v. M'Ghie*, *supra*. *Cato v. Irving*, 21 L. J. Ch. 675.

The Admiralty Court Act, 1861, 24 Vic. c. 10, s. 11, enacts, that the Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered.

The only forms of transfer and mortgage to be used are those appended to 17 & 18 Vic. c. 104; 30 L. J. Ch. 379.

The circumstance of a mortgagee being registered as absolute owner is not conclusive as to the rights of the parties. 4 Kay & J. 676. See *Ward v. Beck*, *ante*, p. 433.

A., being owner of a ship which was unfinished, on the 5th of July mortgaged it to B. A. on the 5th of Aug. registered the ship as owner, pursuant to the 17 & 18 Vic. c. 104, s. 42. On the following day B. caused the mortgage to himself to be inserted on the registry, A. having become

(*d*) *Certificates of Sale or Mortgage.*[1]
(*e*) *By Capture and Condemnation.*[2]
(*f*) „ *Decree and Sale of Admiralty Court.*[3]
(*g*) „ *Operation of Law, as Death, Bankruptcy, &c.*[4]

II. Board of Trade: General Functions as to Merchant-Shipping.[5]

bankrupt: — *Held*, that A.'s assignees could not maintain trover against B. for the ship. *Bell v. Bank of London*, 3 H. & N. 730; 28 L. J. Ex. 116. *Woods v. Russell, ante*, p. 433.

Where a ship, it has been noticed, has been mortgaged for a debt, a creditor who has got judgment against the registered owner of the ship cannot take and sell the ship in execution, for to do so would be to defeat the rights of the mortgagee to make the ship available as a security for his debt, given him by 17 & 18 Vic. c. 104. *Kitchen v. Irvine*, 5 Jur. N. S. 118; 28 L. J. Q. B. 46; C. C. A. See *Dickenson v. Kitchen*, 8 E. & B. 789.

Mortgagees of a ship having permitted the mortgagor to remain in possession upwards of two years, and during that time to navigate the ship for his own profit, the latter, without the knowledge of the mortgagees, delivered her to the defendant, a shipwright, for the purpose of having reasonable and necessary repairs done to her, which the defendant did; the mortgagee having demanded possession of the defendant, the latter refused to deliver her up until his bill for the repairs was paid: — *Held*, that the mortgagees must be taken to have impliedly authorised the mortgagor to keep the vessel in an efficient state, and for that purpose to order the necessary repairs to be done upon the ordinary terms, one of which was, that the shipwright should have his lien upon the ship for the repairs. *Williams v. Allsup*, 30 L. J. C. P. 353; 4 L. T. (N. S.) 550; *see* 17 & 18 Vic. c. 104, s. 70.

The law as to the effect of a transfer of a ship, which is in form absolute, but is in reality only intended as a security for an advance, we have seen (*ante*, p. 433), is not altered by the 17 & 18 Vic. c. 104, and the provisions of sect. 66 of that act do not prevent the owner, who has executed a bill of sale absolute in its terms, from showing, as before, that it was intended to operate as a security only. As to sale of ship by mortgage, *see* 3 Moore, P. C. 457. *Ward v. Beck*, 32 L. J. C. P. 113.

[1] The object of these documents is to afford facilities for effecting a sale or charge in distant countries, and they will authorise (s. 78) a mortgage or sale in the United Kingdom, if the ship be registered there, or in any British possession where she is registered. If an owner (sect. 76) be desirous of disposing, by way of mortgage or sale, of his ship or share, at any place out of the country or possession in which her port of registry is situate, the registrar, upon application, is to grant one of these certificates. Before this is granted the applicant must (sect. 77) state to the registrar, who is to enter in the register-book, the names of the persons by whom the power is to be exercised, and by whom alone (sect. 78) it can be exercised; and in case of a mortgage, the maximum amount of charge to be created, if it is intended to fix a maximum; and in case of a sale, the minimum price at which it is to be made, if it is intended to fix a minimum, the places where the power is to be exercised. A certificate of mortgage or sale in a given form (*see* sched. M. & N.) is then to be granted. Sect. 79. *See* 30 L. J. Ch. 379.

This instrument, being in truth a mere power, the death (*Watson v. King*, 1 Stark. 121), bankruptcy, or insolvency of the donor would revoke it, and, without more, it would be of little benefit. In order to obviate this, it is provided that no mortgage (sect. 80) or sale (sect. 81) for a valuable consideration, *bonâ fide* made, shall be impeached by reason of the death of the owner before the power was executed.

Upon proof (sect. 82), that any certificate of mortgage or sale is lost, or so obliterated as to be useless, and that the powers granting it have not been exercised, or, if exercised, upon proof of what has been done, the registrar, with the sanction of the Commissioners of Customs, may either issue a new certificate or direct such entries to be made in the register, or such other matter or thing to be done, as if the loss or obliteration had not happened.

[2] A capture from an enemy in time of war, legalised and sanctioned by a sentence of condemnation in a court of the capturing power, constituted according to the law of nations. *The Flad Oyen*, 1 Rob. A. R. 135. *The Constant Mary*, 3 id. 97, n. They are the sentences of the courts acting and exercising functions in the belligerent country. If the capture be made by a ship belonging to her majesty, the prize is formally condemned, and the value distributed among the captors. Capture by pirates does not divest the property of the owners (27 Edw. 3, stat. 2, c. 13: Year-Book, 2 Rich. 3, 2. Jenkin's *Cent.* p. 165); but the capture by an enemy in the exercise of war between two nations wholly divests the property of the owner, and transfers it to the captor or the sovereign of his state. *See* Capture, vol. iii. p. 28.

[3] Property may be acquired by purchase at a sale decreed by the Court of Admiralty. *The Fremont*, 1 Wm. Rob. 164.

[4] The acquirement of property in a ship may be by act and operation of law, as upon death or bankruptcy of the owner.

[5] At different intervals statutes have been passed, giving to public departments of the state certain superintending and controlling powers over matters connected with the mercantile marine. *See* 5 & 6 Wm 4, c. 19; 7 & 8 Vic. c. 112; 8 & 9 id. c. 116; 13 & 14

III. Registration of British Ships.

(A) *What acquired by, and Obligation to Register.*[1]

id. c. 93, s. 32. By the act now in force (17 & 18 Vic. c. 104, extended and modified by 25 & 26 id. c. 65), the sects. 2 and 6 provide that the Lords of the Committee of Privy Council, who constitute the Board of Trade (sect. 2), shall be the department to undertake the general superintendence of matters relating to merchant-ships and seamen, and shall be authorised to carry into execution the provisions of this act, and all other acts relating to merchant-ships and seamen, other than such acts as relate to the revenue (Sect. 6.)

Local Marine Boards.—These are (13 & 14 Vic. c. 93) to regulate arrangements, and superintend the examination of masters and mates. The boards are to be at such places as the Board of Trade appoints, and consist of the mayor or provost and stipendiary magistrate; or, if there be several of such officers, of such of them as the Board of Trade selects; of four persons appointed by the Board of Trade, residing or having places of business at or within seven miles of the port; and of six members elected by the owners of foreign-going and home-trade passenger-ships registered here. The sections relating to them in 17 & 18 Vic. c. 104, are from 110–121.

Shipping Offices.—Local marine boards are established. Sect. 122 is to afford facilities for engaging seamen by keeping registries of their names and characters, to superintend and facilitate their engagement and discharge. *See* ss. 122–130.

[1] By sect. 7, certificates and documents purporting to be sealed or signed in a given manner to be received in evidence. (13 & 14 Vic. c. 93, s. 19.)

By sect. 8, Board of Trade to issue forms. (Id.)

By sect. 9, certain instruments to be exempt from stamp-duty. (7 & 8 Vic. c. 112, s. 41; 13 & 14 Vic. c. 93, s. 22.)

By sect. 10, penalties for forgery of seal and fraudulent alteration of forms, and for not using forms issued by Board of Trade. (13 & 14 Vic. c. 93, s. 23.)

By sect. 11, application of monies and fines paid to Board of Trade. (16 & 17 Vic. c. 131, ss. 3, 4, 26.)

By sect. 12, returns to Board of Trade. (13 & 14 Vic. c. 93, s. 102.)

By sect. 13, officers of Board of Trade, naval officers, consuls, the registrar-general of seamen, officers of customs, and shipping, masters, may inspect documents and muster crew. (17 & 18 Vic. c. 112, ss. 55, 56; 13 & 14 Vic. c. 103.)

By sect. 14, Board of Trade may appoint inspectors. (13 & 14 Vic. c. 93, s. 104; 14 & 15 Vic. c. 79, s. 31.)

By sect. 15, powers of inspectors. (13 & 14 Vic. c. 93, s. 105; 14 & 15 Vic. c. 79, s. 32.) Witnesses to be allowed expenses. Penalty for refusing to give evidence.

By sect. 16, penalty for obstructing inspectors in the execution of their duty. (13 & 14 Vic. c. 93, s. 106; 14 & 15 Vic. c. 79, s. 33.)

These references to the corresponding repealed acts and sections are taken from Mr. Dowdeswell's highly valuable edition of the Merchant Shipping Acts.

Public registers of ships are required to be kept by several statutory provisions (12 Car. 2, c. 18; 9 Wm. 3, c. 22; 27 Geo. 3, c. 19, s. 8, and various subsequent statutes. The policy or wisdom of these regulations it would be a useless digression in this place to examine. The principal object sought to be attained by such parliamentary registrations is to give notoriety as to whom the property in vessels belong.

The privileges conferred by registrations consisted formerly, we have seen (*ante*, p. 431), of a capacity to trade exclusively in some locality, and of a right to special indulgence with respect to duties. These privileges have been from time to time greatly reduced, and at present are substantially confined to the right of assuming the national character and flag, and of claiming the incidental protection and benefits. With respect to custom-duties, charges, &c., foreign and British ships are placed on the same identical basis.

Until the 17 & 18 Vic. c. 120 (repealing ss. 7, 8 of 12 & 13 Vic. c. 29, and 16 & 17 Vic. c. 131, s. 31), a vessel to obtain the immunities of a British ship must have been "navigated as such." The master must have been a British subject, and a certain proportion of the crew. At present a vessel may be manned by the subjects of any country.

Anterior to the 17 & 18 Vic. c. 104, s. 19, it was not compulsory to register: it was only necessary to secure the special privileges of a British ship: but by that section every British ship must be registered in manner hereinafter mentioned, and then proceeds to declare that no ship hereby required to be registered shall, unless registered, be recognised as a British ship, and no officer of customs shall grant a clearance or transire to any ship hereby required to be registered, for the purpose of enabling her to proceed to sea as a British ship, unless her master, when required, produces her certificate or register; and if she attempt to proceed to sea as a British ship, without a clearance or transire, the officer may detain her until the certificate is produced.

By sect. 32, a register-book is to be kept for registering particulars.

By sect. 33, the port or place at which a British ship is registered for the time being is to be considered her port of registry, or the port to which she belongs.

By sect. 34, before registry the name of each ship, and of the port to which she belongs, must be painted on a conspicuous part of her.

By sect. 35, a body corporate may be re-

(B) *When Re-Registration necessary.*[1]

(C) *Certificate of Registry.*[2]

(D) *Proof of Registry.*[3]

(E) *When Registration Dispensed with.*[4]

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gistered as owner by its corporate name. Sect. 38 requires a declaration of ownership to be made by owner in a certain form.

By sect. 43, no notice of any kind, express or implied, or constructive, is to be entered in the register-book, or receivable by the registrar. A vessel under fifteen tons, navigating on the coast of the United Kingdom, need not be registered; and if she has been unnecessarily, she may be retransferred without fresh registry. *Benyon v. Cresswell*, 12 Q. B. 899; 12 Jur. 1086; 18 L. J. Q. B. 1. The Court of Chancery cannot entertain the question whether a ship was properly registered, but must take the registration as conclusive. *Coombs v. Mansfield*, 3 Drew, 193; 1 Jur. N. S. 270. The court will not relieve against the operation of the Ship Registry Act, 8 & 9 Vic. c. 89, on the ground of equitable fraud or of notice.

[1] Prior to 30th April, 1855, a registry *de novo* was required in four instances. 1st. Whenever the owners who subscribed the declaration had transferred all their shares in her. (8 & 9 Vic. c. 89, s. 11.) 2ndly. If the certificate were lost or mislaid. (Sect. 24.) 3rdly. If any person were convicted of illegally detaining the certificate. If the ship had been altered so as not to correspond with the particulars in her certificate. (Sect. 31.) But now, in the first of these cases, the transfer alone is registered (17 & 18 Vic. c. 104, s. 57); and in the second (sects. 48, 49) and third (sect. 51), a new certificate of registry may be granted by the registrar. With respect to the fourth, *see* ss. 84–87.

On any change of property in a ship the owners may, if they think fit, have her registered *de novo*. 8 & 9 Vic. c. 89, s. 42; 17 & 18 Vic. c. 104, s. 88.

[2] By 17 & 18 Vic. c. 104, s. 44, upon completion of the registry of a ship, the registrar is to grant a certificate containing the following particulars:— 1. The name of the ship and of the port to which she belongs. 2. The details as to her tonnage, build, and identity. 3. The name of the master. 4. The several particulars as to her origin stated in the declarations of ownership. 5. The names and descriptions of her registered owner or owners; and if there be more than one owner, the proportions in which they are interested indorsed upon the certificate. Sect. 45 requires a change of ownership to be indorsed on the certificate. Sect. 46 requires a change of the master likewise to be indorsed. By sect. 50, the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in the certificate; and the section provides for obtaining possession of the certificate by summary proceedings before a justice of the peace. 17 & 18 Vic. c. 120, repeals the 8 & 9 Vic. c. 89, s. 30, containing a similar enactment.

There is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of a court of equity to decree its delivery up, as against a party unlawfully detaining it. *Gibson v. Ingo*, 6 Hare, 112. A master has no lien on the certificate of registry, either for his wages or for monies disbursed by him for the use of the ship; nor have shipbrokers any lien on the certificate of registry for advances made by them to the owners for the use of the ship. (Id.) The 8 & 9 Vic. c. 89, did not prevent a lien being created on a certificate of an original registry, deposited by an unregistered owner to secure advances for the use of the ship. *Clarke v. Butlers*, 1 Kay & J. 242.

With respect to this section, it has been decided that it makes any pledge of the certificate of registry of a ship illegal and void, and that the sole owner and captain of a ship who has pledged it with a person who has a good and *bonâ fide* claim against him, as a security against his sailing before a particular day, may re-demand it before the arrival of the day in question, for the purposes of navigation; and if it be not delivered up, may maintain an action for the damage arising from its detainer. (Sect. 46). *Wiley v. Crawford*, 1 E. B. & S. 253; 30 L. J. Q. B. 319.

[3] By 17 & 18 Vic. c. 104, s. 107, every registry of, or declaration of ownership, in respect of a British ship, may be proved either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original, which certified copies he is to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each certified copy; and every such register, or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar, or other proper officer, shall be received in evidence.

[4] Ships not exceeding fifteen tons burthen, employed solely on the rivers or coasts of the United Kingdom, or of some British possession, within which their managing owners reside. Ships not exceeding thirty tons burthen, and not having a whole or front deck, employed solely in fishing. See *Benyon v. Creswell, ante*.

Ships registered before May 1st, 1855, need not be registered anew under 17 & 18 Vic. c. 104, s. 19. The 25 & 26 Vic. c. 63, s. 13,

IV. As to the Duties and Liabilities of Owners generally.

(A) *Duties of.*

(*a*) *As to the Condition of the Ship.*[1]

(*b*) *As to Loading, Receipt of Goods, Stowing, Ship's Papers, and when to Sail.*[2]

(B) *Liabilities of.*[3]

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provides that the third part of Shipping Act, 1854, shall apply to fishing-boats, lighthouse-vessels, and pleasure-yachts, with certain exceptions, specified in third part of the 13th section.

[1] The primary duty is to provide a vessel tight and stanch, and furnished with all tackle and apparel necessary for the intended voyage. Emerigon, tom i. p. 373; Roccus, Not. 19,57,69. *Ord. of Rotterdam*, 2 Magens, p. 101, art. 124; Molloy, b. 2, c. 2, s. 10; Wellwood's *Sea Laws*, tit. 7, p. 22. For if the merchant suffer loss or damage from any insufficiency in these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners, but in the body there may be latent defects unknown to both. *See* 1 Smith, M. L. 82. *Towse v. Henderson*, 4 Ex. 890. *Thompson v. Gillespey*, 5 E. & B. 209. *Worms v. Story*, 11 Ex. 427. And not only must the ship and her furniture be sufficient for the voyage, but she must also be furnished with a sufficient number of persons, of competent skill and ability, to navigate her. And for sailing down the rivers, out of harbours, or through roads, &c., where, either by usage or the laws of the country, a pilot is required, a pilot must be taken on board. There is no implied warranty of seaworthiness in a contract between the owner and a seaman to serve on board (*Couch v. Steel*, 3 E. & B. 402; 23 L. J. Q. B. 121); or between the shipowner and shipper on a contract to convey goods. *Schloss v. Heriott*, 32 L. J. C. P. 211. It is the duty of the owner to have proper medicine aboard. (Id.)

[2] The manner of taking goods on board, and the commencement of the owner's duty, are often affected by the regulations of the Custom-house, or the usage of the particular place. See *Cobban v. Downe*, 5 Esp. 41. More or less is to be done by wharfingers or lightermen, according to the usage. If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt. Molloy, b. 2, c. 2, s. 2; Roccus, Not. 88; Mellwood, tit. 9; Dig. 493. See *Morewood v. Pollok*, 1 E. & B. 743. And as soon as any goods are put on board, he must provide a sufficient number of persons to protect them (*Morse v. Slue*, 1 Vent. 190, 238. *Rich v. Kneeland*, Hob. 17; Dig. 4, 9, 11); for even if the crew be overpowered by a superior force, and the goods stolen while the ship is in a port or river within the body of a country, the master and owners will be answerable for the loss, although they have been guilty of neither fraud nor fault, the law in this instance holding them responsible. See *De Rothschild v. R. M. S. P. Co.* 7 Ex. 734. It is in all cases the duty of the master to provide ropes, &c. proper for the actual reception of the goods into the ship. *Laws of Oleron*, art. 10; *Laws of Wisbury*, art. 22; Wellwood, 9. And if a cask be accidentally staved in letting it down into the hold of the ship the master must answer for the loss. *Goff v. Clinkard*, cited 1 Wils. 282. The ship must also be furnished with proper dunmage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality. *Ord. of Rotterdam*, 2 Magens, 101, art. 125, 126. And care must be taken by the master (unless, by usage or agreement, this business is to be performed by persons hired by the merchant) so to stow and arrange the different articles of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship. Wellwood, p. 29. *Ord. of Antwerp*, 2 Mag. p. 16, art. 12; *Laws of Wisbury*, art. 23; *Laws of Oleron*, art. 11. And more must not be taken on board than the ship can conveniently carry, leaving room for her own furniture and the provisions of the crew, and for the proper working of the vessel. Roccus, Not. 30. *Ord. of Rotterdam*, 2 Mag. p. 102, art. 127. Neither may the master take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture or detention. Molloy, b. 2, c. 2, s. 7; Roccus, Not. 66; Wellwood, 9. *See* 16 & 17 Vic. c. 107. The master must also take on board no false or colourable papers that may subject the ship to capture or detention. And he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo by the law of the countries from and to which the ship is bound.

Where, by the terms of a charter-party, a number of days are appointed for the landing of the cargo, either generally, and without payment on that particular account by the merchants, or by way of demurrage, the master must not sail before the expiration of the time. On the other hand, a delay in sailing to be justified can only be for the purposes of the voyage, as for papers, provisions, and the like. *Langhorn v. Allnutt*, 4 Taunt. 511. *Raine v. Bell*, 9 East, 195. *Palmer v. Marshall*, 8 Bing. 320. *See* vol. iii. pp. 85–88.

[3] *As to Liability.*—With respect to bill of lading, *see* vol. ii. p. 491; charter-party, vol. iii. p. 79; collision, vol. v. p. 518.

For Repairs, Stores, &c.—The registered

(C) *Part-Owners.*[1]

owner of a ship is the party who, besides the master, is *primâ facie* liable for stores provided or repairs done. *Trewheller v. Rowe*, 11 East, 435. *Stokes v. Carne*, 2 Camp. 340. *Webster v. Seekamp*, 4 B. & A. 352. In order to charge a party, by reason of his name appearing on the ship's register, as part-owner for repairs done to the ship, it must clearly appear that they were done upon his credit, and that the order for them was given with his authority, express or implied. *Curling v. Robertson*, 8 Scott, N. R. 12; 7 Man. & G. 336; 13 L. J. C. P. 137. But if it be shown that another person is beneficially entitled to, and receives the profits (*Young v. Brander*, 8 East, 10), or that credit was given to another, this implied contract does not arise; so where goods are shipped in or stores supplied to a chartered vessel, the action for non-delivery of the one and for the price of the other should be brought against the charterer, and not the owner. *James v. Jones*, 3 Esp. 27. See *Fraser v. Marsh*, 13 East, 238. And the mortgagee of a ship is not liable for wages or repairs where the party claiming the debt was employed by the mortgagor, expressly giving him credit. *Annett v. Carstairs*, 3 Camp. 354. *Briggs v. Wilkinson*, 7 B. & C. 30. *Cox v. Reid*, R. & M. N. P. C. 199. *Harrington v. Fry*, 2 Bing. 179. *Curling v. Roberts*, 8 Scott, N. C. 12. *Frost v. Oliver*, 2 E. & B. 301.

An owner of a general ship is subject to the same responsibility for loss or damage of goods as a common carrier. *Laveroni v. Drury*, 8 Ex. 166; 22 L. J. Ex. 2. *See* Limitations to this Liability, *infra.*

Besides the ordinary courts, jurisdiction is now given by 24 Vic. c. 10, s. 4, to the Court of Admiralty over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship, or the proceeds thereof, are under the arrest of the court.

Limitations of Liability.—The 17 & 18 Vic. c. 104, s. 503, is repealed by 25 & 26 Vic. c. 63, s. 54, which enacts that the owners of any ship, whether British or foreign, shall not, in the cases specified in the act, be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, merchandise, &c., to an amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, merchandise, &c., whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* per ton, such tonnage to be registered tonnage in the case of sailing-ships, and in the case of steamships, the gross tonnage, without deduction on account of engine-room. And in the case of any foreign ship, where practicable, this method of calculating tonnage is to be observed. Where not practicable, the surveyor-general of tonnage in this kingdom, and the chief measuring officer in any British possession abroad, is to hear evidence, and give a certificate containing his opinion of what the tonnage would have been if measured according to British law.

But insurances effected against any or all of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk.

The 17 & 18 Vic. c. 104, s. 506, declares that the owner is to be liable on every distinct occasion to the same extent as on one. With reference to which the act 1862 enacts, that in any proceeding against the owner of a ship in respect of loss of life, the master's list, or the duplicate list of passengers delivered to the proper officer of customs under the 16th section of the Passengers' Act (1855), shall, in the absence of proof to the contrary, be sufficient proof that the persons alleged to be dead were on board.

By the 24 Vic. c. 10, s. 6, jurisdiction is given to the Court of Admiralty over any claim by the owner or consignee or assignee of the bill of lading of any goods carried into any port of England or Wales in any ship for damage done to the goods, or any part thereof, through negligence or misconduct. A., being sole owner of a vessel, contracted to sell one-half share in her to M. and T., and agreed with them that they should have exclusive direction, management, and control of the vessel, to be dealt with and managed by them as managing owners and ship's husbands as they might think best, without let or hindrance from A. There was at the end of the contract a clause that M. and T. were to pay A. 900*l.* as a charter for his half share of the vessel, for the first six months from the date of the vessel being ready to receive her cargo. During those six months repairs became necessary to the vessel, and were ordered to be done by T.:— *Held*, that A. was liable as part-owner to pay for such repairs. *Preston v. Tamplin*, 2 H. & N. 684; 3 Jur. N. S. 1247; 27 L. J. Ex. 192.

A declaration of ownership in a ship held *primâ facie* proof of ownership without the registry, and though the party has ceased to be owner, yet if he has been present when the work was done, giving directions about it, that will be evidence of liability for repairs. *Tibbald v. Wood*, 1 F. & F. 287.

A shipwright who has had a ship delivered to him to be repaired, and who has expended work and materials in repairs, is entitled to a lien on the ship for the amount of the sum due for such repairs, but he is not entitled to be paid for the use of his dock while he detains the ship under the lien against the will of the owner, unless there be some special contract, custom, or usage to authorise such claim. *British Empire Shipping Co. v. Somes*, 4 Jur. N. S. 893; 27 L. J. Q. B. 397.

[1] The 17 & 18 Vic. c. 104, s. 37, provides that the property in a ship shall be divided into sixty-four shares, and not more than thirty-two individuals shall be registered at the same time as owners. No person can be registered as owner of a fractional part, but

(C) *Part-Owners (continued).*

(*a*) *Duties, Rights, and Liabilities,* inter se.[1]

(*b*) *Rights and Liabilities as to Third Persons.*[2]

any number not exceeding five may be registered as joint-owners, and considered as one person.

[1] The several part-owners of a ship are tenants in common with each other of their respective shares. Each has a distinct, although individual, interest in the whole; and upon the death of any one his share goes to his own personal representatives, and does not accrue to the others by survivorship. *See* Smith's M. L. b. ii. c. 1. *Buckley v. Barber*, 6 Ex. 180. *Green v. Briggs*, 6 Hare, 395.

No personal chattel vested in several distinct proprietors can be enjoyed advantageously without a common consent and agreement among them. Where, therefore, several persons become part-owners in a ship under a fixed compact for the employment of it, or by common consent they delegate the management of their common concern to one of them, who is called the husband of the ship; in this case nothing is left for the law of the state but to enforce the compact and agreement of the parties, according to its own mode of administering justice in analogous cases. But where no such concurrence exists, the Court of Admiralty interferes, by arresting the ship and preventing the majority of owners from sending her abroad against the will of the minority, without first entering into a stipulation, in a sum equal in value to the shares of the dissentients, either to bring back the ship or pay the value of their shares; on giving this security they are permitted to send the ship to sea (*see* Abb. on Shipp. p. i. c. 2); and if the minority are in possession of it, may take it out of their hands for that purpose by a warrant of the court, but the dissentient owners bear no part of the expense, and are entitled to no part of the profits of the voyage to which they have disagreed. *Davis v. Johnson*, 4 Sim. 539. *The Apollo*, 1 Hagg. Ad. Rep. 306; Abb. on Shipp. part i. c. 3. In case the owners be equally divided in opinion, either half may apply to the court. The Court of Admiralty cannot, under any circumstance, compel a part-owner to sell his interest. *Surten v. Hebden*, 1 Wils. 101; see *Ex-parte Young*, 2 W. & B. 242. *See* 3 & 4 Vic. c. 65, s. 24; id. c. 10.

The interest of part-owners in a ship, and in the profits and loss of an adventure undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the outfit. So in a joint shipping adventure, which produces certain goods, no partner, nor any representative of one, has a right to his aliquot part of such goods until he has paid his share of the expense of procuring it; but his lien seems confined to the profits of the adventure, and not to extend the bankrupt's share in the ship itself. *Ex-parte Young*, 2 Ves. & B. 242. *Ex-parte Harrison*, 2 Rose, 76; contrà, *Doddington v. Hallett*, 1 Ves. sen. 497. The proper course is (bankruptcy or no bankruptcy), first, to deduct all the expenses which have been incurred in order to obtain the goods, and then to divide the residue among the shareholders in proportion to the shares to which each is entitled. *Smith v. De Silva*, Cowp. 469. *Holderness v. Shackels*, 8 B. & C. 612.

Part-owners in a ship's use and employment, and the law as to the earning, whether as freight, cargo, or otherwise, follows the general law of partnership. *Green v. Briggs*, 6 Hare, 395; 12 Jur. 326; 17 L. J. Ch. 323.

A part-owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue the co-owners for their proportion of the expense before the adventure ends. (Id.) The same rule applies to the expenses of repairs to the hull of the ship. *Green v. Briggs, supra.* See *Darby v. Baines*, 9 Hare, 369; 21 L. J. Ch. 801. *Alexander v. Simms*, 23 id. 721; 18 Beav. 80. *Brockbank v. Anderson*, 7 Scott, N. S. 813; 13 L. J. C. P. 102; 4 Jur. N. S. 943.

One of several co-owners of a ship, who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie v. Couper*, 28 Beav. 344.

An express authority is necessary from a part-owner of a ship to the ship's husband to order works not necessary as repairs, but such authority once given cannot be revoked after it has been acted upon, and it is for the part-owner, when sued for contribution, to prove that it was revoked before the works were commenced, or a contract for them entered into. *Chappell v. Bray*, 30 L. J. Ex. 24; 3 L. T. (N. S.) 278.

By 24 Vic. c. 10, s. 8, the Admiralty Court shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered, or any share thereof, and may settle all accounts outstanding between the parties, and may direct the said ship, or any share thereof, to be sold, and may make such order in the premises as to it shall seem fit; and it gives to the court complete control over the disputes of co-owners.

The act 1854 provides that all sums of money paid for or on account of any loss or damage in respect of such the liability of the owners, is limited by the ninth part of the act to loss of life or personal injury, that is, loss of or damage to ships or merchandise, and all costs incurred in relation thereto may be brought into account.

[2] The several part-owners of a ship make in law but one owner, and in all actions, whether of contract or tort, ought re-

V. As to Masters and Crew.

(A) *Summary of Statutes relating to.*[1]

gularly to be joined. *Sedgworth v. Overend*, 7 T. R. 279. *Cooper v. South*, 4 Taunt. 802; 2 Wms. Saund. 117, a. In the case of the death of any part-owner after an injury received, the right of action survives in general to the surviving part-owners, who must afterwards pay to the personal representatives of the deceased the value of his share.

[1] The principal statutes are the 17 & 18 Vic. c. 104 (1854); 25 & 26 id. c. 63 (1862). Part iii. of the former act (s. 109) defines its application, unless the context or subject-matter otherwise requires. As relates to the delivery or transmission of lists of crews to the registrar-general of seamen, shall apply to all fishing-vessels, to all ships belonging to the Trinity House, or the commissioners of northern lighthouses, and to all pleasure-yachts, and to the owners, masters, and crews of such ships. As relates to the delivery and transmission of lists of crews, and to the usages and effects of deceased seamen and apprentices, shall apply to all sea-going British ships, wherever registered, of which the crews are discharged, or whose final port of destination is in the United Kingdom.

Examination and Certificate of Masters and Mates.—Sect. 131 directs that examinations shall be instituted of masters or mates of foreign-going or home-trade passenger-ships, or persons wishing to procure certificates of competency. *See* sects. 131–140.

Apprenticeship to Sea-Service. — By sect. 141, shipping-masters to assist in binding apprentices, and may receive fees. By sect. 142, indentures of boys bound apprentice to sea-service by guardians or overseers to be witnessed by two justices. By sect. 143, indentures of apprenticeship to be exempt from stamp-duty, and to be recorded. By sect. 144, rules to govern apprenticeship of paupers in Great Britain and Ireland respectively. By sect. 145, apprentices and their indentures to be brought before shipping-master before each voyage in a foreign-going ship.

Engagement of Seamen. — The 146th sect. authorises Board of Trade to license persons to procure seamen. Sects. 147, 148, impose penalties for acting without license, or receiving remuneration from seamen.

By sect. 149, agreements to be made with seamen containing certain particulars. 13 & 14 Vic. c. 93, s. 46; 14 & 15 Vic. c. 96, ss. 7, 15. Proviso as to forms for colonial ships. By sect. 156, for foreign-going ships, such agreements, when made in the United Kingdom, except in special cases, to be made before and attested by a shipping-master. Provision for substitutes. 13 & 14 Vic. c. 93, s. 47; 14 & 15 Vic. c. 96, ss. 7, 8. By sect. 151, foreign-going ships, making short voyages, may have running agreements. 14 & 15 Vic. c. 96, s. 9. By sect. 152, engagements and discharge of seamen in the meantime. (Id. s. 10.) By sect. 153, duplicates of running agreements, how to be dealt with. (Id. s. 11.) By sect. 154, fees to be paid on such running agreements. (Id. s. 12.) By sect. 155, in home-trade ships, agreement to be entered into before a shipping-master, or other witnesses. 13 & 14 Vic. c. 93, s. 48. By sect. 156, special agreements for home-trade ships belonging to same owners. By sect. 157, penalty for shipping seamen without agreement duly executed. (Id. s. 55.) By sect. 158, charges in crew to be reported. (Id. ss. 18, 93.) By sect. 159, seamen engaged in the colonies to be shipped before some shipping-master or officer of customs. By sect. 160, seamen engaged in foreign ports, to be shipped with the sanction and in the presence of the consul. 7 & 8 Vic. c. 112, s. 54. By sect. 161, rules as to production of agreements and certificates of masters and mates of foreign-going ships. 13 & 14 Vic. c. 93, ss. 50, 55; 14 & 15 Vic. c. 96, s. 6. By sect. 162, rules as to production of agreements and certificates for home-trade ships. 13 & 14 Vic. c. 93, s. 51. By sect. 163, alterations to be void unless attested to have been made with the consent of all parties. 13 & 14 Vic. c. 93, s. 49. By sect. 164, penalties for falsifying agreements. (Id. s. 55.) By sect. 165, seamen not to be bound to produce agreement. (Id. s. 52.) By sect. 166, copy of agreement to be made accessible to crew. (Id. ss. 54, 55.) By sect. 167, seamen discharged before voyage to have compensation. (Id. s. 57.)

Allotment of Wages. — Sect. 168 directs that all stipulations for the allotment of any part of the wages of a seaman during his absence, which are made at the commencement of the voyage, shall be inserted in the agreement, and state the amount and time of payment in form sanctioned by the Board of Trade. By sect. 169, allotment-notes may be sued on summarily by certain persons and under certain conditions.

Discharge and Payment of Wages. — By sect. 170, discharge from foreign-going ships to be made before shipping-master. By sect. 171, master to deliver account of wages. By sect. 172, on discharge, master to give seamen certificates of discharge, and return certificates of competency of service to mates. By sect. 173, shipping-master may decide questions which parties refer to him. By sect. 175, masters and others to produce ship's papers to shipping-masters, and give evidence. By sect. 175, settlement of wages. Release to be signed before and attested by the shipping-master. To be a discharge, and to be evidence. No other receipt to be a discharge. Voucher to be given to the master, and to be evidence. By sect. 176, master to make reports of character.

Remittance of Wages, and Establishment of Savings' Banks for Seamen.—See sects. 177–180.

Legal Rights to Wages.—By sects. 181, 182, a seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work, or presence on board, whichever first happens. No seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages, to which he would otherwise have been entitled, and every stipulation in any agreement inconsistent with any provision of this act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative. By sect. 183, wages not to be dependent on the earnings of freight. By sect. 184, in case of death, such wages to be paid as herein mentioned. By sect. 185, rights to wages in case of termination of service by wreck or illness. By sect. 186, wages not to accrue during refusal to work, or imprisonment. By sect. 187, period within which wages are to be paid. By sect. 188, seamen may sue for wages in a summary manner. By sect. 189, restrictions on suits for wages in superior courts. By sect. 190, no seaman to sue for wages abroad, except in cases of discharge or of danger to life. By sect. 191, master to have same remedies for wages as seamen.

Relief to Seamen's Families out of Poor-Rates.— See sects. 192, 193.

Wages and Effects of Deceased Seamen.— By sect. 194, master to take charge of or sell effects of deceased seamen which are on board, and enter the same, and wages due, in the official log. By sect. 195, such effects and wages to be paid either to consul or to shipping-master, with full accounts.

As to other special provisions, *see* sects. 200–204.

By sect. 196, penalties for not taking charge of, remitting, or accounting for such monies and effects. By sect. 197, officers of customs and consuls to take charge of effects left by seamen on board, and to remit the same, and their wages, to Board of Trade. By sect. 198, wages and effects of seamen dying at home to be paid, in certain cases, to the Board of Trade. By sect. 199, if less than 50*l.*, wages and property of deceased seamen may be paid over, without probate or administration, to the persons entitled.

Leaving Seamen Abroad. — By sect. 205, on discharge of seamen abroad, by sale of ship or otherwise, certificates of discharge to be given, and seamen to be sent home at expense of owner. By sect. 206, turning seamen on shore is a misdemeanor. By sect. 207, no seaman to be discharged or left abroad without certificate of some functionary. By sect. 208, proof of such certificate to be upon the master. By sect. 209, wages to be paid when seamen are left behind on ground of inability. And *see* sects. 210–213.

Volunteering into Navy.—By sect. 213 this is allowed under regulations in sects. 214–220.

Provisions, Health, and Accommodation. — By sect. 221, survey of provisions and water on complaint made. By sect. 222, forfeiture for frivolous complaint. By sect. 223, allowance for short or bad provisions. By sect. 224, medicines, lime, or lemon-juice, sugar, and vinegar, to be provided and kept on board certain ships. By sects. 225, master to keep weights and measures on board. By sect. 226, Board of Trade and local boards may appoint inspectors of medicines, who are to see that ships are properly provided. By sect. 227, penalty for selling bad drugs for ships. By sect. 228, expense of medical attendance and subsistence in case of illness, and of burial in case of death, how to be defrayed. By sect. 229, expenses, if paid by consul, to be recoverable from owner. By sect. 230, certain ships to carry medical practitioners. By sect. 231, place appointed to seamen to have a certain space for each man, and to be properly constructed and kept clear.

Power of making Complaint.—By 232, seamen are to be allowed to go ashore to make complaint to justices.

Protection of Seamen from Impositions. — By sect. 233, sale of and charge upon wages to be invalid. By sect. 234, no debt exceeding 5*s.* to be recoverable till end of voyage. *See* other provisions, sects. 235–238.

Discipline. — *See* sects. 239 – 259. At common-law, the master has authority over all persons in the ship in matters relating to her navigation and the preservation of good order on board, and may, in case of disobedience or disorder, administer reasonable correction — his authority in this resembling that of a parent over his child, or a master over his apprentice or scholar. But he must take care that there be a sufficient cause for chastisement, and that the chastisement be reasonable, otherwise he will be punishable. Abbott, p. 2, c. 4.

Naval Courts on the High Seas Abroad.— By section 260, they may be summoned for hearing complaints and investigating wrecks on the high seas or abroad. Sects. 261, 262, prescribe constitution of court, and functions. Sect. 263 empowers them to supersede the master; to discharge a seaman; to forfeit wages; to decide disputes as to wages, &c.; to direct costs of imprisonment to be paid out of wages; to send home offenders for trial; to order payment of costs, &c. By sect. 264, orders to be entered in official log. By sect. 265, report to be made of proceedings of naval courts. By sect. 266, penalty for preventing complaint or obstructing investigation.

Crimes Committed on High Seas and Abroad. — *See* sects. 267–270.

Registrations and Returns respecting Seamen.—See sects. 271–279.

Official Logs. — By sects. 280, 281, to be kept in form sanctioned by the Board of

(B) *Authority and Duties of Master.*[1]

Trade, and entries to be made in due time. And *see* sects. 282–287.

East Indies and Colonies. — By sect. 288, provisions of act, as applied by East Indian and colonial governments to their own ships, may be enforced throughout the empire. By sect. 289, East Indian and Colonial Acts to be subject to disallowance, and require sanction, as in other cases. Sect. 290. Conflict of laws. As to the jurisdiction of a court of Admiralty as to wages account, &c., *see* 17 & 18 Vic. c. 104, s. 191.

[1] The master of a ship has authority by law to pledge the credit of his owner for supplies in a foreign port for the necessary use of the ship, on the credit of the owners, independently of express stipulation in the charter-party. *Westerdell v. Dale*, 7 T. R. 312; Abb. Ship. by Shee; and in *Arthur v. Barton*, 6 Mee. & W. 142, it was held that, even in an English port, the master may, if it be a case of necessity, borrow money for the use of the ship's account. *Weston v. Wright*, 7 Mee. & W. 396. But this is on the supposition not merely that the supply of money is necessary (*Beldon v. Campbell*, 6 Ex. 886. *Macintosh v. Mitcheson*, 4 id. 175; 18 L. J. Ex. 385), but that the owner cannot be communicated with; and the rule is the same as to goods. *Johns v. Simons*, 2 Q. B. 425. *Stonehouse v. Grant*, id. 431. *Benson v. Duncan*, 3 Ex. 644; 18 L. J. Ex. 169. *Frost v. Oliver*, 1 E. & B. 301; 22 L. J. Q. B. 353. *See post*, p. 447.

In *Hart v. Oliver*, 2 E. & B. 301, *Mitcheson v. Oliver*, 5 id. 419, it was declared that the master of a vessel stands in no different position from any other agent; *Erle, J.*, remarking that the origin of the authority of the master as agent stands on the same principle as that of any agent, and that each case must depend upon its own circumstances, in accordance with the rule which now governs every other case of agency.

Where the necessary resources cannot be obtained on the personal security of the master, or even of the owner, there is a further method for ensuring the reimbursement to the person advancing them, which consists in pledging the ship in specie, freight, or cargo, and giving him a right to enforce repayment of his claim against the actual vessel herself. This is called hypothecation, and is effected through the instrumentality of a bottomry bond, &c. *See post*, p. 447. *The Gratitudine*, 3 Rob. 240. *Benson v. Duncan*, 3 Ex. 644. *Stainbank v. Fenning*, 11 C. B. 51. *Stainbank v. Shepard*, 22 L. J. Ex. 341. *Samson v. Braggenton*, 2 Hagg. Ad. 48. But the master has no right to create a lien upon the vessel until he has made every reasonable endeavour to obtain supplies, repairs, or money, upon his own personal credit, or that of the owners. *Heathorne v. Darling*, 1 Moore, P. C. C. 5. *The Nelson*, 1 Hagg. 176. *La Ysabel*, 1 Dod. 273. *Oretia*, 3 Hagg. 84. *Dunegan Castle*, id. 331. It is not until all other means of obtaining necessaries fail that he has authority to hypothecate the ship, and to give maritime interest, which is in effect defeating the object of the adventure, and transferring to the creditor much of the profits of the voyage. If the master, at a foreign port, is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies, or raises money on bottomry (*Wallace v. Fielden*, 7 Moore, P. C. C. 398); and if he borrows money for his own purposes, as distinguished from those of the shipowners, his contract will fail to create a lien upon the vessel (*The Reliance*, 3 Hagg. 66); nor can he create such a charge for repairs ordered and executed, or money advanced previously, without an agreement for a bottomry-bond, or a lien upon the vessel. No repairs, &c. executed on personal credit of the owner can afterwards be converted into a bottomry transaction. See *Edwards v. Havill*, 14 C. B. 107. If money cannot otherwise be obtained, he may sell the ship (Abbott, p. 2, c. 3. *Ireland v. Thomson*, 4 C. B. 158. *See* 13 Moore, P. C. C. 132), and may, in some cases of extremity, dispose even of the cargo itself for the benefit of all concerned. *Hunter v. Parker*, 7 Mee. & W. 322. *Slerboom v. Chapman*, 13 id. 230. *Ireland v. Thompson*, 4 C. B. 149. *The Australian*, 1 Swab. 480. See *Lapwich v. Burrow*, 13 Moore, P. C. 132. *The Bonita*, 30 L. J. Ad. 145. *Castrique v. Imrie*, 30 L. J. C. P. 179. *Atkinson v. Stephens*, 21 id. Ex. 329. *Duncan v. Benson*, 17 id. 238; 18 id. 169. *Blythe v. Smith*, 6 Scott, N. C. 360; 12 L. J. C. P. 203. *Ewbank v. Nutting*, 7 C. B. 797.

The authority of the master may not only extend to all things necessary for the successful navigation of the ship to the close of her voyage, but also, in the event of that becoming impossible, to the forwarding of the cargo in the best manner practicable to its port of destination, and this in the interest of all parties concerned — of the shippers, to enable them to regain their property; and of the owners, to entitle themselves to freight. His authority in this respect is said to extend to hiring another vessel for the purpose of transhipping and forwarding the cargo, and to charging the merchant with the increased rate of freight required for it, and also to selling or hypothecating the cargo. 3 Kent's Com. 212. See *Shipton v. Thornton*, 9 Ad. & E. 314. *Matthews v. Gibbs*, 30 L. J. Q. B. 55. He may sign charter-parties and bills of lading (*Ellis v. Turner*, 8 T. R. 531), but he cannot vary a special contract for employment of the ship, nor substitute another for it (*Burgon v. Sharpe*, 2 Camp. 529); nor can he bind the owners to carry goods free of freight (*Dewell v. Moxon*, 1 Taunt. 391); and he has no general authority to sign bills of lading for goods not received on board, and all persons taking a bill of lading by indorsement or otherwise have notice that he has no such power. *Grant v. Norway*, 10 C. B. Rep. 665. *See* 18 & 19 Vic. c. 111. He exhausts his authority, moreover, by signing bills of lading of a cargo actually on board, and

(C) *Liabilities of Master.*[1]

VI. Pilot and Pilotage.[2] *See* also *ante*, p. 132.

cannot sign further bills with respect to the same cargo. *Hubbersty v. Ward*, 8 Ex. Rep. 330. He is bound to give his whole time and attention to the service of his employer (6 Hare, 112), and to account for the profits of using the ship. 5 L. T. (N. S.) 824.

[1] Masters of ships being something more than mere agents, are personally responsible in respect of stores and necessaries furnished for the use of vessels under their command, and for repairs done by their orders, unless they expressly disavow personal liability, and confine the credit to the owners. *Rich v. Coe*, 2 Cowp. 639. The master's authority, independent of statutory enactment, only extends to doing and procuring things necessary (*see* 1 Lushington, 329) to conduct the ship to the termination of her voyage (*Beldon v. Campbell*, 6 Ex. 886); and accordingly, prior to the 17 & 18 Vic. c. 104, he could not pledge the owner's credit for board and lodging furnished to sailors injured by an accident, if they were not necessary to the prosecution of the voyage. *Osgan v. Brodie*, 10 Ex. 449.

By sect. 205 of this act, the master is bound to provide a seaman or apprentice who is discharged abroad, in consequence of the transfer of the ship there, with a passage home, or sufficient money to defray the expenses of subsistence and a passage home; and if he fails in doing so, such expense, by whomsoever defrayed, are directed to be a charge upon the ship, and recoverable against the owner. By sect. 213, if any seaman or apprentice is left behind at a place out of the United Kingdom, without full compliance on the part of the master with all the provisions of the act in that behalf, the expenses incurred with respect to him are to be charged upon the ship. By sect. 228, in the case of any injury in the service of the ship to a seaman or apprentice, the cost of medical attendance, of his subsistence, and if he dies, of his burial, is to be defrayed by the owner, without deduction from his wages; and in the case of illness, in consequence of which he is temporarily removed from the ship, returning, however, subsequently, the costs of his medical attendance and of his subsistence are to be defrayed in like manner, and also the costs of medical attendance, if the seaman or apprentice remains on board. In other cases of reasonable expenses incurred by the owner in respect of the illness or death of seaman or apprentice, he is entitled to deduct them from the wages due. *Blaikie v. Stembridge*, 29 L. J. C. P. 212; S. C. Ex. Ch. 6 C. B. 894; 28 L. J. C. P. 329.

It is the duty of a master to receive and properly stow on board goods delivered to him alongside. For any damage arising from his negligence, either in taking them on board or stowing them, he is responsible to the shipper; and if the damage happens from his misconduct, he is responsible to the owner: if from the misconduct of the mate or other of the crew, and not from any fault of his own, he is not responsible to the owner. *Blaikie v. Stembridge*, 5 Jur. N. S. 1128; 28 L. J. C. P. 330, Ex. Ch.; affirmed on appeal, 8 W. R. 239, Ex. Ch. But where a stevedore is appointed for the shipper, and acts in the stowage, the master is not responsible for damage done to the goods in the course of taking on board or of stowage. (Id.) Custom or agreement may vary the above rules. (Id.) If a shipper, knowing an article to have corrosive properties, desires it to be shipped on board a general ship, and stowed in bulk, without communicating the character of the article, and it is shipped accordingly, and being placed in the ship in contact with certain casks corrodes their hoops, so that liquids contained in them flow out of them and into the above-mentioned article, and spoil it, the shipowner being unaware of the character of the article is not liable to the shipper as for negligence in carrying and conveying, although the article is well known in commerce. *Hutchinson v. Guion*, 4 Jur. N. S. 1149, C. P. But in such case it is not an answer to the action that the shipper directed the articles to be stowed in bulk. (Id.) See *Sack v. Ford*, 32 L. J. C. P. 12. *Garrett v. Melhuish*, 4 Jur. N. S. 943. The master is liable to the seamen for their wages. 7 L. T. (N. S.) 440.

[2] *See* 25 & 26 Vic. c. 63, ss. 39, 40, as to authority of Board of Trade. As to returns to, *see* 17 & 18 Vic. c. 104, s. 337; examination of pilots and certificates, id. ss. 340–344; pilot-boats, ss. 345–352; compulsory pilotage, ss. 353–355, and ss. 39 and 41 of 25 & 26 Vic. c. 63; remuneration, privileges, and liabilities, 17 & 18 Vic. c. 104, ss. 356–362; Trinity-house power and duties, id. ss. 362–386. Besides what is stated *ante*, p. 438, as to responsibility of owners or masters, *see* 17 & 18 Vic. c. 104, s. 88.

No owner or master is to be answerable for loss or damage caused by the fault or incapacity of any qualified pilot acting within any district where his employment is compulsory. (Sect. 388.) It is noticeable here, that the owner and master will only be relieved of liability where the loss or damage is caused by the act of the pilot. The law thus enacted being in confirmation of previous decisions. *The Protector*, 1 Wm. Rob. 45. *Hammond v. Rogers*, 7 Moore, P. C. C. 160. *Rodriques v. Melhuish*, 10 Ex. 110. And where there is no proof that the pilotage was compulsory, no exemption can be claimed by the owners on the ground of the vessel having been in charge of a pilot. *Owners of Peerless v. Owners of Jason*, 30 L. J. Ad. 89. The ingredients essential to fixing with liability the owners of the ship alleged to have been in fault, are stated by *Lord Chelmsford* in the case cited. He said, "The question may conveniently be

VIII. Conveyance of Passengers.[1]

considered under the three following heads: —1st. Was the collision occasioned by negligence on board the Peerless while she was in charge of a licensed pilot? 2dly. Did any omission of the master or owner of the Peerless contribute to the collision? and 3dly. If the pilot was wholly to blame, are the owners of the Peerless, either upon general principles of law, or by any act of the local legislature, exonerated from liability?" It was determined that the collision was caused by negligence on board the Peerless, which was solely attributable to the pilot, but in the result the owners were held liable, as it appeared that the pilotage was not compulsory.

[1] The master has extensive authority over the passengers. They must, in obedience to his orders, do works of necessity for the preservation of life and property; and the master may compel them so to do. On the approach of an enemy he has the power to assign to each his post, and each must obey him. If a passenger refuse obedience, even his confinement (if necessary for the discipline of the crew and the security of the vessel) may be justified; but necessity alone can justify such an exercise of power. *Boyce v. Bayliffe*, 1 Camp. 58. *Newman v. Walters*, 3 B. & P. 612. *See* also *Prendergast v. Compton*, 8 C. & P. 454. *Clutterbuck v. Coffin*, 1 Dowl. N. S. 486. A passenger, however, is not compellable to remain by a ship in danger until all hope of saving her is lost, as the crew are, but is at liberty to abandon her at any moment he pleases; but he thus disentitles himself to prize-money or salvage. (Id.)

The Passengers' Act (18 & 19 Vic. c. 119, amended by 26 & 27 Vic. c. 90), chiefly relates to emigration ships. It shall extend to every passenger-ship proceeding on a voyage from the United Kingdom to any place out of Europe, not being in the Mediterranean sea, and to every ship bringing passengers into the United Kingdom from any place out of Europe, and not being in the Mediterranean sea, with the exception of certain classes of vessels, amongst which are steam-vessels regularly employed in the conveyance of the public mails under an existing contract with the government of the state or colony to which they belong, provided a certificate of exemption, such as is pointed out by the act, is produced. It regulates and prescribes the rights and duties of passengers on ships of this description, and is the only act relative to the subject now in force.

No policy of assurance effected in respect of any passenger, or of any passage, of compensation money, by any person liable under the act to provide passages or pay compensation, shall be void by reason of the nature of the risk sought to be insured. See *Gibson v. Bradford*, 4 E. & B. 586. And nothing contained in the act is to take away the right of action accruing to any passenger in respect of any contract into which he has entered with the master or owner.. (Sect. 58.)

Power is given to the queen by an order in council to prescribe rules and regulations for (amongst other things) preserving order, promoting health, and securing cleanliness and ventilation on board passenger-ships sailing from this country to any place in her majesty's possessions abroad (sect. 59); and the surgeon, aided by the master, is empowered to exact obedience to any such rules, and a penalty is imposed on any one refusing obedience, or guilty of riotous or insubordinate conduct. (Sect. 60.)

In the absence of any agreement to the contrary, the owner is to be the party ultimately responsible amongst those made liable to the payment of monies by the act, and monies so paid may be recovered from the owner in an action. (Sect. 63.) On the passage-money being paid, the passenger is to receive a contract ticket in a form prescribed by the act, and obedience to all directions contained in it is enforced by a penalty. (Sect. 71.)

Any dispute arising out of any of the stipulations in such ticket may, at the option of the passenger, be determined in a summary way before the justices or officers authorised by the act. (Sect. 73.)

No action can be brought against any officer for anything done in pursuance of the act, unless ten days' notice in writing of the cause of action be given, nor after three calendar months after the act committed and mentioned in the notice for which the action is brought. (Sect. 93.) And where no time is expressly named, within which any complaint or information is to be laid for breach of any of the requirements of the act twelve calendar months next after the matter of complaint arose will be the limit of time allowed. (Sect. 94.)

For provisions with respect to the survey of passenger-steamers, and the duties of owners and masters, or other persons in charge of them, the reader is referred to 17 & 18 Vic. c. 104, ss. 303-321. 25 & 26 id. c. 63, provides, with regard to duly-surveyed passenger-steamers, that drunken and disorderly passengers, as well as those who attempt to evade paying their fare or showing their ticket, or who refuse, under certain circumstances, to leave the ship, or who shall be drunken or disorderly, or force their way on board the ship when full, shall be liable to a penalty (Id. s. 35); as likewise those who wilfully cause any obstruction or do any injury to the machinery of the steamer, or obstruct or impede her crew. (Id. sect. 36); and the master is empowered to detain any person guilty of any of those offences, and whose name and address are unknown, and convey him without warrant before some justice who shall have jurisdiction to try. (Id. s. 37.) *See* Maude & Pollock, 454. A passenger cannot recover for the loss of his luggage unless he has complied with the conditions imposed by the owner. 10 C. B. 453; 8 Jur. 232; 30 L. J. C. P. 706. As to assigning a cabin, *see* 2 F. & F. 413.

IX. Conveyance of Goods.[1] *See* also Bill of Lading, vol. ii. p. 490; Carriers, vol. iii. p. 29; Charter-Party, id. p. 79; Demurrage, vol. iv. p. 36; Freight, id. p. 532; *ante*, Liabilities of Owner, p. 440; Liabilities of Master, p. 444.

XII. Wreck, Casualties, and Salvage.[2]

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[1] Goods may be carried in a ship, the whole or principal part of which is hired by the merchant under a charter-party, or in a general ship, where a number of persons desiring a means of conveyance for their merchandise contract separately to have them sent in a ship destined by the owners for a specific voyage.

When the goods have been loaded, the obligation of the owners is ordinarily to take the utmost care of them; but this responsibility may be modified by express contract, or by statute.

Where a ship is announced for a specific voyage it is obligatory on the owners, if her destination is changed, to give formal notice to all those who subsequently ship goods (*Peel v. Price*, 4 Camp. 243); and even when there is no express agreement as to time, there must be no unreasonable or unusual delay in the commencement of the voyage.

Before statutory limits (*see ante*, p. 439) were fixed, shipowners, like other common carriers, were insurers, and were liable as such for any loss or damage to goods intrusted to them, unless occasioned by the act of God (such as storms, &c., or of the queen's enemies. They were also liable for damage done by their servants acting within the scope of their employment; and the law formerly exacted a full compensation out of all their property, upon the principle that persons undertaking the conveyance of goods are answerable for the conduct of the persons whom they employ, of whom the parties suffering damage know nothing, and over whom they have no control. See *per Lord Stowell* in *The Dundee*, 1 Hagg. 121. The exception of cases of *vis major* allowed by the civil law was not recognised by the common law. *See* Molloy, b. ii. chap. 2, s. 2. In a case in which the damage to the goods arose from one of the perils excepted in the bill of lading, but the exposure to that peril was caused by the mode in which the ship was moored during the unloading, it was held that the shipowners were not liable if they had exercised ordinary and reasonable care. *Laurie v. Douglas*, 15 Mee. & W. 746. Generally speaking, there is no distinction between a land and a water-carrier. See *per Buller, J., in Prop. of Trent Navigation v. Ward*, 3 Esp. 132; and the judgment in *Laveroni v. Drury*, 8 Ex. 170. *See*, as to whether shipowners carrying passengers beyond the seas are strictly common carriers, *Bennett v. the Peninsular Steam-boat Co.* 6 C. B. 775. The fact that a carrier's terminus *ad quem* is without the realm does not relieve him from the liabilities of a common carrier. See *Crouch v. the London and North-Western Railway Co.* 14 C. B. 255. The Carriers' Acts, 11 Geo. 4, and 1 Wm. 4, c. 68, protect carriers who have contracted to carry goods partly by land and partly by water where the loss occurs on the land. *Peanciani v. the London and South-Western Railway Co.* 18 C. B. 226. But the general liability, however, no longer exists: it is not only usually narrowed by the express terms of the contract for carriage.

By the 17 & 18 Vic. c. 104, s. 503, the owners are exempt from liability for loss of cargo by fire. See *Morewood v. Pollok*, 1 E. & B. 743; 22 L. J. Q. B. 250; 17 Jur. 881. *Bourne v. Gatliff*, 11 Clark & Fin. H. L. 45.

If goods are received at a wharf or quay by a boat belonging to the ship, the master is responsible for their safe custody. Molloy, b. ii. c. 2, s. 2. Where however goods, previous to their shipment, are delivered by the merchant to a wharfinger or lighterman, questions often arise as to when his responsibility determines and that of the master commences. Where the liability of the wharfinger or lighterman ends, that of the master begins.

By sect. 339, 17 & 18 Vic. c. 104, no person shall be entitled to carry in any ship, or to require the master or owner of any ship to carry therein, any aquafortis, oil of vitriol, gunpowder, or any other goods which, in the judgment of such master or owner, are of a dangerous nature; and if any person carries or sends by any ship any goods of a dangerous nature, without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the master or owner, at or before the time of carrying or sending the same to be shipped, he shall for every such offence incur a penalty not exceeding 100*l.*; and the master or owner of any ship may refuse to take on board any parcel that he suspects to contain goods of a dangerous nature, and may require them to be opened to ascertain the fact. *See* Form of Pleas, *Hutchinson v. Guion*, 28 L. J. C. P. 63. *Alston v. Herring*, 25 L. J. Ex. 177; 11 Ex. 822.

[2] Salvage is the compensation to be made to persons who contribute by their exertions to the saving of the ship, or its restoration after actual loss. See *Hartfort v. Jones*, 1 Ld. Raym. 393; and 31 L. J. Adm. 210. Their efforts must have been successful. (Id. 46.) It appears to have been the opinion of Lord Stowell, that a pilot, even under some circumstances, might successfully maintain a claim for salvage, and be claimed under special circumstances by a passenger (*Newman v. Walters*, 3 B. & P. 612); and with respect to mariners, it has been held (*The Florence*, 16 Jur. 572. *The Neptune*, 1 Hagg. 227), that where a ship was abandoned at sea, and part of her

XIII. Liens connected with.[1] *See* vol. v. p. 382.

XIV. Steam-Ships; Statutory Enactments regulating.[2]

XVII. Bottomry[3] and Respondentia.[4] *See* also Div. V., Authority and Duties of Master, p. 443.

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crew afterwards falling in with her volunteered to return on board, and ultimately navigated her into harbour, they were entitled to salvage, but certain conditions must co-exist in order to put an end to the mariner's contract and legitimatise his claim. 16 Jur. 572. As to passenger's right to salvage, *see* 1 Lushington, p. 322.

With respect to the numerous provisions in the 17 & 18 Vic. c. 104, part 8, and the extensive amendments in 25 & 26 Vic. c. 63, ss. 49–53, that all questions relating to salvage, both as regards the amount and the apportionment, are within the jurisdiction of the Admiralty, and cannot be recovered by action, but must be referred to two justices, see *Atkinson v. Woodall*, 31 L. J. Rep. (N. S.) M. C. 174.

In determining the proportion to be awarded to salvors is the degree of peril they underwent, and that is mainly to be considered: ordinarily, those who first rendered aid will receive the larger portion of the reward, even although subsequent parties may have rendered indispensable service. *See* 3 Hagg. Ad. R. 117; 2 id. 361.

Salvage is payable, not only for the ship and cargo, but for freight actually in the course of being earned.

Claims for salvage on the part of the officers or crew of her majesty's ships are regulated by the Merchant Shipping Act, 1854, sects. 484, 485, whereby it is provided that no claim shall be allowed in respect of loss or risk of the ship's stores or tackle in rendering salvage service, and that no claim whatever by the commander or crew of any of her majesty's ships shall be finally adjudicated on, unless the consent of the Admiralty, signified under the hand of the Secretary to the Admiralty, has first been obtained.

The 18 & 19 Vic. c. 91, s. 19, provides, that in case of wreck of foreign ships the consul-general is to be deemed agent of owners, and directs remuneration for service by coast-guard.

[1] A right to enforce a claim against the ship itself in respect of services rendered to her, or injury inflicted by her, without an actual or constructive possession of the vessel in the claimant at the time being necessary. It can be enforced only in the Court of Admiralty *in rem*; when the ship is under arrest of the court, and may be for wages, pilotage, towage, salvage, and bottomry. The preference which one of these liens is entitled to over another is determined on the principle that it belongs to that for the latest service rendered. See *Harmer v. Bell*, 7 Moore, P. C. C. 267. *Castrique v. Imrie*, 8 C. B. 1; 29 L. J. C. P. 321. *See* 16 Q. B. 117; 31 L. J. Q. B. 81; 29 id. Ex. 350; 29 id. Ch. 657; 5 H. & N. 728.

[2] As to build and equipment of steamship, *see* ss. 300–302. Survey of passenger-steamers, *see* ss. 303–321. Misconduct of passengers in steamers, *see* ss. 322–325. Accident to steam-ships to be reported to the Board of Trade, and notice to be given of apprehended loss (s. 327). Collisions to be entered in official logs (s. 328). Sect. 329 regulates the taking of dangerous goods on board. The 25 & 26 Vic. c. 63, s. 15, requires steamers to hire a certificated master.

[3] An agreement entered into by the owner of a ship, or the master as his agent, in consideration of a sum of money advanced for the use of the ship: the borrower undertakes to repay the same, with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship for the performance of his contract. Smith's *Merc. Law*, 261. The instrument by which this is effected is usually in the shape of a bond, called a bottomry bond, which is in the nature of a mortgage of the vessel, and is defined to be a contract for a loan of money on the bottom of the ship, at an extraordinary interest upon maritime risk, to be borne by the lender for a voyage, or for a definite period. Smith's *Merc. Law, ubi sup.*; 3 Kent's Com. 354. Bottomry is a contract of a peculiar character, differing essentially from an ordinary loan. The master is the agent alone of the owner in borrowing money on bottomry. *Benson v. Duncan*, 3 Ex. 644; 10 L. J. Ex. 169.

[4] Imports a loan of money upon the pledge of the cargo of a vessel, to be repaid with maritime interest if the subject arrives safe, or if it shall not have been injured, except by its own defect, or the fault of the master or mariners. 3 Kent's Com. 354, 355. Called *respondentia*, because it is generally only a personal obligation on the borrower, who is bound to answer the contract. Id.; 2 Bl. Com. 458. The contract is executed in the form of a bond called a respondentia bond. 3 Kent's Com. 354. *See* Abbott on Ship. 150.

The authority of the master to hypothecate the ship for himself extends also to the freight, but not to the cargo (*Benson v. Duncan*, 3 Ex. 644), and can only exist in a foreign country, or under circumstances of extreme difficulty of communication between himself and the owners (*La Ysabel Bugo*, 1 Dods. 373. *Walmon v. Fielder*, 7 Moo. P. C. C. 398); and where a security of this kind is given, accompanied by the payment of maritime interest, the owners will be relieved of their personal liability (*see* Abbott on Shipping, 10th ed. p. 117); and it is now finally settled by *Stainbank v. Fenning*, 11 C. B. Rep. 5, and *Stainbank v. Shepard*, 22 L. J. Rep. N. S. Ex. 341, that the master has no authority to hypo-

SHOOTING. *See* Murder, vol. v. p. 501.

SHORE. *See* Rivers, *ante*, p. 348; Seashore, *ante*, p. 363.

SHORT Notice of Trial. *See post*, Trial.

SHOWERS. *See post*, View.

SIC utere tuo ut alienum non lædas. *So use your own as not to injure another's.* 9 Co. 59.

SIDE-BAR Rule.[1]

SIDESMEN or Questmen.[2]

SIGNATURE.[3]

SIGN Manual.[4]

SIGNING Judgment.[5]

SIMILITER.[6]

SIMONY.[7] *See* Resignation Bond, *ante*, p. 336.

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thecate, unless the repayment of the money is made to depend on the arrival of the ship, and that he cannot hypothecate and also pledge the owner's credit. See *Edwards v. Havill*, 14 C. B. 107. *Beldon v. Campbell*, 6 Ex. 886. *Oryan v. Brodie*, 10 id. 449; *ante*, p. 443.

Where it appeared that a bottomry bond had been given at a foreign port at which the owner had a recognised agent, within the probable knowledge of the person making the advance, the court decreed the bond void. *The Faithful*, 31 L. J. Ad. 81.

Advances made for the service of the ship to pay debts *bonâ fide* incurred before may be included. 2 Wms. Rob. 413; but see *Gore v. Gardner*, 3 Moo. P. C. C. 79. Proof of the necessity lies on the merchant, but with the expediency of the repairs and the like he seems to have nothing to do. (Id.) A bottomry bond may be good in part and bad in part. *The Hearts of Oak*, 1 Wm. Rob. 215. *The Queen*, 2 id. 437. When there are several bonds, and one is secured on the ship and freight, and another on the ship, freight, and cargo, the Court of Admiralty will marshal the assets. The ship and freight form the primary resources for the discharge of such bonds, and the cargo is only liable when these resources are exhausted. So, as a general rule, when ship and freight belong to different persons, the bond is to be paid by both *pro ratâ*, and without the bondholders' movement or concurrence the Admiralty Court will bring one or the other into contribution. *The Dowthorpe*, 2 id. 85. When one bond is upon the ship and another on the cargo, demands for pilotage, towage, and seamen's wages, must be satisfied *pro ratâ* out of the proceeds of ship and freight. *The Trident*, 1 Wm. Rob. 29. *La Constancia*, id. 460. Generally such a bond does not become due until the voyage for which it was given is completed; but if the completion be prevented by the act of the master, or by circumstances beyond the control of the bondholder, payment of it may be at once enforced in the Admiralty Court. *The Armadillo*, 2 Rob. 255. *The D. Dante*, id. 428.

[1] A rule granted by the officers of the several courts as a matter of course, without formal application in open court.

[2] Persons yearly chosen, according to the custom of the parish, to assist the churchwardens. The office is now nearly obsolete.

[3] A signature may be written either by the party himself or by his authorised agent, and it may be expressed either by the party's actually writing his name or making his mark (the original meaning of *signum*), and it may be written in some cases in pencil as well as with ink, and even expressed by the party's initials. To particular document, *see* Bills and Notes, Bond, Frauds, Statute of, &c. &c.

[4] The royal signature to grants and letters written at the top of the instrument. 2 Bl. Com. 347.

[5] The allowance of the proper officer of a court obtained by the party entitled to judgment. As soon as the costs are taxed, and the master's *allocatur* or certificate of the amount is granted, judgment is signed by an entry to that effect in the master's judgment-book: till this is done the proceedings are incomplete. *Pierce v. Davy*, 4 Q. B. 635. *Walter v. De Richmond*, 6 id. 544. *Salter v. Slade*, 3 Nev. & M. 717. *Butler v. Bulkeley*, 1 Bing. 233. When duly entered, the party may immediately issue execution.

[6] The name of the short formula formerly used either at the end of pleadings or by itself, expressive of the acceptance of an issue of fact tendered by the opposite party. A joinder in issue is now adopted instead. The form being, "plaintiff joins issue upon the defendant's plea, &c." Steph. Pl. 57, 237.

[7] Is the corrupt presentation of any one to an ecclesiastical benefice or dignity for money, gift, or reward. 31 Eliz. c. 6, s. 5; 12 Anne, st. 2, c. 12, s. 2. The right of presentation is thereby forfeited *pro hac vice* to the Crown: both the giver and taker forfeit the double of one year's value of the benefice, one to the Crown and the other

SIMPLE Contract. *See* vol. iii. p. 194; Deeds, vol. iv. p. 1.

Larceny. *See* Larceny, vol. v. p. 311.

SINGLE Bill.[1]

SINGULAR Successor.[2]

SITTINGS.[3] *See* also *post*, Sunday.

SIX Clerks.[4]

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to the informer. The presentation is void, and the presentee is for ever incapable of enjoying the benefice. But it is not simony for a layman, or for a spiritual person, not purchasing for himself, to purchase while the church is full either an advowson or next presentation, however immediate may be the prospect of a vacancy, unless that vacancy is to be occasioned by some agreement or arrangement between the parties. Nor is it simony for a spiritual person to purchase for himself an advowson, although under similar circumstances. If either a layman or a spiritual person purchase an advowson while the church is vacant, a presentation by the purchaser upon any future avoidance after the church has been filled for that time is not simony. It is simony for any person to purchase the next presentation while the church is vacant. It is simony for a spiritual person to purchase for himself the next presentation, although the church be full. It is simony for any person to purchase a next presentation, or, if the purchase be of an advowson, the next presentation by a purchaser would be simoniacal if there is any agreement or arrangement between the parties at the time of the purchase for causing a vacancy to be made. If any person purchase an advowson while the church is vacant, a presentation by the purchaser for that vacancy is simony. Cripps, 517.

If the incumbent of a living is sick and dying, and the next presentation is purchased with intent to present a particular person as soon as the expected vacancy occurs, the purchase is simoniacal and void; but not if it is made without the privity and without a view to the nomination of the clerk afterwards appointed. *Sheldon v. Brett*, Winch. 63. *Fox v. Bishop of Chester*, 6 Bing. 1; 1 Dow & Clark, 416. The 3 & 4 Vic. c. 113, which enacts "that it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him," does not extend to an agreement touching an advowson or right of presentation authorised by 1 Geo. 1, st. 2, c. 10, or 8 & 9 Vic. c. 70; 9 & 10 Vic. c. 88. See *Barrett v. Glubb*, 2 W. Black. 1052. *Fox v. Bishop of Chester* (in error), 2 B. & C. 635; 4 D. & R. 93. *R. v. Bishop of Oxford*, 7 East, 601; 3 Smith, 570.

Selling a curacy, and taking money to admit a person into holy orders, is simony. *Bishop of St. David's v. Lucy*, Carth. 484; 1 Ld. Raym. 447.

In an action for use and occupation by an incumbent against a tenant of the glebe lands who has paid him rent, the defendant cannot give in evidence a simoniacal presentation of the plaintiff in order to avoid his title (*Cook v. Loxley*, 5 T. R. 4); and where the occupier of lands has entered into an agreement for a composition for tithes, he cannot set up a defence to an action on such an agreement that the incumbent was simoniacally presented. *Brooksby v. Watts*, 2 Marsh. 38; S. C. 6 Taunt. 333.

Where a resignation bond had been declared simoniacal, and the presentation of the party therefore void:—*Held*, that the church was not to be deemed full, and the presentee of the Crown, who had been put into corporeal possession of the church, was entitled to maintain ejectment against the former incumbent. *Doe d. Watson v. Fletcher*, 8 B. & C. 25; and 2 R. & M. 206.

[1] A written engagement under seal for the payment of money without a penalty. It seems to have formerly been nearly the same as a single bond — a bond without a condition. Shep. Touch. 367. Single bills are still in use in the United States.

[2] In Scotch law a purchaser, in contradistinction to the heir of a landed proprietor. Bell's *Dict.* *See* 1 Forbes's *Inst.* part iii. p. 1.

[3] The holding of a court before all the judges, or a sittings *in banco* or at *nisi prius*, by one of the judges. By 17 & 18 Vic. c. 125, s. 95, the superior courts may appoint and hold sittings *in banco* at any time or times not being between the 10th Aug. and 24th Oct. As to the notices to be given, see *Field v. Mackenzie*, 6 C. B. 389; and by the same section the courts may appoint and hold sittings for the trial of issues in fact by judge or jury at any time, whether in term or vacation, not being between the 10th Aug. and 24th Oct.; and by sect. 2, two judges may hold separate sittings at the same time, so that the trial of two causes may be proceeded with simultaneously.

[4] Formerly officers in the Court of Chancery; abolished 5 Vic. c. 5.

SIX Months.[1]

SLANDER, Verbal.[2] Slander, Written, *see* Libel, vol. v. p. 362.

I. Definition: Intent; Malice, p. 450.

II. Words Imputing Crimes or Offences, p. 451.

III. Words spoken of Persons in Employments, Offices, Trades, and Professions, p. 452.

IV. Imputing Personal Defects, Contagious Disease, Want of Chastity or Moral Conduct, &c. p. 454.

V. Confidential and Privileged Statements and Communications, p. 454.

VI. Repetition of Slander spoken by Others, p. 455.

VII. Construction and Application of Words, p. 456.

VIII. Slander of Title. *See post*, Slander of Title, p. 467.

IX. Words Actionable only on the ground of Special Damage, p. 456.

X. Scandalum Magnatum, p. 456.

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(A) *By Action*, p. 457.

XI. Remedies for (*continued*).

(*a*) *Parties to*, p. 457.

(*b*) *Pleadings*, p. 458.

(1) *Venue*, p. 458.

(2) *Declaration, Inducement, Innuendo, Colloquium, &c.* p. 458.

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(B) *Evidence*, p. 461.

(*a*) *For Plaintiff*, p. 461.

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(*b*) *For Defendant*, p. 461.

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(D) *Directions of Judge to Jury; Verdict; and Judgment*, p. 466.

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(F) *When a Criminal Offence*, p. 467.

I. Definition;[3] Intent; Malice.

[1] Is sometimes construed to mean half a year, and not merely six lunar months. Cro. Jac. 167.

[2] Holt on Libel; Starkie on Slander; Wingrove Cooke on Defamation; Selwyn's N. P.; Addison on Torts; Hilliard, id.

[3] This term, used generally, without qualification, is often applied indiscriminately by the earlier writers to both oral and written defamation. Under the present title the law will be confined to unwritten calumnies. Spoken slander, that is, the utterance of false, malicious, and defamatory words, tending to the damage and derogation of another (3 Bl. Com. 123; 3 Steph. id. 472, and works referred to *supra*); or it may be more comprehensively defined as the imputation — 1. Of some temporal offence, for which the party might be indicted and punished in the temporal courts; 2. Of an existing contagious disorder, tending to exclude the party from society; 3. An unfitness or inability to perform an office or employment of profit, or want of integrity in an office of honour; 4. Words prejudicing a person in his profession or trade; 5. Any untrue words occasioning *actual* damage. *See* judgment of *De Grey, C. J.*, in *Onslow v. Horne*, 3 Wils. 186.

There is a very material distinction (*see* also vol. v. p. 363, n.) between libels and words. A libel is punishable, both criminally and by action, when the mere speaking the words would not be punishable in either way. For uttering the words "rogue" and "rascal" of any party an action will not lie, but if these words were written and published of any one an action could be sustained: *Per Gould*, in *Villers v. Monsley*, 2 Wils. 403; 5 Co. 125, b. The words must be spoken wilfully, and with *an intent to slander*, and be so understood by the hearers, and without lawful excuse. Thus, words spoken jocosely or in merriment, without any intention to defame, are not actionable. *Brook v. Montague*, Cro. Jac. 90, 91. So, it has been said, if spoken in grief and sorrow. Lev. 82; 1 Ven. Ab. 40; 1 Stark. lib. 217. So it may be shown in excuse or mitigation, according to the circumstances, that the defendant was insane when the words were spoken (1 Hill. on Torts, 244); and in America, after judgment against a lunatic for slander, a perpetual injunction has been granted. (Id.) Slander implies malicious falsehood. Of malice, in reference to calumnious words, there are two descriptions — malice in fact, malice in law: the former is for the jury; the latter, that is the legal tendency of the words, is matter of law for the courts (*see* observations of *Bayley, J.*, in *Bromage v. Prosser*, 4 B. & C. 257, that there is no instance of a verdict for defendant on the *ground of want of malice*. The defendant is presumed to contemplate the consequences of his own act. *Haire v. Wilson*, 9 B. & C. 643; 4 M. & R. 605. Malice is *conclusively implied* from the deliberate making of a slanderous charge; this is *a conclusion of law* which the plaintiff is not required to prove, nor the defendant permitted to deny, except where the statement would be privileged, if

II. Words Imputing Crimes or Offences.[1]

not proved by the plaintiff to be in fact malicious. *See* id. *R. v. Phillips*, Chit. 470. *R. v. Creevy*, 1 M. & S. 273. *Simpson v. Robinson*, 12 Q. B. 513.

[1] The correct rule seems to be, to render words actionable in themselves, it is not sufficient that they impute to the plaintiff the violation of a penal or criminal law, but they must charge an offence indictable, involving moral turpitude, or subjecting the party to infamous punishment. Words imputing crime are actionable, though untechnical and not in terms directly charging the commission of the offence: popular meaning is the test. *Tozer v. Mashford*, 6 Ex. 539. *Peake v. Oldham*, Cowp. 275. Thus, "Jo. Tindal set the house on fire" (*Tindal v. Moore*, 2 Wils. 114), "You have committed an act for which I can transport you" (*Curtis v. Curtis*, 10 Bing. 477), are actionable *per se*. To accuse any person of treason (Finch, b. 3, c. 2; 2 Selw. N. P. 1254. *Heming v. Power*, 10 Mee. & W. 564; see *Parrott v. Carpenter*, Cro. Eliz. 502. *Graves v. Blanchet*, Salk. 696. *Lewis v. Roberts*, Hard. 203); or murder (Roll. Abr. 72, pl. 4); or bigamy (*Fleming v. Power, supra*); or larceny (Al. 31); or perjury (Roll. Abr. 39, l. 25); or subornation of perjury (Cro. Jac. 158); or theft, imputing felony (*Curtis v. Curtis*, 10 Bing. 479); or robbery (*Rawcliffe v. Edmunds*, 7 Mee. & W. 12); or that he keeps a bawdy-house (1 Roll. Abr. 44, l. 15; Cro. Eliz. 643; 1 Bulst. 138).

The charging a solicitation to commit a felony is actionable. Thus, for saying "my Lady Cockrane did offer 2*s.* to a woman with child, to get her to drink, to kill her child, because it was gotten by J. S., Sir T. C.'s butler." *Lady Cockrane's case*, Cro. Eliz. 49. *Tibbott v. Haynes*, id. 191. So, "If I had consented to Mr. Cardinal, J. H. had not been alive." *Cardinal's case*, 4 Co. R. 16; see *Eaton v. Allen*, id.; Cro. Eliz. 684; overruled by *Lewknor v. Cruchley*, Cro. Car. 140; see *R. v. Higgins*, 2 East, 5. *Bendish v. Lindsay*, 11 Mod. 193; see *R. v. Pitt*, 3 Burr. 1335. *Sir G. Moor v. Foster*, Cro. Jac. 65. So, to charge a person with having given money to the commissioners to be made purser of a man-of-war, as imputing corruption in a public trust, and criminal in both the commissioners and person tempting them (*Purdy v. Stacey*, 5 Burr. 2698); or with receiving stolen goods (1 Stark. Ev. 38); or selling unwholesome beer (1 Vin. Abr. 477; 6 Bac. Abr. 210; Free. K. B. 25); but not saying "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows;" for the bars of iron are parcel of the freehold, and the stealing of them is not any felony. Cro. Jac. 204. (This is now made felony by 7 & 8 Geo. 4, c. 29, s. 44.) So, "Thou art a thief, and hast stolen my corn, in the field," for it shall be intended standing corn, which is not the subject of felony. *Binge's case*, cited 1 Stark. 3648.

An action lies for these words, "Thou art forsworn in a court of record, and that I will prove," although it is not said in what court, nor that he was forsworn in giving evidence. *Ceely v. Hoskins* (in error), Cro. Car. 509. So, "Thou art a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over 30*l.* to make up the breach." *Somers v. House*, Holt, 39. So, "Baker stole my box-wood, and I will prove it." *Baker v. Pierce*, Ld. Raym. 959; 6 Mod. 234; Holt, 654. But it is not absolutely requisite, in order to make words actionable, that they should impute to the plaintiff an act of a criminal nature; if they signify the purposed design of the mind, although they do not import the carrying of such design into effect, they may still be actionable: as, for instance, the compassing or imagining the death of the queen, So, the following words were held actionable: "If Sir J. S. might have his will, he would kill the king." *Sydenham v. Mann*, Cro. Jac. 407. So, "He knew of the murder of L., and did not reveal it until long after it came to his knowledge." Yelv. 154; 1 Vin. Abr. 446.

The words are actionable, although they convey the suspicion or opinion of the speaker only as to the commission of the criminal act. Thus, where Y. said of H., "For my ground in A., H. seeks my life, and if I could find J. H., I do not doubt but within two days to arrest H. for suspicion of felony." *Hoxt v. Yeomans*, 4 Rep. 15. So, "I think, or I dreamed he committed a certain felony." *Smith v. Wisdome*, Cro. Eliz. 348; 3 Bulst. 249. So, "I am thoroughly convinced you are guilty." *Peake v. Oldham*, Cowp. 275. So, "If thou hadst thy rights thou hadst been hanged for such a felony." Brownl. 3. But words of suspicion or opinion must, directly or indirectly, impute some act. 1 Stark. 65. So, "I will take him to Bow Street on a charge of felony;" innuendo, that the plaintiff had been and was guilty of felony:— *Held*, not actionable, as they charged only a suspicion of felony. *Harrison v. King*, 4 Pri. 46, citing *Wood v. Merrick*, Roll. Abr. 73, pl. 21, l. 50. *Pollard v. Mason*, id.; Hob. 381; see *Davis v. Noak*, 1 Stark. 377. It seems to be a question for the jury whether the defendant, though he use words of suspicion only, did not mean in effect to impute the substantive crime to the plaintiff. *Tempest v. Chambers*, 1 Stark. 67. So, for the following words spoken *comparatively* an action lies: thus, "You are as great a rogue as J. S., who stole quilts." *Upton v. Pinfold*, Rep. 267. So, "Thou art as arrant a thief as any in England." Cro. Jac. 687. "As sure as God governs the world and King James this kingdom, J. N. hath committed treason." Sid. 63. So, for words spoken *interrogatively*, as, "When wilt thou bring home the nine sheep stolen from J. N.?" (*Hunt v. Thimblethorpe*, 1 Vin. Abr. 429); or, "Did you hear that J. S. is guilty of treason?"

III. Words spoken of Persons in Employments, Offices, Trades, and Professions.[1]

Northampton's case, 12 Rep. 134. *Hayward v. Naylor*, 1 Roll. Abr. 50.

An action lies for negative words if spoken ironically. 1 Vin. Abr. 433, pl. 8.

It is actionable to say, "I could prove J. S. perjured if I would," for if true, he must have committed an act of perjury. 1 Vin. Abr. 406, pl. 3; Sty. 220, 221; 2 Roll. Abr. 415. *Speed v. Perry*, Salk. 697. So, "You may well spend money at law, for you can coin money out of halfpence and farthings." *Held* actionable, for they implied an act, and not a power. *Horne v. Powell*, Salk. 697. So, "He was put in the round-house for stealing ducks at C." *Beavor v. Hides*, 2 Wils. 300. So, "His character is infamous; he would be disgraceful to any society; whosoever proposed him must have intended it as an insult: I will pursue him and hunt him from all society. If his name is enrolled in the Royal Academy I will cause it to be erased, and I will not leave a stone unturned to publish his name and infamy. Delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me." *Woolnoth v. Meadows*, 5 East, 463.

Words imputing an intention to commit a crime are not actionable *per se*. Thus, "Thou wouldst have killed me." Cro. Jac. 407; 2 Bulst. 206. But "She would have cut her husband's throat, and did attempt it," are actionable, for the attempt is an act. Lam. 98; 1 Vin. Abr. 440, pl. 9. If a married woman say, "You have stolen *my* goods," the words are nevertheless actionable. Roll. Abr. 74; 6 Bac. Abr. 238. *Charnel's case*, Cro. Eliz. 279. *Stamp v. White*, Cro. Jac. 600. *Bendish v. Lindsey*, 11 Mod. 194.

"Words, to be actionable, must be unequivocally so. Imputing to a person an evil inclination, which is not carried into effect, is not actionable." *Harrison v. Stratton*, Selw. N. P. 1254, n. 4. *Per Ellenborough, C. J.* And words charging another with a crime, of which by no possibility could he be guilty, as killing one who is still living, are not actionable, because the plaintiff cannot be in any jeopardy from such a charge. *Snag v. Gee*, 4 Rep. 16. See *Hunt v. Algar*, 6 C. & P. 245. The words must contain an express imputation of some crime liable to punishment, some capital offence or infamous crime or misdemeanor, and the charge upon the person spoken of must be precise.

[1] Many imputations upon a party, not personally, abstractly, or merely as an individual, may not be actionable, that would be clearly so in connexion with some office held or employment followed by him tending to prejudice him in that capacity. The general rule is, that words spoken of a person in an office of profit, which tend to deprive him of the appointment, or which impute the want of some necessary qualification, or some misconduct in it, are actionable. *Lamby v. Allday*, 1 Tyr. 217: *Bayley, B.* 1 C. & J. 301. The distinction has been made that an office of credit is, however, not of profit; words imputing mere want of ability are not actionable, as to call a justice an "ass, or beetle-headed justice." *Davis v. Miller*, 2 Stra. 1169. *How v. Prinn*, 2 Salk. 695. Thus, an action cannot be sustained for charging a man generally with cheating, or being a cheat or swindler; but it is otherwise when he is a trader, and the words spoken of him in relation to his trade or occupation. *Ludwell v. Hole*, 2 Ld. Raym. 1417. Hence an action lies for calling a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like. Finch, L. 186. *See* the several cases in Com. Dig. 22–27, F. 9, 10; 2 W. Black. 750; 3 Wils. 187, 59; 2 Stark. N. P. Rep. 245, 297; 4 Esp. 191; 3 B. & P. 372; 2 Stra. 898; Fitzg. 121. *Evans v. Harlow*, 13 L. J. Q. B. 120. *Edsall v. Russell*, 4 Man. & G. 1090. But imputations on his morality, temper, or conduct generally, which would be injurious to him, whatever were his pursuits, are not actionable *per se*, even though they tend to injure him in his business, occupation, profession, or trade (*Alexander v. Angle*, 1 Tyr. 9), or office. *Lamby v. Allday, supra. Ayre v. Croden*, 4 Nev. & M. 220; 2 Ad. & E. 2. *Bellamy v. Burch*, 16 Mee. & W. 370. But to impute wickedness to a bishop (2 Mod. 159), or drunkenness, or preaching false doctrine, to a clergyman (2 Stra. 946; 4 Rep. 19b); but he must not only be in orders, but must hold preferment (*Pemberton v. Colls*, 10 Q. B. 473; 16 L. J. Q. B. 403); disaffection to a justice (*How v. Prinn*, Holt, 652); or corruption to any official person; or want of scholarship or attainment to a member of the learned professions (Cro. Car. 382); or to an attorney (Id. 192; 3 Wils. 59; 2 Esp. 624), or surgeon or apothecary (1 N. R. 196); or want of skill or knowledge to a person exercising an art. *Tutty v. Alewin*, 11 Mod. 221. *Redmon v. Pyne*, id. 19. *Flower's case*, Cro. Car. 211. Want of honesty, or using false weights (*Griffith v. Lewis*, 7 Q. B. 65); or general imputations upon the credit or solvency of a trader (Cro. Car. 265, 317–570. *Brown v. Smith*, 12 C. B. 599. *Robinson v. Marchant*, 7 Q. B. 918; 3 Salk. 326; 10 Mod. 111, 196; 7 T. R. 17): nor for this purpose is it necessary that he should have been subject to the bankrupt laws (Lofft. 322; 3 Mod. 155; or that the words should expressly refer to his trading. *Jones v. Little*, 7 Mee. & W. 423. Generally, speaking ill of a chattel, without special damage, is not actionable, but it is to materially disparage the articles in which a tradesman deals (Cro. Car. 570; 6 Bing. N. S. 212; 1 Esp. 437); but not as to a specific article as private persons may desire to sell. *Evans v. Harlow*,

5 Q. B. 623; 1 Stark. Slander, 130. The trade or occupation must be a legal one. *Manning v. Clement*, 7 Bing. 362. *Hunt v. Bell*, 7 Moore, 212; 1 Bing. 1. *Yaisarrie v. Clement*, 3 Bing. 432; 11 Moore, 308.

A declaration alleged that the plaintiff, being proprietor of rooms adapted for a dancing academy, the defendant falsely and maliciously published of the building and rooms, and of the plaintiff as the proprietor, that "the magistrates in quarter sessions having refused to renew a music and dancing licence to the proprietor, all such entertainments there carried on are illegal, and the proprietor renders himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law," by means of which premises he was prevented from letting the rooms:—*Held*, on demurrer, that the declaration disclosed a good cause of action. *Bignell v. Buzzard*, 3 H. & N. 217; 27 L. J. Ex. 355.

Semble, that the words "he is a bad character; none of the medical men here will meet him," are actionable. *Southee v. Denny*, 17 L. J. Rep. (N. S.) Ex. 151; 1 Ex. Rep. 196.

The declaration in an action for slander, after averring that the plaintiff was a dealer in winches, proceeded (with the ordinary innuendoes) to allege that the defendant said to the plaintiff, "I have been robbed of three dozen of winches — you have bought three of them at 2*s.*; you well knew when you bought them that they could not have been honestly come by." Whereupon the plaintiff said to the defendant, "I have bought half a dozen winches from a new maker," and then produced certain winches to the defendant, "who, further contriving and intending as aforesaid," falsely and maliciously replied, "Oh, no; these are not my winches; you know that well enough: these (the said defendant pointing to some others) are mine. I am sorry to say anything against any tradesman, but I will bring the man who stole my winches, and let you see him, for he is in my custody," (innuendo that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by, and to have been feloniously stolen):—*Held*, that the words, "further contriving and intending," did not make the latter part of the declaration a fresh count, and that sufficient appeared on the face of the declaration to sustain the verdict, which had been found for the plaintiff. *Alfred v. Farlow*, 15 L. J. Rep. (N. S.) Q. B. 259; 8 Q. B. Rep. 854.

In an action for slander the first count stated that the plaintiff was a clergyman of the United Church of England and Ireland as by law established, and vicar of W.; that the defendant was also a clergyman of the said united church; that the defendant, intending to injure the plaintiff in his said character of a clergyman, falsely, &c. spoke the following words of and concerning the plaintiff in his said profession of a clergyman: "The very day I (the defendant) came into residence, Dr. P. (the plaintiff) sent for me: I went out and dined with him, and the wine must have been drugged, for I took but two glasses and was quite stupefied. While in this condition Dr. P. (the plaintiff) put a bill into my hands and requested me to sign it, saying, 'C., just put your name to this: I wish to have it as a security for the payment of 130*l.* per annum for reading for you at the new church.' I (the defendant) answered, 'Will you give me a pen and I will sign it; but I thought I had sufficiently satisfied you.' Immediately I had signed it, Dr. P. (the plaintiff) snatched it up and walked to the fire in order to dry the signature, and, laughing, said, 'This will be quite safe; I (the plaintiff) will take care of this.' The bill, I (the defendant) think, was drawn for 2500*l.*; but having been stupefied with the wine, I do not rightly remember;'" and also the following words: "You cannot suppose that I (the defendant) can meet a man who so cheated me at my first coming:"—*Held* good, as charging imputations on the plaintiff in his professional character. *Pemberton v. Colls*, 16 L. J. Q. B. 403; 10 Q. B. 461.

Words spoken of a superintendent of police: "I saw a letter respecting an officer of the Leeds Police Force, who was superior in rank to A. B., and who had been guilty of conduct unfit for publication:"—*Held*, not actionable without special damage; the conduct imputed to the plaintiff not being connected on the face of the declaration with his official character. *James v. Brook*, 16 L. J. Rep. (N. S.) Q. B. 17; 9 Q. B. Rep. 7.

Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for re-election that he had misappropriated parish monies while holding the office before:— *Held*, that the occasion was privileged. *George v. Goddard*, 2 F. & F. 689.

Where an underwriter, in discussing with an agent of the assured, a claim on his part as for a total loss, made a statement purporting to be founded on a letter of the assured which he professed to have seen, implying a design to make such claim dishonestly, no such letter having been written: — *Held*, that the occasion was privileged, but whether the communication was so would depend on the motive with which it was made, and whether there was a mere mistake or a statement wilfully false. *Hancock v. Case*, 2 F. & F. 711.

The plaintiff being one of the overseers, and the defendant assistant-overseer of a township, a rate was made on a railway company, against which they appealed. Shortly before the hearing of the appeal a meeting of the overseers was called to consider the matter, when it was resolved to abandon the rate; and a vestry meeting was called to choose fresh overseers, and consider the propriety of removing the defendant from his office. At that meeting the plaintiff imputed to the defendant neglect of duty in collecting the rates, and having made a rate which the overseers were obliged to give up; to which the defendant retorted by

IV. Imputating Personal Defects, Contagious Disease, Want of Chastity or Moral Conduct.[1]

V. Confidential and Privileged Statements and Communications.[2] *See* also vol. v. p. 368, and other instances, *ante*, p. 453.

saying, that the plaintiff had sold the ratepayers to the railway company, and had received a bribe from them for that purpose. After the meeting a person remarked to the defendant that he ought not to have said what he did without some foundation for it; to which the defendant replied, that he believed there was reason for thinking that the plaintiff had had communications with the officers of the railway company. An action having been brought for the words used by the defendant at the meeting, *quære*, whether the words were spoken under circumstances which rendered them a privileged communication? But held, that assuming they were, there was evidence of malice proper to be left to a jury. *Senior v. Medland*, 4 Jur. N. S. 1039, Ex.

An action of slander cannot be maintained by a lessee or renter of tolls, for words spoken of him in his character of contractor for tolls, after he has ceased to contract for renting the tolls, respecting which the words are spoken. The renting of tolls is not a profession or trade. *Bellamy v. Burch*, 16 Mee. & W. 590.

[1] The imputations of an act of immorality, as adultery or fornication, unassociated with any particular employment, is not legal slander; but as a character for chastity is essential to the obtaining a livelihood, as a governess, it is. 3 Salk. 397. *Lamby v. Allday*, 1 Tyr. 217. *Moore v. Meagher*, 1 Taunt. 39. See *Lynch v. Knight*, *post*, p. 457. Stating seriously and positively that a party has a contagious disease, as small-pox, &c., is actionable, as it tends to exclude him from society. *Bloodworth v. Gray*, 7 Man. & G. 334; 8 Scott, 9. It must refer to a contemporaneous existing illness, and not to a past period. *Carslake v. Mapledoram*, 2 T. R. 473.

[2] In numerous instances the legal presumption of malice is negatived by the circumstances under which the alleged slander is uttered.

When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection, as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, and therefore entitled to the same protection. *Beatson v. Skene*, 5 H. & N. 838.

The plaintiff had been a general commanding a corps of irregular troops during the war in the Crimea. Complaints having been made of the insubordination of the troops, the corps was placed under the superior command of V. The plaintiff then resigned his command. V. directed S. to inspect and report upon the state of the corps, and referred S. for information to the defendant, who was a civil commissioner. The defendant, in a conversation with S., made a defamatory statement respecting the conduct of the plaintiff upon his giving up the command of the corps. The plaintiff having brought against the defendant an action for slander: — *Held*, that it was properly left to the jury to say whether the communication the defendant made to S. was relevant to the inquiry S. had to make, and in which the defendant had to assist him. (Id.)

A party in a matter before the court had kept a sum of money, which, by his contract, he ought not to have kept: counsel in reference to this detention used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence: — *Held*, first, that the words were not actionable; secondly, that they were not irrelevant to the matter before the court. *Needham v. Dowling*, 15 L. J. C. P. 9. *See* vol. ii. p. 382.

A *primâ facie* calumny may impose no liability when uttered in the course of a confidential communication between parties having a common interest, in the absence of express malice, or in giving honest advice to a party, or in the course of a judicial proceeding, or in discharge of some public or private duty, or in answer to inquiries respecting the character of a servant (*Somerville v. Hawkins*, 10 C. B. 590. *Kershaw v. Bailey*, 1 Ex. 743. *Gardener v. Slade*, 18 L. J. Q. B. 334. *Senior v. Medland*, 4 Jur. 1039); the solvency of a tradesman (Bull. N. P. 8); the report of a surveyor to his employer (*Kerr v. Shedden*, 4 C. & P. 528); a communication made to a member of a dissenting congregation, as to a minister about to be appointed (*Blackburn v. Blackburn*, 4 Bing. 395; 1 M. & P. 53); or to a client as to the conduct of his attorney (*M^c Dougal v. Claridge*, 1 Camp. 267); or steward of an estate (*Clever v. Sarraude*, id. 268); or *bonâ fide* charges before a magistrate with reasonable grounds of suspicion (*Padmore v. Laurence*, 11 Ad. & E. 382), by parties (*Revis v. Smith*, 18 C. B. 126; 25 L. J. C. P. 195); or witnesses in a suit, or counsel in a cause (*see* vol. ii. p. 382); or by justices in the exercise of the duties of their magisterial office (*Kendellon v. Maltby*, 2 M. & Rob. 438. *Allardin v. Robertson*, 6 Dowl. N. S. 514); or relating to matters of discipline among particular sects (1 Bl. Rep. 386); or conduct of a person respecting whom inquiries are made. *Storey v. Challands*, 8 C. & P. 234.

VI. Repetition of Slander spoken by Others.[1]

A communication otherwise privileged is not the less so because made in the presence of a third person. *Toogood v. Spyring*, 1 C., M. & R. 181; 4 Tyr. 582. A meritorious motive is not sufficient to neutralise a defamatory statement; hence a voluntary communication from a party having no community of interest, or acting in the discharge of any public or private duty, is not privileged. *Toogood v. Spyring*, *supra*. *Brooks v. Blanchard*, 1 C. & M. 779; 3 Tyr. 844. A circular letter sent by the officer of a society for the protection of trade is unprivileged (*Getting v. Foss*, 3 C. & P. 160. *Smith v. Matthews*, 1 M. & Rob. 151. See *Martin v. Strong*, 5 Ad. & E. 535; 1 N. R. 291. *Kine v. Sewell*, 3 Mee. & W. 303), so are words slanderous in themselves spoken by a clergyman from the pulpit. *Gilpin v. Fowler*, 9 Ex. 625; 23 L. J. Ex. 152. The defamatory matter to be privileged must be within the limits of the exigency of the occasion. *Ward v. Smith*, 6 Bing. 749; 4 M. & P. 595.

Words spoken by a medical officer to the steward of a public school, to the effect that the plaintiff, a butcher, who supplied it with meat, sold bad meat, are privileged in the absence of malice. *Humphreys v. Stillwell*, 2 F. & F. 590.

The defendant *bonâ fide* believing that the plaintiff, who was a clerk to M., a customer of the defendant's, and who had been sent to the defendant's shop by M., had, while there, stolen a box from an inner room, went to M., and after telling him of his loss, intimated his suspicion of the plaintiff, saying, "There was no one else in the room, and he must have taken it:"—*Held*, that the communication was privileged by the occasion. *Amann v. Damm*, 8 C. B. (N. S.) 597; 7 Jur. N. S. 47.

It seems that no action is maintainable against a coroner for anything said by him while he is acting as coroner, and addressing a jury impannelled before him, although he uses defamatory language towards a person, and does so falsely and maliciously. *Thomas v. Chirton*, 8 Jur. N. S. 795; 31 L. J. Q. B. 139.

Under the stat. 5 & 6 Vic. c. 109, the vestry, upon precept from the justices, are to make out and return a competent number of persons qualified and liable to serve the office of constable; the list is to be published, and notice given of when and where objections will be heard by the justices, who, at a special session, have power to strike out of the list the names of persons disqualified, and to choose and swear in constables from the list; and the vestry may return a resolution to have paid constables, in which case the justices are to appoint paid constables.

A vestry made out a list and returned it, with a resolution to have a paid constable, and the plaintiff being named in the list was about to be sworn in as a paid constable by the justices, when the defendant, a parishioner, made a statement to the justices, in the presence of a number persons, affecting the plaintiff's character. In an action for slander, it being objected that the statement ought to have been made to the vestry, and not to the justices, who could only hear objections as to qualification and liability to serve:—*Held*, that the plaintiff was not entitled to recover if the statement was made *bonâ fide* in furtherance of the ends of justice. *Kershaw v. Bailey*, 17 L. J. Rep. N. S. Ex. 129; 1 Ex. Rep. 743. *Warren v. Warren*, 1 C., M. & R. 250. The language and manner ought not go beyond what is requisite for the attainment of the object of the communication. *See* 4 Bing. 670; 1 M. & P. 692. *Tuson v. Evans*, 12 Ad. & E. 736.

Words *primâ facie* protected raise a question for the jury whether there was any express malice; its existence may be inferred from slight or indirect proof, or from the expressions themselves. *Wright v. Woodgate*, 2 C., M. & R. 573. *Kelly v. Partington*, 2 Nev. & M. 460; 4 B. & Ad. 700.

[1] According to *Lord Northampton's case* (12 Rep. 134), slanders repeated upon the authority of another were privileged, and the utterer exonerated himself by naming his informant. This doctrine, however, is practically overruled, for the utterer must not only give the name of the original speaker at the time of repeating the words (*Davis v. Lewis*, T. R. 17. *Woolnoth v. Meadows*, 5 East, 7 463), but give the identical words used by his informant (*Maitland v. Goldney*, 2 id. 425. *Lewis v. Walters*, 4 B. & A. 605. *M'Pherson v. Daniels*, 10 B. & C. 270); and it seems now to be settled, that a spontaneous and unauthorised repetition of slanderous words is not the necessary consequence of the original uttering of the words, and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the words by persons who had no authority from him to repeat what he had said. *Ward v. Weeks*, 4 M. & P. 808; 7 Bing. 211. But where the first speaker of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known duty it is to repeat it, he is responsible for the repetition of it. *Kendellon v. Maltby*, Car. & M. 402.

In an action by a surgeon and an accoucheur for slander, imputing that a female servant had had a bastard child by him, whereby D. would not employ him as an accoucheur, and he was otherwise injured in the way of his business, it was proved that the words were spoken by the defendant in conversation with D.:—*Held*, that the plaintiff was not entitled to recover such damages in respect of a general loss of business as might have been caused by repetitions of the slander, but which could not have arisen directly from the speaking of

VII. Construction and Application of Words.[1]

IX. Words Actionable only on the ground of Special Damage.[2]

X. Scandalum Magnatum.[3]

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the words by the defendant to D. *Dixon v. Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

[1] The test as to the construction of words being actionable, is their effect, and not the meaning of the party uttering them. *Hankinson v. Bilby*, 16 Mee. & W. 442. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them." The rule that words were to be construed *in mitiori sensu* to avoid vexatious actions, has long been exploded. *Button v. Heyward*, 8 Mod. 24. They are to be construed by the courts, as they always ought to have been, in the plain popular sense in which the rest of the world naturally understand them; *Per Lord Ellenborough*, in *Roberts v. Camden*, 9 East, 96. See *Woolnoth v. Evans*, 5 id. 468. If spoken in a *foreign language*, they must be set forth with a translation, and the hearers must have understood them. See *Zenobio v. Axtell*, 6 T. R. 162.

A declaration alleged that the defendant asserted of the plaintiff, "I am surprised that Mr. R. should allow a blackleg" (meaning the plaintiff) "in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester, and a fraudulent gamester). A witness having deposed that the defendant used the language with reference to the plaintiff, was asked, "What did you understand by the word 'blackleg?'" who replied, "A person who cheats at cards:"—*Held*, *per Pollock, C. B.*, and *Watson, B.* (*dissentiente Martin* and *Bramwell, BB.*), first, that the word "blackleg" is not actionable without special damage. *Barnett* or *Burnett v. Allen*, 1 F. & F. 125; 3 H. & N. 376; 4 Jur. N. S. 488; 27 L. J. Ex. 412. *Held*, secondly, that the above evidence of its meaning was improperly received. (Id.) *Held*, thirdly, that even if the evidence were receivable, it did not prove the innuendo as laid in the declaration. (Id.)

[2] Although for *actionable words* actual damage need not be proved, yet words, not slanderous *in themselves*, may become the proper subject of an action by proof of special damage resulting from them to the plaintiff. The damage must be exclusively and immediately, legally and naturally, the consequence of the words. *Vicar v. Wilcocks*, 8 East, 1. Hence, when attended by such special damage, any slanderous imputation may be actionable; as calling a person swindler (*Wilby v. Elston*, 8 C. B. 142), or rogue, or guilty of immoral conduct (*Lamby v. Allday*, *ante*, p. 452), or to call a man a blackleg (*Barnett v. Allen*, 3 H. & N. 376; 27 L. J. Ex. 412), or imputing to a lady that she lived by prostitution. *Wilby v. Elston*, *supra*. See *Hopewood v. Thorne*, 8 C. B. 313. In an American case, where the same count set forth words actionable *per se*, with others which were not so, concluding with an allegation of special damage, to which defendant pleaded not guilty, it was held, that as he had been precluded from demurring, he might at the trial raise any question as to the plaintiff's right to maintain the suit for words not actionable *per se*. 2 Hill. on Torts, 257.

On a statement of special damage by loss of custom, the customers themselves must be called. *Barnett v. Allen*, 1 F. & F. 125. *Wood v. Jones*, id. 301.

In an action for verbal slander not actionable *per se*, the declaration alleged as special damage that, in consequence of the speaking of the words, four of the plaintiff's customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with plaintiff in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that he did not deal with the plaintiff afterwards:—*Held*, some evidence of special damage. *Bateman v. Lyall*, 7 C. B. (N. S.) 638.

The fact that defamatory words, not actionable in themselves, have occasioned illness, does not constitute special damage so as to give a right of action, either to the person defamed or (if a married woman) to her husband, illness not being the natural or immediate result of words spoken. *Allsop v. Allsop*, 5 H. & N. 534; 6 Jur. N. S. 433; 29 L. J. Ex. 315.

The plaintiff brought an action for speaking these words: "Your house is a bawdy-house, and no respectable people will live in it." The words proved were addressed to the plaintiff's wife, and were as follows: "You are a nuisance to live beside of; you are a bawd, and your house is no better than a bawdy-house:"—*Held*, that the words were actionable without special damage, and substantially supported the declaration. *Huckle v. Reynolds*, 7 C. B. (N. S.) 115. See *Brayne v. Cooper*, 5 Mee. & W. 249.

The words "she is living by imposture," are not actionable unless special damage be proved to have resulted from the use of them. *Wilby v. Elston*, 18 L. J. Rep. (N. S.) C. P. 320; 8 C. B. Rep. 142.

[3] Words spoken in derogation of persons of certain rank, for which an action lies by obsolete stats., 3 Edw. 1, c. 36; 2 Rich. 2, c. 1, s. 5; 12 Rich. 2, c. 11. By these, slander applied to peers, judges, and great officers of state, is identical with libel; and any expression of a derogatory character is *scandalum magnatum*. There is no modern instance of any dignitary availing himself of

XI. Remedies for.[1]

(A) *By Action.*

(*a*) *Parties to.*[2]

the enactments. The statutory remedy is wholly disused.

[1] Slander of a particular person is not in general a criminal offence. The remedy is only by action. *See post*, p. 467, as to when a criminal offence. The form is an action on the case. The county court has no jurisdiction in slander. 9 & 10 Vic. c. 95, s. 58.

[2] As to the parties, the action is governed by the ordinary rules in actions of tort: where the wrong complained of is an entire joint damage, the parties may join in the action; but where the cause of action, as well as the interest, is several, each injured party must sue separately. *See ante*, pp. 62, 63. Broom's *Parties to Actions.* For injury to personal reputation, therefore, several parties cannot sue jointly. Thus, where A. says to B. and C., "You have murdered D.," B. and C. must bring several actions (*Smith v. Croker*, Cro. Car. 512), for B. and C. have no joint interest in each other's reputation. But where the defamation is of two partners in their trade, or of two joint-tenants or coparceners in respect to the title to their estate, the interest is joint, and so may be the action. 3 B. & C. 150; 2 East, 426; 2 Saund. 117, a. But where words are spoken imputing insolvency in trade to one partner, he may maintain his action alone, and it is not necessarily to be considered as an injury to the partnership, for which a joint action can only be maintained. *Harrison v. Bevington*, 8 C. & P. 708.

As to the chairman of a company suing, see *Williams v. Beaumont*, 10 Bing. 260.

In defamation of husband and wife the tort is several, and the husband alone may bring the action; but the wife may be joined provided the injury be laid as done to herself; and a count may be added for a claim in the husband's own right. 15 & 16 Vic. c. 76, s. 40. In defamation of wife alone, if the words are actionable in themselves, and no special damage is laid, the wife must be joined, because she is the meritorious cause of action, and the action would survive to her. Bull. N. P. 7. But if special damage be laid, whether the words be actionable in themselves or not, it seems that the wife should not be joined, for the special damage accrues to the husband and not to the wife, so that the injury is not joint. But where the husband has brought his action, and recovered for special damage accruing to him from defamation of his wife, if the words were actionable in themselves the wife may maintain another action for the wrong to her after her husband's death, or may join with her husband in such action in his lifetime. *Guy v. Livesey*, Cro. Jac. 501. *Young v. Pridd*, Cro. Car. 89; *see* 8 Mod. 26; Cro. Jac. 538, 664; Stra. 977; Fort. 377. *Emington v. Gardner*, 1 Selw. N. P. 301.

As to defendants, it is settled that for words spoken parties cannot be joined, even although they speak the same words (Cro. Jac. 647); even where husband and wife speak the same words there must be two actions, one against husband and wife for the words spoken by the wife, and another against the husband alone for those spoken by him. 2 Wils. 227; Bull. N. P. 5. *Emington v. Gardner, supra.*

L., a step-brother of the wife of K., spoke slanderous words to K., imputing to Mrs. K. gross levity, and asserting that she had been all but seduced by another man before marriage. The husband, acting on this imputation, dismissed her, and sent her to her father. She (joining her husband as co-plaintiff, for conformity) brought an action against L., alleging the loss of her husband's consortium as special damage:—*Held*, whether or not the action lay, the damages were too remote, for the special damage was not the natural and probable consequence of the injury complained of, seeing that no husband acting reasonably would dismiss a wife on an unsupported charge of gross levity, when no actual adultery was imputed. *Lynch v. Knight*, 5 L. T. (N. S.) 291, H. L.; 8 Jur. 724.

Where a person imputes to a married woman adultery, which he pretends to know, and asserts as a fact, and the husband, reasonably believing the charge to be true, dismisses her, the wife is entitled to maintain an action (joining her husband for conformity) against the slanderer for the special damage caused to her by the loss of the husband's consortium. (Id.) *Lord Campbell C.*, and *Lord Cranworth.*

A married woman cannot maintain an action for being deprived of the society of her husband by the slander of another upon her character, though the husband deserts her in consequence. (Id.) *Lords Wensleydale* and *Brougham.*

Though no action lay, yet the desertion by the husband was properly laid as special damage; for, to make words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated to follow from the speaking of the words, and need not be such as would reasonably follow. (Id.) *Lord Wensleydale.*

The law of England is barbarous in holding that an imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or pure virgin, is not actionable without proof that

(*b*) *Pleadings.*

(1) *Venue.*[1]

(2) *Declaration, Inducement, Innuendo, Colloquium, &c.*[2]

(3) *Plea of Not Guilty.*[3] *See* also vol. v. p. 561.

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it has actually produced special temporal damage to her. (Id.) *Lord Campbell, C.*, and *Lord Brougham.*

An action by husband and wife for words not uttered in his presence, but repeated to him by the wife, imputing to her a want of chastity, will not lie against the author of the slander, the special damage being the husband's refusal to live with the wife in consequence of the imputation upon her. *Parkins v. Scott*, 8 Jur. N. S. 593; 31 L. J. Ex. 331; 10 W. R. 562; 6 L. T. (N. S.) 394.

[1] The venue in actions for defamation is transitory, which may be changed upon the usual affidavit, that the cause of action arose in the county to which the defendant wishes the venue to be changed, and not elsewhere in this kingdom. *Metcalf v. Markham*, 3 T. R. 652. The court on special grounds will always change the venue.

[2] Under 15 & 16 Vic. c. 76, s. 16, the form given in sched. B. 32, 33, is, "That the defendant falsely and maliciously spoke and published of the plaintiff the words following; (that is to say,)" &c. And if there be any special damage it should be stated with reasonable certainty and precision, naming the persons concerned, otherwise specific evidence of a particular damage cannot be proved at the trial, and the plaintiff's recovery limited to general damage. *Hartley v. Herring*, 8 T. R. 130. *Evans v. Harris*, 26 L. J. Ex. 31; 1 H. & N. 251. Therefore, where a trader complains of loss of customers, the names should be given. *Fenn v. Dixe*, 1 Roll. Abr. 58. So, a woman a loss of suitors (*Barnes v. Prudlin*, 1 Sid. 396); or hospitality of friends (*Moore v. Meagher*, 1 Taunt. 39); but this particularity is not required where, from the nature of the loss, specific names, &c., cannot be given, as guests of an innkeeper (*Evans v. Harris, supra*), or the members of the congregation of a chapel, &c. *Hartley v. Herring*, 8 T. R. 133. The declaration must positively, and not by way of recital, allege the speaking of the slanderous words. *Brown v. Thurlow*, 16 Mee. & W. 36; 4 D. & L. 301. No colloquium is necessary, and any construction may be put upon the words by innuendo (*Hemmings v. Gasson*, E., B. & E. 346), whether the words were spoken with such meaning is for the jury.

We have seen (vol. v. p. 370) that by 15 & 16 Vic. c. 76, s. 61, prefatory statements are no longer necessary, and the matters material to be attended to in framing the declaration are described.

Where slanderous words are uttered in a foreign language, the declaration should aver that the persons in whose presence they were spoken understood the expressions. *Amann v. Damm*, 8 C. B. (N. S.) 597; 7 Jur. N. S. 47.

[3] As to the general effect of the plea of "not guilty," *see* vol. v. p. 561. And by R. H. 4 Wm. 4, c. 2, s. 4, in an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. See *O'Brien v. Clements*, 15 L. J. Ex. 285. It does not in any case operate as a denial of the inducement. See *Heming et Ux. v. Power*, 10 Mee. & W. 564. And all matters in confession and avoidance are to be specially pleaded. (Id.)

The declaration alleged that the words "black sheep" were used by the defendant to mean bad characters, and then stated a libel, calling the plaintiff a "black sheep." The meaning assigned to the words cannot be disproved by the defendant under not guilty, for it is inducement only. *M'Gregor v. Gregory*, 11 Mee. & W. 287.

By 3 & 4 Wm. 4, c. 42, s. 21, the defendant is prohibited from paying money into court in actions for slander. As to libel, *see* vol. v. p. 373.

When the defendant admits the speaking of the words as stated, but justifies the use of them because they are true, he must plead such matter specially, as he cannot give it in evidence under not guilty. *Smith v. Richardson*, Willes, 24. Under the general issue the defendant may disprove the fact of speaking, or show that words are not of an injurious character, or that they were uttered on some justifiable occasion. *O'Brien v. Clement*, 15 L. J. Ex. 285; 3 D. & L. 676.

Where the defence is that the words were spoken not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under not guilty (*Smith v. Richardson*, Willes, 20, n. b. *R. v. J. Wright*, 8 T. R. 293. *Lillie v. Price*, 5 Ad. & E. 645); and on this ground a plea of privilege cannot be pleaded together with not guilty. *Stockdale v. Hansard*, 7 C. & P. 731.

Where the words are *primâ facie* actionable, but there are circumstances attending the publication which rebut the legal inference of malice, evidence of such circumstances will be a good defence under not guilty. *Fairman v. Ives*, 5 B. & A. 644. *Pattison v. Jones*, 8 B. & C. 578. As where the words are spoken in the course of a legal proceeding by a judge (*Jekyl v. Moore*, 2 N. R. 341; 2 Inst. 228); counsel (*Brook v.*

Montague, Cro. Jac. 90. *Hodgson v. Scarlett*, 1 B. & A. 241. *Needham v. Dowling*, 15 L. J. C. P. 9; vol. ii. p. 382); by a party (*Ram v. Lambey*, Hutt. 113. *Westson v. Dobniet*, Cro. Jac. 432. *Astley v. Younge*, 2 Burr. 807. *Johnson v. Evans*, 3 Esp. 32); or by a witness (*Brode's case*, Palm. 144. *Harding v. Bulman*, 1 Brownl. 2); or in order to forward the ends of justice, as by giving a man in charge (*Johnson v. Evans*, 3 Esp. 32); or to obtain redress (*Kine v. Sewell*, 3 Mee. & W. 303. *Findon v. Westlake*, Moo. & M. 461; 1 Saund. 131; Bac. Abr. Libel, A, 2. *Fairman v. Ives*, 5 B. & A. 642.

Where the slander is a representation made *bonâ fide* to a public officer by the defendant respecting the conduct of the plaintiff, a person under him, this defence may be shown under the general issue. *Blake v. Pilfold*, 1 Moo. & R. 198. *Woodward v. Lander*, 6 C. & P. 548. In *Hearn v. Stowell* (12 Ad. & E. 719), where the defendant attacked the character of a Roman Catholic priest, the court held it to be no excuse that the slander was published at a meeting to petition parliament against Roman Catholics.

A reflection upon goods sold by plaintiff is not actionable without special damage. *Evans v. Harlow*, 5 Q. B. 624. The court were equally divided as to whether it is actionable honestly, and with a reasonable ground of belief that it is true, to volunteer information with reference to a third party to another, materially affecting the interests of the latter, where the danger to him is not imminent. *Coxhead v. Richards*, C. B. 569. *Toogood v. Spyring*, 1 C., M. & R. 181. *See* also *Brooks v. Blunshard*, 1 C. & M. 791. *Bennett v. Deacon*, 2 C. B. 628.

Under the statute 5 & 6 Vic. c. 109, the vestry, upon precept from the justices, are to make out and return a competent number of persons qualified and liable to serve the office of constable. The list is to be published, and notice given of when and where objections will be heard by the justices, who, at a special session, have power to strike out of the list the names of persons disqualified, and to choose and swear in constables from the list; and the vestry may return a resolution to have paid constables, in which case the justices are to appoint paid constables. A vestry made out a list, and returned it with a resolution to have a paid constable, and the plaintiff, being named in the list, was about to be sworn in as a paid constable by the justices, when the defendant, a parishioner, made a statement to the justices, in the presence of a number of persons, affecting the plaintiff's character. In an action for slander, it being objected that the statement ought to have been made to the vestry, and not to the justices, who could only hear objections as to qualification and liability to serve:—*Held*, that the plaintiff was not entitled to recover, if the statement was made *bonâ fide* in furtherance of the ends of justice. *Kershaw v. Bailey*, 17 L. J. Ex. 129.

Where it appears that the mode or extent of the speaking is unwarranted by the usual course of proceeding, or by the necessity of the case, the defendant will be without defence. 2 Stark. 297; 1 Lev. 241; 2 Stark. Ev. 875.

Defendant may show that plaintiff pursues an illegal avocation, as that he keeps a public room for pugilistic exhibitions, and that the words were respecting his conduct in such avocation. *Hunt v. Bell*, 7 Moo. 212; 1 Bing. 1; *ante*, p. 452.

Defendant may also show under the general issue that the communications were made *bonâ fide* and in confidence, and belief of their truth, notwithstanding they may be false and erroneous, and prove injurious to the party. *Lillie v. Price*, 5 Ad. & E. 645. If slander be of the nature of a privileged communication, that destroys its malicious character, and negatives the existence of any actionable wrongful act; and such defence may be proved under not guilty. *O'Brien v. Clement*, 15 L. J. Ex. 285. *Little v. Price*, 5 Ad. & E. 645. See *Cotten v. Brown*, 3 Ad. & E. 312: *per Lord Denman, C. J.* *Heming v. Trenery*, 9 Ad. & E. 930. *Hopwood v. Thorn*, 19 L. J. C. P. 94.

The law not only extends this exemption to the confidential communications of friendship, but to all such charges as necessarily exclude the suspicion of malice. *Weatherstone v. Hawkins*, 1 T. R. 110. *Dunman v. Biggs*, 1 Camp. 269. *Rex v. Hart*, 2 Burn. E. L. 779.

Words spoken by way of advice to persons asking it, or having a right to expect it, are privileged. *Towgood v. Spyring, supra. Warren v. Warren*, 1 C., M. & R. 250. *Fountain v. Boodle*, 3 Q. B. 5. Therefore, in an action for saying of a tradesman, "He cannot stand it long; he will be a bankrupt soon," the jury were directed to find the defendant not guilty, it appearing that the words were not spoken maliciously, but in confidence and friendship, and by way of warning. *Herver v. Dowson*, Bull. N. P. 8. See *M'Dougall v. Claridge*, 1 Camp. 267. *Dunman v. Biggs, supra.* So, where a master or mistress is applied to for the character of a servant who has lived with him or her, and giving it uses defamatory words, he may show this under the general issue. *Edmonson v. Stephenson*, Bull. N. P. 8; cited in *Blackburn v. Blackburn*, 4 Bing. 408. *Weatherstone v. Hawkins, supra.* But the words must be used honestly and *bonâ fide* (*Kelly v. Partington*, 5 B. & Adol. 645), and not maliciously, or with intent to injure the servant. *Rogers v. Clifton*, 3 B. & P. 587. *Child v. Affleck*, 9 B. & C. 403. *Fountain v. Boodle*, 2 Gale & D. 455. Whether the master made the communication voluntarily or not is a question which the jury are to consider in forming an opinion on the *bona fides*. *Rogers v. Clifton*, 3 B. & P. 592: *per Lord Alvanley. Pattison v. Jones*, 8 B. & C. 578.

Where the defendant spoke to the plaintiff's mistress words charging the plaintiff with irregularity in her conduct as a servant girl, in consequence of which the plaintiff lost her place:—*Held*, that under not guilty the defendant might disprove the malice in

(4) *Plea of Justification, and Particulars.*[1]

the various methods by which it is usually disproved, yet that he was estopped from giving evidence of the truth of the facts as rebutting the malice, for want of a plea that the facts were true. *Rumsey v. Webb*, 1 C. & M. 104.

The use of words imputing an indictable offence is actionable or not, according to the sense in which they may fairly be understood by reasonable bystanders, or which may render them a privileged communication, and the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial. *Hankinson v. Bilby*, 16 Mee. & W. 442. *Griffiths v. Lewis*, 7 Q. B. 61.

Where a defendant volunteered a statement to a third party, injurious to the credit of the plaintiff in his trade, and untrue:— *Held, per Tindal, C. J.*, and *Erle, J.*, that it was a question for the jury whether the communication was malicious. *Per Coltman* and *Cresswell, JJ.*, *contra: Bennett v. Deacon*, 15 L. J. 289, C. P. So, if the words were innocently read, as a story out of a history (Cro. Jac. 91), or were spoken through concern (*Crawford v. Middleton*, 1 Lev. 82), or in a sense not defamatory (*Lord Cromwell's case*, 4 Rep. 12, b, cited Rep. 69), the same may be given in evidence under the general issue. But it is said to be no defence to show that the words were spoken carelessly, wantonly, or in jest. Hawk. P. C. b. 1, c. 28, s. 14, 8th ed.

Defendant may also show that the slander was the subject of amicable or Christian reproof, or that it was mere matter of caution to a friend (4 B. & C. 247; Holt, Rep. 306), or that defendant spoke the words not maliciously, but out of concern for the plaintiff. 1 Lev. 182; *ante*, p. 459.

Special Damage. — Where the words are actionable only by reason of special damage alleged in the declaration, such special damage, as well as the words, are denied by the plea of not guilty. *Welby v. Elston*, 8 C. B. 142; 18 L. J. C. P. 320. See *Perring v. Harris*, 2 Moo. & R. 5. *Smith v. Thomas*, 2 Bing. N. C. 372. In such actions the plaintiff cannot prove general damage beyond the special damage laid. *Dixon v. Smith*, 29 L. J. Ex. 125.

To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff is a good plea in bar. *Chantler v. Lindsey*, 16 Mee. & W. 82.

Where the inducement in the declaration stated the plaintiff's innocence of the imputation, the defendant could not, even before the Reg. Gen. H. T. 4 Wm. 4, under the general issue, assert the plaintiff's guilt, although the declaration contained such introduction, and the same rule now continues even in stronger force. 1 Ch. Pl. 415. And if there be a prefatory statement of general good character, the defendant cannot traverse it by his plea. *Wolverley v. Strachey*, Sty. 118. *Jones v. Stevens*, 11 Price, 235. Since the Reg. Gen. H. T. 4 Wm. 4, unless the inducement or prefatory matter be particularly traversed or denied, it will, in effect, be admitted, and need not be proved by the plaintiff upon a plea of not guilty. *Duke v. Gostling*, 3 Dowl. 619. *Chalmers v. Shackle*, 6 C. & P. 475. *Gwynne v. Sharpe*, 1 C. & M. 532. See *Fradley v. Fradley*, 8 C. & P. 572: *per Lord Abinger, C. B. Heming v. Power*, 10 Mee. & W. 564.

The defamatory sense attributed to the words in the inducement may be traversed (*see* a form in *M'Gregor v. Gregory*, 11 Mee. & W. 287); and if they do not constitute the whole slander complained of, the plea should be accordingly limited. (Id.)

Where slanderous matter is capable of division into two parts, each of which is actionable, the defendant may plead separately to each, and, if the remainder of the slander be not actionable, the defendant will succeed on not guilty. *Clarkson v. Lawson*, 5 Bing. 589. *Clarke v. Taylor*, 2 Bing. N. C. 664. See *Ingram v. Lawson*, 5 id. 66. But slanderous matter is not divisible where several statements tend to one conclusion and imputation; and in such case a single sentence, or portion of a sentence, cannot be selected and separately pleaded or demurred to. *Eaton v. Johns*, 1 Dowl. N. S. 602: *per Lord Abinger, C. B.* See *Gregory v. Duke of Brunswick*, 1 D. & L. 518. *Smith v. Parker*, 2 id. 394.

Statute of Limitations.—Actions upon the case for slander must be brought within two years after the words spoken (21 Jac. 1, c. 16, s. 3); or if actionable on the ground of special damage, six years. 2 Saund, 63, a. It must be pleaded.

[1] The truth of words must be specially pleaded. 1 Saund. 139. See *Rumsey v. Webb*, 1 C. & M. 104. But that should not be done unless there is ground for believing that it will be proved, for pleading it unsuccessfully would enhance the damages. *Wilson v. Robinson*, 14 L. J. Q. B. 196.

The law does not allow of pleas of justification, containing *general* charges of fraud or felony, because they do not apprise the plaintiff of the defence which is intended to be set up, and such pleas ought to be demurred to. *Jones v. Stevens*, 11 Price, 235. *I'Anson v. Stuart*, 1 T. R. 748. So, a justification, repeating general charges against an attorney of gross fraud, &c., was held bad on demurrer. *Holmes v. Catesby*, 1 Taunt. 543; recognised in *Higginbotham v. Leach*, 10 Mee. & W. 361. See *Newman v. Bailey*, 2 Chit. Rep. 665. *Duncan v. Thwaites*, 3 B. & C. 566. But where the charge contained in the slander is in itself specific, the defendant need not further particularise it in his plea; as where the words were, "he stole two sheep of J. S.," a plea that the plaintiff stole the said sheep is sufficient. 1 Ch. Pl. 563. See *Edwards v. Bell*, 1 Bing. 403. *Clarke v. Taylor*, 2 Bing. N. C. 668. *Weaver v. Lloyd*, 2 B. & C. 678; 4 D. & R. 230. *Basan v.*

(5) *Replication and Subsequent Pleadings.*[1]

(B) *Evidence.*

(*a*) *Proof for Plaintiff.*

(1) *Right to begin.*[2]

Arnold, 8 Dowl. P. C. 356. A plea justifying slander in respect of the occasion on which it was uttered, must also be specific as to the names of third persons, &c. (*Rowe v. Roache*, 1 M. & S. 304); and in an action for slander, charging the plaintiff, as pawnbroker, with "duffing," redeeming damaged goods, and pledging them with other pawnbrokers, the justification must state the specific instances. *Higginbotham v. Leach*, 2 Dowl. N. S. 270; 10 Mee. & W. 361. *Edmonds v. Walter*, 3 Stark. 7; 2 Chit. Rep. 291.

A plea justifying slanderous words must be true *in toto*. *Weaver v. Lloyd*, *Basan v. Arnold*, *Stubbs v. Lainson*, 1 Mee. & W. 728. A plea merely stating that the words are true in substance would be bad (*Flint v. Pike*, 4 B. & C. 473; 6 D. & R. 528), though that the alleged slander is true is now often pleaded where the charge is specific. 1 Saund. 244, n. 6; *see* 10 Mee. & W. 363; 16 id. 159. *See* form, B. & L. 432.

In general it is sufficient that the *gist* and *substance* of the slanderous matter charged are justified and covered by the matters of fact stated in the plea, and constituting the offence charged. *Helsham v. Blackwood*, 20 L. J. C. P. 187, *contrà*. *Morrison v. Harmer*, 3 Bing. N. C. 759.

The plea of justification must confess the speaking of the words alleged; otherwise it is bad. *Johns v. Gittings*, Cro. Eliz. 239. So, we have seen (*ante* p. 455), it is no justification to an action of slander to say that such an one told the slander to the defendant. *Earl of Northampton's case*, 12 Rep. 130. *Davis v. Lewis*, 7 T. R. 17, *contrà*. *Maitland v. Goldney*, 2 East, 426. *Woolnoth v. Meadow*, 5 East, 463. This disclosure and statement, if allowable at all, must be made at the time of republishing the slander; for it will not avail the defendant to make it for the first time in pleading to an action brought by the party injured; and according to *Holroyd, J.*, in *Lewis v. Walter* (4 B. & A. 605), the republication must be on a fair and justifiable occasion, and according to *Bayley, J.*, in *M'Pherson v. Daniels*, 10 B. & C. 271, the defendant must show also that he believed it to be true. *Ward v. Weeks*, 7 Bing. 211; and *Bennett v. Bennett*, 6 C. & P. 588: *per Alderson, B.*; and the remarks of *Best, C. J.*, in *De Crespigny v. Wellesley*, 5 Bing. 401.

If the plea profess to justify the whole slander, but in effect justify a part only, it will be bad; as where the charge was taking cloth and velvet, and the plea justified the taking the velvet only, it was held ill. *Johns v. Gittings*, *supra*. *Clarkson v. Lawson*, 6 Bing. 266; recognised in *M'Gregor v. Gregory*, 11 Mee. & W. 287.

A plaintiff cannot, upon the trial of an action for slander, object that a plea of justification is insufficient; because, however insufficient it may be, the defendant is entitled to a verdict on that plea, if it be proved, as the plaintiff should have demurred. *Edmonds v. Walter*, 3 Stark. 7; 2 Chit. 291; and see *Clement v. Lewis*, 10 Price, 181. A demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the innuendo. *Wheeler v. Haynes*, 9 Ad. & E. 386. It is an erroneous notion, that by demurring to a plea of justification the plaintiff necessarily admits the truth of the slanderous matter, for that which is well pleaded is alone admitted by such demurrer. *Jones v. Stevens*, 11 Price, 235. *See* form, B. & L. 431. The plea should of course be only pleaded to so much as the defendant can justify. *Clarkson v. Lawson*, *supra*.

A plea of justification may be allowed, in a general form, where the charge is not matter indictable, the defendant rendering particulars of the charges intended to be justified. *Behrens v. Allen*, 8 Jur. N. S. 118.

The court has a general jurisdiction, applicable to every species of action, to order a plaintiff to furnish the defendant with particulars, if the circumstances of the case, and the course of justice, require it. *Early v. Smith*, 12 Ir. Com. Law. Rep. App. xxxv., Q. B. Therefore where, in an action for slander, the defendant moved the court to order the plaintiff to furnish "the names, descriptions, and addresses, of the persons in whose presence the slanderous words were spoken, and the time or times when, and the place or places where, the words were spoken:"—*Held*, that the plaintiff should furnish a statement of the occasion or occasions on which the words were spoken, but not of the names, descriptions, and addresses, of the persons present. (Id.) See *Honess v. Stubbs*, 8 W. R. C. P. 188.

[1] By the C. L. P. Act, 1852, s. 77, the plaintiff may traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts, to deny all the rest, or deny any one or more allegations. By r. 78 the defendant may in like manner deny the whole or part of the replication or subsequent pleading of the plaintiff. By r. 79, either party may join issue.

[2] Formerly, where a defendant pleaded a justification only with not guilty, he was entitled to begin (*Cooper v. Wakley*, M. & M. 248); but by a resolution of the judges in case of slander, as the plaintiff seeks to recover damages of an unascertained amount, he is to begin, although the affirmative of the issue in point of form may be with the defendant. *Carter v. Jones*, 1 M. & R. 281. The invariable practice now is for the plaintiff first to open his case.

Under the general issue, the plaintiff must prove the speaking of the words, and

the malice. In proving the essential words care should be taken that there be no variance between the declaration and proof; but such variances are now comparatively immaterial (*May v. Brown*, 3 B. & C. 122; 4 D. & R. 670. *Teesdale v. Clement*, 1 Chit. Rep. 603), as the uniform course is to amend; and if the amendment requires it, postpone the trial at the costs of the plaintiff.

It is necessary for the plaintiff to prove the actual words alleged, or enough of them to sustain the action, and it will not be sufficient to prove the speaking of other words of similar meaning, and involving the same charge. *M'Connell v. M'Kenna*, 10 Ir. Com. Law Rep. 511, C. P.

When specially denied upon the pleadings, all introductory averments essential to the plaintiff's case must be proved, but the finding upon them will be immaterial if they are not essential to the character of the slander.

If unnecessary inducement be stated, it need not be proved. *Cox v. Thomason*, 2 C. & J. 361. Where the words themselves convey an imputation of an offence, as "He is a thief, and has robbed me of my bricks," no introductory averment, we have seen, is necessary, or need be proved. *Slowman v. Dutton*, 10 Bing. 402. *Curtis v. Curtis*, 10 Bing. 477.

The plaintiff cannot give general evidence of his good character, either where not guilty is only pleaded, or where there are pleas of justification on the record (*Cornwall v. Richardson*, R. & M. 305. *Stuart v. Lovell*, 2 Stark. 93. *Jones v. Stephens*, 11 Price, 235), unless such character is involved in the issue.

Where slander has been uttered concerning the plaintiff in a particular character, and is only actionable as having been spoken of him in that character, such character must, if traversed by the plea, be proved.

Where the words used have been spoken in a sense different from their ordinary meaning, facts should be proved to show that they have been used in a particular sense. *Daines v. Hartley*, 3 Ex. 200; 18 L. J. Ex. 81.

Where the character of physician is denied, or is not impliedly admitted by the words, it is necessary to prove that the plaintiff is a physician, and where he practises under a diploma it must be produced. *See*, as to proving by registry, vol. iv. p. 483, n. *Moises v. Thornton*, 8 T. R. 308. It is not enough, where the words charge the plaintiff with being no physician, to show that he did in fact *practise* as a physician. *Collins v. Carnegie*, 1 Ad. & E. 695.

Where the declaration averred that the plaintiff practised as a physician in England, such averment is not supported by evidence that he practised under a Scotch diploma, without a license from the College of Physicians, for such practice is illegal. (Id.)

The books of a university conferring the degree of doctor of laws are evidence to prove that fact. *Moises v. Thornton, supra.*

In the case of an attorney, where the words do not admit his character, an examined copy of the roll, signed by the plaintiff himself, or the authorised *Law List*, is *primâ facie* evidence. *Rex v. Crossley*, 2 Esp. 526. *Lewis v. Walter*, 3 B. & C. 138; 4 D. & R. 670. The certificate need not be produced. *Jones v. Stevens*, 11 Price, 251. *Sparling v. Hadden*, 9 Bing. 11.

In an action by an innkeeper for words spoken of him in his trade, proof that upon one occasion he sold spirits to be drunk out of his house, suffices. *Whittington v. Gladwin*, 2 C. & P. 146. But where the slander itself admits the character of the plaintiff, it is sufficiently proved. *Yrisarri v. Clement*, 3 Bing. 432.

Where the plaintiff declares that he had been a woolstapler at Cirencester, and was a brewer at Oxford, and that defendant spoke of him as such trader in these words, "Mr. H. (the plaintiff), and B. have both been bankrupts, Mr. H. at Cirencester," and gave no evidence of his having been a woolstapler, but only that he was a brewer at Oxford, and proved the words spoken to have been these — he was a bankrupt at Cirencester, &c.; it was held that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at Oxford may be a bankrupt at Cirencester (*Hall v. Smith*, 1 M. & S. 287); and where the character itself of a public officer is in issue as assistant overseer, his acting as such is sufficient evidence. *Cannell v. Curtis*, 2 Bing. N. C. 228.

Where the title to any particular situation is not the subject of any express documentary appointment, the acting in the situation is, of course, the only evidence which the fact admits of. 2 Stark. Evid. 860.

Where the declaration alleged that the plaintiff was employed by the N. Z. Company, and that the words were of him in such employment, it was held sufficient to prove that the company was commonly so called, though that was not its legal name. *Rutherford v. Evans*, 6 Bing. 451. So, where the declaration alleged the plaintiff to be a carpenter and sworn appraiser, and that the defendant, intending to injure him in his several trades, in a discourse concerning the plaintiff in his trade of a carpenter, spoke the words, &c.:—*Held* unnecessary to prove that the plaintiff carried on the trade of a sworn appraiser. *Figgins v. Cogswell*, 3 M. & S. 369. *See* also *Rutherford v. Evans, supra.* Whether the words are spoken of the plaintiff in a particular character, is for the jury (*Jones v. Littler*, 7 Mee. & W. 423); and if the words are such as must be injurious to the plaintiff as a trader; thus, words imputing insolvency; it need not be proved that they were spoken of him as such trader. (Id.)

Introductory averments: since the new rules no proof of them is required, unless they are put in issue by an appropriate plea. See *Heming v. Power*, 10 Mee. & W. 564.

Where the speaking is said to be of and concerning some fact alleged in the inducement, it is still a question on not guilty, 1st. Whether the words were meant to refer to it? 2ndly. Whether, supposing they did

not refer to it, the fact itself was material? If material, then the connexion must be proved; if immaterial, then it matters not whether the words refer to it or not. Rosc. Ev. 387.

As to the malice, the jury may in most cases infer it from the libel or words; or, with a view to the damages, the plaintiff may give evidence of other slanders of him by the defendant, to prove the malicious motive in uttering the slander, even although the evidence so given prove another substantive cause of action; but the judge who tries the cause must, in such a case, caution the jury not to give damages in respect of it. *Pearson v. Lemaitre*, 5 Man. & G. 700. *Plunket v. Cobbett*, 5 Esp. 136. *Barwell v. Atkins*, 1 Man. & G. 807. So, the defendant may give evidence, under the general issue, to disprove any malicious motive upon his part (*Pearson v. Lemaitre, supra: per Tindal, C.J.*), provided it do not amount to a justification.

In actions for words, plaintiff has been allowed to give evidence of words subsequently spoken, for the purpose of showing that the original words were spoken maliciously, and to injure (*Per Mansfield, C.J.*, in *Finnerty v. Tipper*, cited Selw. N. P. 1042); or spoke the same words at different times. *Charter v. Parret*, Peake, 22. But where the words declared on are unambiguous, or the intention is not equivocal, evidence of subsequent words of the same import with the slander has been refused. *Pearce v. Ornsby*, 1 M. & R. 455. *Symmons v. Blake*, id. 477. *Stuart v. Lovell*, 2 Stark. 93. But previous slander, for which damages have been recovered, is admissible. *Symmons v. Blake, supra.* The plaintiff may show that he had recovered in a previous action for slander against the defendant's son, and that after the trial of that action he sent to the defendant's attorney to compromise the present action. *Defries v. Davis*, 7 C. & P. 112.

The plea of not guilty puts the malice in issue. *Hoare v. Silverlock*, 19 L. J. C. B. 215.

Where words are defamatory (*Somervill v. Hawkins*, 20 L. J. C. P. 131), the law infers malice, unless the circumstances attending the publication rebut that inference. *R. v. Cheevey*, 1 M. & S. 282. But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice, in fact, must be proved by the plaintiff. *O'Brien v. Clement*, 15 Mee. & W. 437. *Edmonson v. Stevenson*, Bull. N. P. 8. But such malice, in fact, need not be proved by extrinsic evidence; it may be collected by the jury from the slander itself. *Wright v. Woodgate*, 2 C., M. & R. 573. The falsehood of part of the charge is evidence to go to the jury of malice, although part may be true. *Blagg v. Sturt*, 8 L. T. Q. B. 135. *James v. Boston*, 2 C. & K. 4.

The plaintiff may show that the character given was false (*Rogers v. Clifton*, 3 B. & P. 587. *King v. Waring*, 5 Esp. 13. *Pattison v. Jones*, 8 B. & C. 578); or part of it was false (*Blagg v. Sturt*, 16 L. J. Q. B. (N. S.) 39); which may be rebutted by evidence, without a special justification (*Brown v. Croome*, 2 Stark. 297). Mere untruth is not evidence of malice, unless it be shown that the defendant knew it to be so; if the defendant believed it to be true, it is a defence. *Fountain v. Boodle*, 3 Q. B. 5.

Where a plea of justification has been abandoned at the trial, the jury ought not to take it into their consideration, as evidence of express malice, to negative the defence of a privileged communication under the general issue. *Wilson v. Robinson*, 7 Q. B. 68.

Where the defendant, in the presence of a third person, not an officer of justice, charged the plaintiff with having stolen his property, and afterwards repeated the charge to another person, also not an officer of justice, who was called in to search the plaintiff, with his consent:—*Held*, that the charge was privileged if the defendant believed in its truth, acted *bonâ fide*, and did not make the charge before more persons, or in stronger language than was necessary, and that it was a question for the jury, and not the judge, whether the facts brought the case within this rule. *Padmore v. Lawrence*, 11 Ad. & E. 380; recognising *Towgood v. Spyring*, 1 C., M. & R. 181. See *Kine v. Sewell*, 3 Mee. & W. 297. *Martin v. Strong*, 5 Ad. & E. 535.

In order to prove express malice, an examination of the plaintiff in the Insolvent Court, in the presence of the defendant, relating to a disputed debt, inserted by the plaintiff in his schedule as due to him from the defendant:—*Held*, admissible in evidence. The learned judge, in addressing the jury, commented upon the fact that the defendant had refused at the trial to make any apology and withdraw his justification, though he gave no evidence in support of it, as evidence of malice:—*Held*, no misdirection. *Simpson v. Robinson*, 11 L. T. 266, Q. B.

Defendant having some cause for suspicion, went to plaintiff's relations, and charged him with theft; it appearing, however, that his object in making the communication was rather to compromise felony than to promote inquiry or to enable the relations to redeem the plaintiff's character:—*Held*, that malice must be implied, and that the existence of it was not a fact to be left for the consideration of the jury. *Hooper v. Truscott*, 2 Bing. N. C. 457.

Where other words than those laid in the declaration are given in evidence, the defendant may prove them to be true, because he had no opportunity of justifying them (*Warne v. Chadwell*, 2 Stark. 457); but not where the words amount to a mere repetition of the slander in the declaration. *Higgs v. Snell*, Rosc. Ev. 396.

Proof that the slander was of plaintiff, and the matters alleged, is essentially requisite.

Where the declaration stated that the

(*b*) *For Defendant.*[1]

plaintiff was treasurer and collector of certain tolls, that defendant spoke of the plaintiff as such treasurer and collector certain words, meaning that the plaintiff, as such treasurer and collector, had been guilty, &c., and the plaintiff failed to prove that he was such treasurer and collector:—*Held*, that the plaintiff was bound to prove that he was both treasurer and collector. *Sellers v. Till*, 4 B. & C. 655. *Shepherd v. Bliss*, 2 Stark. 510. And where the slander itself does not convey the intended meaning, and is connected with some extrinsic matter previously stated, such matter must be proved accordingly.

Where the words are only actionable, because they are spoken of a tradesman, &c., as that he is a cheat, bankrupt, &c., and the declaration avers, as it must do, that the defendant spoke the words of the plaintiff in the way of his trade, &c., the plaintiff must, on the trial, prove that the words were spoken in relation to his trade, &c.; otherwise he will be nonsuited. *See* 2 Saund. 307, n. 1.

If traversed, the plaintiff must in general prove the innuendoes as laid; and the whole must be proved where it gives a specific character to the slander. *Williams v. Stott*, 1 C. & M. 687. *Harvey v. French*, id. 11. *Roberts v. Camden*, 9 East, 93. Therefore, where the words imputed fraud or felony, and the innuendo confined them to the latter sense:—*Held*, that plaintiff must prove them to have been spoken in that sense. *Smith v. Cary*, 3 Camp. 461.

If the words be connected by innuendo, with a particular allegation, plaintiff will be bound to prove slander relating to the matter contained in that allegation. *May v. Brown*, 3 B. & C. 128. *Sellers v. Till*, 4 id. 655. But where the plaintiff, instead of referring to any precedent allegation, improperly introduces new matter not requisite to sustain the action, such new matter is mere surplusage, and does not require proof. *Roberts v. Camden, supra. Harvey v. French, supra.*

It seems, where the words import in themselves a criminal charge, and the innuendo introduces matter merely useless, it may be treated as surplusage. *Day v. Robinson*, 1 Ad. & E. 554. *Williams v. Gardiner*, 1 Mee. & W. 245. Whether the words of an innuendo bear the construction put upon them in the innuendo is for the jury. *Broome v. Gosden*, 1 C. B. 728.

[1] In the preceding passages the evidence under not guilty has been stated, and what the defendant can establish to disprove malice. Where that which is stated as the cause of action in the declaration is proved at the trial, the plaintiff cannot be nonsuited, the defendant should have demurred, and must, after verdict, move in arrest of judgment. *Landey v. Allday*, 16 L. J. 401. Evidence admissible and pertinent under not guilty cannot be excluded on the ground that it happens incidentally to prove the truth of the alleged calumny. *Manning v. Clement*, 7 Bing. 364.

Where the defendant admits the speaking of the words, and justifies by reason of their truth, he cannot give it in evidence under the general issue. *Smith v. Richardson*, Willes, 20; 1 Saund. 130, n.; H. T. 4 Wm. 4, *ante*, p. 460. Such evidence is inadmissible, either in bar of the action or in mitigation of the damages. *Underwood v. Parks*, 2 Stra. 1200.

After the plaintiff has proved his case under not guilty, the defendant must be prepared to support his plea of justification. The evidence must necessarily depend on the facts stated in the plea. A plea that the words are true in substance and fact, must be strictly proved as to all the material parts of the slander. *Snope v. Dobbs*, 1 Bing. 203. *Weaver v. Lloyd*, 2 B. & C. 678; 4 D. & R. 230. Under a plea of justification, that the defendant was only the repeater of the slander (supposing such plea to be good, *see ante*, p. 455), and that he named the author at the time of the slander, and that he was present and heard the original slander published by the third person, the defendant must prove the slander actually published by such third person, and not merely the substance of it. *Maitland v. Gouldney*, 2 East, 426. *Mills v. Spencer*, Holt, N. P. 533. *M'Gregor v. Thwaites*, 3 B. & C. 24; 4 D. & R. 695. *Lewis v. Walter*, 4 B. & A. 605. And it must be shown that the defendant believed the words to be true, and that he repeated them on a justifiable occasion (*M'Pherson v. Daniels*, 10 B. & C. 263), which is in fact tantamount to a privileged statement. See *Bennett v. Bennett*, 6 C. & P. 588. *Speck v. Phillips*, 5 Mee. & W. 279.

Where there is a plea of not guilty and justification, and the jury find for the defendant on the general issue, they should be discharged from finding on the special pleas. *Robertson v. M'Dougall*, 4 Bing. 670, 675; 1 Moo. & P. 692; 3 C. & P. 259.

In an action for words, where the general issue is pleaded, and also special pleas in justification, the plaintiff may in the outset give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant; but he is not entitled to give part of such evidence in the first instance, and reserve the remainder for reply to the defendant's case. *Browne v. Murray*, R. & M. 254.

The judges formally resolved that, on not guilty, the truth of the words shall not be allowed to be given in mitigation of damages. *Underwood v. Parks*, 2 Stra. 1200. But the defendant may prove under the general issue, in mitigation of damages, that the plaintiff had been generally suspected of the crime imputed to him, or that there were reports in the neighbourhood that he had been guilty of similar practices (*Lord Leicester v. Walter*, 2 Camp. 251;

(C) *Damages.*[1]

—— *v. Moor*, 1 M. & S. 284. *Knoble v. Fuller*, Peake, Ad. Ca. 139. See *Waitham v. Weaver*, 1 D. & R. 10: *per Abbott, C. J. Mills v. Spencer*, Holt, N. P. 535.

In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant on cross-examination asked a witness, "Have you heard from other persons that plaintiff is addicted to practices of this kind?"—*Held*, that the question was improper, as it was not confined to rumours existing before the words were spoken by the defendant. *Thompson v. Nye*, 20 L. J. Q. B. 85.

The defendant may, it seems, show that he was provoked to utter the words by contemporaneous slander of the plaintiff, reflecting upon him. *Watts v. Fraser*, 7 Ad. & E. 223; 8 id. 170. This is the settled law in America. Hill. on Torts. See *Tarpley v. Blabey*, 2 Bing. N. C. 439. *Judge v. Berkeley*, 7 C. & P. 371. *Fraser v. Same*, id. 621.

Where the declaration alleged that the words "black sheep" were used by the defendants to mean bad characters, and then stated a libel, calling the plaintiff a black sheep, the meaning assigned to the words cannot be disproved by the defendant under not guilty, for it is inducement. *M'Gregor v. Gregory*, 11 Mee. & W. 287.

In *Jones v. Stevens*, 11 Price, 235, it was determined that evidence of the plaintiff's general bad character was not admissible in mitigation of damages under not guilty. *Stuart v. Lovell*, 2 Stark. 93; *see* 1 Saund. 131. *Mawly v. Barber*, 2 Stark. Ev. 470. *Duncombe v. Daniel*, cited 7 Dowl. P. C. 472. Nor can the defendant give in evidence that plaintiff was in the habit of traducing defendant. *Wakley v. Johnson*, R. & M. 422. See *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670. *Finnerty v. Tipper*, id. *Tarpley v. Blabey, supra. Watts v. Fraser, supra. Semble*, where a slander imputes the commission by the plaintiff of a particular offence, evidence of an antecedent general reputation of his general bad character, or of his having some vicious habit, leading to the particular act, is admissible. *Bell v. Parke*, 11 Ir. Com. Law Rep. 413, Ex. But this rule does not let in evidence of a general reputation, that he was guilty of the particular offence charged by the slander. (Id.)

Evidence of rumours shown to have been originated by the defendant is not admissible. (Id.) *Thompson v. Nye, supra.*

[1] Special damage, when necessary to support the action, need not now be specially traversed. *Wilby v. Elston, ante*, p. 460. See *Parping v. Harris*, 3 M. & Rob. 5. *Smith v. Thomas*, 2 Bing. N. C. 372. The measure of damages in this action is the extent of the injury which the person slandered may have sustained.

Where special damage is the gist of the action, plaintiff will be nonsuited if he do not prove such damage as laid in the declaration; but where the words are of themselves actionable, the jury must find for the plaintiff, though the special damage alleged be not proved (1 Saund. 243, n. 5; Bull. N. P. 6. *Lowe v. Harwood*, W. Jones, 196. *Morris v. Langdale*, 2 Bull. N. P. 284. *Ward v. Weeks*, 7 Bing. 211; 4 M. & P. 808), plaintiff must confine himself to the allegations in his declaration, as he will not be allowed to go into evidence of other causes of special damage. 1 Saund. 243 d. n. The persons particularised in the declaration as having left off dealing with the plaintiff by reason of the speaking of the words, it is necessary should be called as witnesses to prove the fact. *See* 1 Saund. 243 a, n., *ante*, p. 456. But where special damage is alleged to be the loss of frequenters of a place of public resort, a witness may be examined generally as to the diminution in the receipts, but he cannot be asked whether particular persons have not attended in consequence. *Ashley v. Harrison*, 1 Esp. 48. See *Hopwood v. Thorn*, 19 L. J. C. B. 94. If the special damage ensued from words spoken by the defendant, he cannot recover on proof that it resulted from a third person repeating what the plaintiff had said. *Ward v. Weeks, supra.*

Where the words are actionable in themselves, or with reference to the plaintiff's trade, &c., it is not necessary to give any evidence of damage (*Tripp v. Thomas*, 3 B. & C. 427. *Ingram v. Lawson*, 6 Bing. N. C. 212); neither in such case nor where the special damage is the gist of the action will the plaintiff be allowed, under the general allegation of damage, to give in evidence particular instances. Bull. N. P. 7; 1 Saund. 243 d, n.

The loss of substantial benefit arising from the hospitality of friends is sufficient special damage. *Moore v. Meagher*, 1 Taunt. 39.

An allegation that, by reason of the speaking of slanderous words by the defendant, one D. refused to trust the plaintiff, is not proved by evidence that the defendant spoke the words to E., who voluntarily and without the privity of the defendant repeated them to D. *Ward v. Weeks, supra.*

The special damage, we have before stated, must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third person (*Vicars v. Wilcocks*, 8 East, 1. *Ward v. Weeks*, 7 Bing. 215; but see *Green v. Button*, 2 C., M. & R. 713. *Newman v. Zachary*, Al. 3); nor must the damage be too remote. *Ashley v. Harrison*, 1 Esp. 48.

Where several statements are laid in the declaration as distinct parts of the same discourse, it will be taken as one count, and a general verdict and damages may be taken, though some of the statements are not actionable. *Griffiths v. Lewis*, 8 Q. B. 841.

[1] The question in an action for words is, not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them. *Read v. Ambridge*, 6 C. & P. 308. *Taylor v. Hawkins*, 20 L. J. Q. B. 313. *Somervill v. Hawkins*, id. C. P. 131. Where words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular parts are so qualified by the other parts of the conversation as to show that they were not intended to convey the idea which their primary and ordinary meaning would give. *Shipley v. Todhunter*, 7 C. & P. 680. *Bromage v. Prosser*, 4 B. & C. 247.

Where three witnesses were called for the plaintiff, the evidence of two of whom was quite inconsistent with the notion of a confidential communication:—*Held*, that it was not a misdirection in the judge to leave it to the jury to say, whether or not they believed the communication to be confidential, and that it was not necessary for him in distinct terms to tell them, that if they believed the evidence they must find their verdict for the plaintiff. *Picton v. Jackman*, 4 C. & P. 257. *Chapman v. Wright*, 1 Arn. 241. *Kine v. Sewell*, 3 Mee. & W. 297. The existence of express malice is only a matter of inquiry, where the words complained of are spoken upon a suggested justifiable occasion. *Hooper v. Truscott*, 2 Bing. N. C. 457. A jury was directed to find whether an alleged libel was a privileged communication, and if so, whether it was attended with express malice; and they found for the plaintiff, with damages, but that the defendant was not actuated by express malice:—*Held*, that the verdict was right, and that the plaintiff was entitled to retain his damages. *Blackburn v. Blackburn*, 4 Bing. 395.

At the trial, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place and they professed to describe; and that the defendant was present at the occurrence to which the slanderous statements referred. The judge ruled that the occasion was privileged, but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice:—*Held*, a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue. *Hartwell v. Vessey*, 3 L. T. (N. S.) 275, C. P.

Where the occasion of making a communication, otherwise slanderous, is such that the communication might be privileged if fairly arising out of the occasion, it is a question for the jury whether it is so or not, as, for instance, whether it is relevant to a privileged investigation; and in such a case, if the inquiry be such as that the communication might be relevant to it, it may be a proper question for the jury whether the defendant really believed it was so. *Beatson v. Skene*, 6 Jur. N. S. 780; 29 L. J. Ex. 430; 2 L. T. (N. S.) 378. See *Bell v. Parker*, 10 Ir. Ex. Rep. 279.

Where a justification of the truth of the words had been pleaded, and the plaintiff, during the trial, offered to accept an apology, and a verdict for nominal damages, if the defendant would withdraw the plea of justification, which the defendant refused to do, though he did not attempt to prove it:—*Held*, that this conduct on the part of the defendant was also proper to be left to the jury, with reference to the question of malice as well as that of damages. *Simpson v. Robinson*, 18 L. J. Rep. (N. S.) Q. B. 73; 12 Q. B. Rep. 511.

Where a defendant volunteered a statement to a third party, injurious to the credit of the plaintiff in his trade, and untrue:—*Held, per Tindal, C. J.*, and *Erle, J.*, that it was a question for the jury whether the communication was malicious. *Per Coltman, J.*, and *Creswell, J. contrà*. *Bennett v. Deacon*, 15 L. J. Rep. (N. S.) C. P. 289; 2 C. B. Rep. 628.

[2] Where one of several counts in a declaration for words is bad, and some of the defamatory statements are proved, and the jury find a verdict generally, with damages, a *venire de novo* will be awarded. *Empson v. Griffin*, 11 Ad. & E. 186. *See* 7 Bing. 119; id. 554. It should have been taken only on the good counts. After verdict for plaintiff, with damages, the court refused to allow a new trial to enable the defendant to plead the truth, though not guilty was pleaded by mistake of the special pleader. *Kirby v. Simpson*, 3 Dowl. P. C. 791. *See* 3 Bing. N. C. 77.

[3] The provisions of 3 & 4 Vic. c. 24, s. 2, are set out in vol. iii. p. 292, which prevents the plaintiff recovering costs if the damages be less than 40s., with limited power to the judge to certify. Under this act it has been held, in an action for libel, that he may certify that the grievance was wilful and malicious; but to do this he must be satisfied that the conduct of the defendant arose from personal malice. *Foster v. Pointer*, 8 Mee. & W. 395. *See* vol. iii. p. 293; and as to costs of particular issues, part of issues, *see* id. p. 302; of witnesses, &c., id. p. 321.

21 Jac. 1, c. 16, s. 6, which provides that, in actions for slanderous words, if the plaintiff recovers less than 40s. damages, he shall only recover the same amount of costs, is not repealed by 3 & 4 Vic. c. 24. *Evans v. Rees*, 9 C. B. (N. S.) 391; 7 Jur. N. S. 369; 30 L. J. C. P. 16.

In an action by a master of a workhouse for words imputing to himself that he dishonestly got honest men turned out of employment there, in order to get in creatures

(F) *When Verbal Slander is a Criminal Offence.*[1]

SLANDER of Title.

(A) *Of Inheritance.*[2] (B) *Of Goods.*[3]

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of his own, for his own purposes:—*Held*, actionable; but being spoken in angry altercation, and without malice, the jury were directed that they might, if they thought there was no real injury, give nominal damages, so as not to carry costs; and the defendant's counsel was allowed to ask, on cross-examination, what would be the probable amount of costs to the defendant if a verdict for more than a nominal amount were given. *Wakelin v. Morris*, 2 F. & F. 26: *Erle, C. J.*

[1] Generally, slanderous words cannot be made the subject of indictment or information, unless they lead directly to a breach of the peace, as involving a challenge to fight, &c. *Per Holt, C. J.*, in *R. v. Langley*, Holt's Rep. 654. *See* 2 Salk. 698; 2 Stra. 1157.

[2] Spoken communications prejudicial to a person in respect of his inheritance are slanderous. Thus the courts have long held that it is slander to allege of an heir apparent that he is a bastard. *Humphrey v. Stanfield*, Cro. Car. 469. Words affecting the present title of a person to lands are not, however, slander (Cro. Eliz. 196), without proof of special damage having arisen from them.

The action for slander of title differs in many of its incidents from the ordinary action of slander. The truth of the words may be given in evidence under the general issue. *Watson v. Reynold*, 1 M. & M. 1. As soon as it appears that defendant claimed title, the plaintiff should be nonsuited. In slander, the action must be brought within two years; but slander of title is confined only by the general clause of limitation to six years. But in this action, as in the common action for slander, the exact words must be set out in the declaration. 1 Mee. & W. 499.

In an action against the surveyor of highways, appointed under the 7 & 8 Vic. c. 84, for slander of title, the slander alleged was, "I shall not allow *purchasers* [meaning persons who then might be disposed to purchase at the said sale the said houses of the plaintiff so exposed for sale as aforesaid] to be finished until the roads are made good. I have no power to compel any one to make the roads; but I have power to stop the buildings until the roads are made." The judge, at the trial, amended the declaration by substituting "the houses" for the word in italic letters:—*Held*, that he had power to make the amendment.

In an action of this kind, where it is necessary for the plaintiff to prove malice, the court will not infer malice from the defendant having put a wrong construction on a complicated act of parliament. *Pater v. Baker*, 16 L. J. C. P. 124; 3 C. B. 831.

[3] Words affecting a title to goods, or words spoken of a party's inheritance, strictly speaking, give a right of action for special damage, rather than an action for defamation. *Malacher v. Soper*, 3 Bing. N. C. 371. *Gatsole v. Mathers*, 1 Mee. & W. 499. It is based on the malicious interference. *Rowe v. Roach*, 1 M. & S. 304. *Watson v. Reynolds*, M. & M. 1. The questions are, Whether the statement was false, malicious, and productive of damage? *Brook v. Raul*, 19 L. J. Ex. 114.

Where a person, in publishing an account of his own goods, compares them with those of another, describing his own as superior to them, but not making any false representation as to the quality and character of the latter, an action is not maintainable, although the declaration allege that the plaintiff has suffered special damage in consequence of the publication, and although the allegation of the superiority of his own goods may be false. *Young v. Macrae*, 32 L. J. Q. B. 6; 11 W. R. 63; 7 L. T. (N. S.) 354.

In an action for slander of title, the defendant having issued an advertisement, offering a reward for the production of a will of a deceased person whose property the plaintiff was about to sell, as administrator, after having been told by the attorney for the deceased that there was no will:—*Held*, that the question was, Whether, after this, he had an honest and reasonable belief that there was a will? *Atkins v. Perrin*, 3 F. & F. 179.

A declaration alleged that the plaintiff had advertised his goods for sale, and that the defendant published of him and of his sale a notice reciting the advertisement, and stating that he unlawfully detained certain goods of the defendant, which he the defendant was informed the plaintiff also intended disposing of, and giving notice that the same were the defendant's property, and any person purchasing would be held responsible; thereby meaning to cause it to be believed that no person could safely purchase any goods at the sale: by means of which persons were prevented from attending, and the sale failed altogether. *Plea*, that the plaintiff did unlawfully detain certain goods of the defendant, who was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the words for the purpose of warning all persons from purchasing the goods so unlawfully detained by the plaintiff, and not otherwise:—*Held*, that the plea was an answer to the action. *Carr v. Duckett*, 29 L. J. Ex. 468. *Semble*, that the plea amounted to not guilty, and would have been struck out, either on that ground, or because it was calculated to embarrass, as being uncertain whether it was pleaded as a justification or as a privileged communication. (Id.)

SLAUGHTER-House. *See* vol. v. p. 51. Arch. *Just.* vol. ii. p. 1.

SLAVE and Slavery.[1]

SMALL Debts' Acts. *See* Costs, vol. iii. pp. 295, 296; County Court, id. p. 330.

SMOKE Nuisance.[2] *See* 16 & 17 Vic. c. 128; *ante*, Nuisance, p. 1.

SMUGGLING. *See* also Revenue, *ante*, p. 339.

I. Generally, and Civil Proceedings for.[3]

[1] The 5 Geo. 4, c. 113, repeals all the acts relating to the slave-trade and the abolition thereof, and the exportation or importation of slaves. Upon the Abolition Act, giving slaves seized to the Crown, the latter giving a certain bounty to the captors, it was held that the flag-officers were entitled to share the bounty in such seizures equally as in cases of other captures. *The Dolores*, 1 Dods. (Adm.) 413. The following cases were determined before the passing of the act:—Slavery is of such a nature that it is incapable of being introduced into this country, on any reasons, moral or political, and can be no farther considered in this country than as it is supported by positive law. *Somerset v. Stewart*, Lofft, 1. A slave cannot be sent out of this kingdom against his will. (Id.) A contract for the sale of a negro in a country where slavery is tolerated may be enforced in the courts of this country; but the person of the slave himself is under the protection of the laws here, and cannot, if he is within the jurisdiction of the courts, be recovered. (Id.) A foreigner who is not prohibited from carrying on the slave-trade by the laws of his own country may, in an English court of judicature, recover damages which may have been sustained by him in respect of a wrongful seizure, by a British subject, of a cargo of slaves on board a ship employed by him in carrying on the African slave-trade. *Madrazo v. Willes*, 3 B. & A. 353. As to harbouring slaves in a British colony, &c., see *Forbes v. Cochrane*, 3 D. & R. 679; S. C. 2 B. & C. 448. *Edward v. Trevelleck*, 4 E. & B. 59; 24 L. J. Q. B. 9.

The provision made in 6 & 7 Vic. c. 98, s. 1, that the 5 Geo. 4, c. 113, for consolidating the laws relating to the slave-trade, "shall be deemed to apply to British subjects, wheresoever residing or being," does not show that the latter act was confined in its operation to acts done within the British dominions, nor was it so confined. *Santos v. Illidge*, 5 Jur. N. S. 1358; 28 L. J. C. P. 317; 8 C. B. 861; 29 L. J. C. P. 348, Ex. Ch.

It is necessary, in order to justify a condemnation imposing forfeiture and penalties for a breach of the 5 Geo. 3, c. 113, that it be shown, as regards the ship, that she was employed in contravention of the object of that act of parliament, and that she was employed with the knowledge of the owner; and as to the shippers, that the goods had been shipped by them wilfully and knowingly, for the purpose of being employed in the slave-trade. *Hocquard v. Reg.* 11 Moore, P. C. C. 155.

As to condemnation of ship for trafficking in, see *The Newport*, 1 Swab. 317; and the protection a naval commander is entitled to for seizing and detaining, see *Bevion v. Denman*, 2 Ex. 167. As to a contract for the purchase of apprenticed labourers, under the 3 & 4 Wm. 4, c. 73, see *Mittelholzer v. Fullerton*, 6 Q. B. 989. *Lozano v. Jonson*, 28 L. J. Q. B. 337.

[2] A steam-tug which plies on the river Thames, and in towing vessels up and down the river between London Bridge and the Nore Light, is within the meaning of sect. 1 of the 19 & 20 Vic. c. 107, which applies to "steam-vessels plying to and fro between London Bridge and any place on the river Thames to the westward of the Nore Light," and should therefore be constructed so as to consume its own smoke. *Walker v. Evans*, 29 L. J. M. C. 22; 1 L. T. (N. S.) 59, Q. B.

The 8 & 9 Vic. c. 20, s. 114, imposes a penalty upon railway companies using any locomotive steam-engine (in which coal is used) not constructed on the principle of consuming, and so as to consume, its own smoke:—*Held*, that the fact that a locomotive steam-engine emits smoke is not conclusive against the company, but that it should be ascertained whether or not such emission of smoke is caused by the neglect of the party in charge of the engine, or from the engine not being so constructed as required. *Manchester, Sheffield, & Lincolnshire Railway Co. v. Wood*, 29 L. J. M. C. 29; 1 L. T. (N. S.) 31, Q. B. As to chimnies, see *Rich v. Basterfield*, 4 C. B. 805.

[3] This offence consists in importing or exporting goods without paying the duties imposed thereon by the laws of the custom and excise. *See* stats. 16 & 17 Vic. c. 107, ss. 199–262; sect. 358 repealed the 8 & 9 Vic. cc. 86, 87; 12 & 13 Vic. c. 90.

By stat. 3 & 4 Wm. 4, c. 53, s. 28, if goods which shall have been warehoused or otherwise secured for home consumption or exportation shall be clandestinely removed from or out of any warehouse or place of security, they shall be forfeited. The king's warehouse is within this clause. *Attorney-General v. Vondiere*, 1 C., M. & R. 571. *Lowe v. Attorney-General*, 2 id. 544; 1 Gale, 249.

If a vessel, having on board goods, spirits, &c., which she has unshipped at more than a league from the shore, during the same voyage approach within one league, she is liable to forfeiture by the stat. 3 & 4 Wm. 4, c. 13, s. 2. But she incurs the forfeiture in such case only by coming within

II. Criminal Proceedings for.[1]

"SO Long."[2]

SOCAGE.[3]

SODOMY. *See post*, Unnatural Offence.

SOLD Note.[4] *See* vol. v. p. 546.

SOLDIER. *See post*, Will.

SOLVIT ad Diem.

post Diem.[5]

SON Assault Demesne. *See* vol. i. p. 565.

SOUTH-Sea Company. *See* 1 Taunt. 227; 4 id. 787; 7 id. 193; 3 M. & S. 117; 4 id. 16; 1 B. & A. 334.

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the distance during the same voyage, and not by doing so in any subsequent and distinct voyages. *Attorney-General v. Schiers*, 2 C., M. & R. 286; 1 Gale, 223. *See* 16 & 17 Vic. c. 107, ss. 41–113. *Rex v. Pereira*, 2 Ad. & E. 375. *Attorney-General v. Tomsett*, 2 C., M. & R. 170; 5 Tyr. 514; 1 Gale, 147.

Goods, the importation of which is prohibited when coming from particular places, may, under the 3 & 4 Wm. 4, c. 53, s. 30, be described in an information for penalties as goods liable to and unshipped without payment of duty, and the defendant may be charged with having been concerned in the unshipping, the duties not having been first paid or secured, although it appeared that they were in fact imported from a place to which the prohibition applies. *Attorney-General v. Greaves*, 2 C., M. & R. 669. *Attorney-General v. Tomsett, supra.*

Where customable goods are landed by bill of sight under the 3 & 4 Wm. 4, c. 52, s. 24, and are afterwards removed without payment of duties, and without a perfect entry having been made of them pursuant to that statute, they are in the situation, for all purposes, of goods illegally unshipped; and all persons who assist in removing or harbouring them, knowing due entry not to have been made, are liable to the penalties imposed by the 3 & 4 Wm. 4, c. 53, s. 44. *Attorney-General v. Hurel*, 11 Mee. & W. 585; 12 L. J. Ex. 413.

An importer of goods from a foreign country is liable, on the importation, to the duties of customs payable thereon, and this liability is not affected by the Warehousing Act, 3 & 4 Wm. 4, c. 57, the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption. *Attorney-General v. Ansted*, 12 Mee. & W. 520; 13 L. J. Ex. 101.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country. *Pellecat v. Angell*, 2 C., M. & R. 311; 1 Gale, 187.

An owner of a vessel, who knowingly let it for the purpose of fetching goods to be landed without payment of duty, was, if the goods were so landed, liable to penalties, under the 8 & 9 Vic. c. 87, s. 46, as a person "concerned" in the illegal unshipping of goods. *Attorney-General v. Robson*, 5 Ex. 790; 20 L. J. Ex. 188.

The being concerned in unshipping goods prohibited to be imported into the United Kingdom, and the being concerned in importing foreign goods contrary to statute, are not indictable offences. *Attorney-General v. Radloff*, 10 Ex. 84; 2 C. L. R. 1116; 10 Jur. 555; 23 L. J. Ex. 240.

An information under 8 & 9 Vic. c. 87, ss. 82, 83, might be laid before one justice. *R. v. Russell*, 13 Q. B. 137; 18 L. J. M. C. 106. In a conviction under this statute it was necessary to negative the exemption. *Von Boven's case*, 9 Q. B. 669; 10 L. J. M. C. 4.

[1] As to making signals to smuggling vessels, &c., *see* 16 & 17 Vic. c. 107, ss. 244, 245. As to armed assemblies for smuggling, s. 248. Shooting at boats, &c., wounding officers, s. 249. Smugglers being armed or disguised, s. 250. Assaulting or resisting officers, with violence, s. 251. Prosecution of offences, ss. 301, 303, 304. Indictment must be preferred within three years after offence committed, s. 303.

[2] In a lease for years, "so long as the lessee shall duly pay the rent," is a limitation, and not a condition: *Vaughan, C. J.* Freem. 25. "So that," in a lease, denotes a condition subsequent. Co. Litt. 204, a.

[3] A tenure by any certain and determinate service. 2 Bl. Com. 79. The tenure by which the great part of real property is holden. *See* Wright on Tenures, 143; 1 Steph. Com. 193; 3 Kent's Com. 509.

[4] A note or memorandum of sale given by the broker to the buyer. *See* Note, Bought and Sold, vol. v. p. 546.

[5] Technical names to pleas on bonds, that the defendant paid "the money on the day,"

SPECIAL Bail. *See* vol. ii. p. 81.

SPECIAL Case.

I. General Nature of, p. 470.
II. In what Proceedings and Stages of them it may be Adopted, p. 470.
III. Proceedings on; Forms and Requisites of, and when Amended, p. 471.
IV. Delivering of Copy to Judges; Argument; Judgment on, p. 472.
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VI. Error on, p. 472.
VII. At Sessions, p. 472.

I. General Nature of.[1]

II. In what Proceedings and Stages of them it may be Adopted.[2]

or "after the day." *See* Bond, vol. ii. p. 524.

[1] As connected with actions at law, a special case is a formal statement of facts agreed to and admitted by the litigants, their dispute being only as to the law upon that state of facts, and they agree to take the opinion of the court, and be finally bound by it, as to what the law is. This course is generally pursued when the questions cannot be raised on the pleadings, or it is not expedient to discuss them on a demurrer.

Before the recent statutes the parties were compelled to go down to trial when a general verdict was taken, subject to the opinion of the court upon a case to be stated. This useless expense is now obviated, and a case may be agreed upon in any stage of a cause.

[2] It was formerly the practice of courts of equity to direct cases to courts of law for their opinion. This is now prohibited by the 61st sect. of 15 & 16 Vic. c. 86. The act is prospective only. *Hobson v. Neale*, 8 Ex. 131; 22 L. J. Ex. 175. A case may be stated for the opinion of any of the superior courts from which the writ has issued, and in any form of action, including ejectments (*Seymour v. Mayor of Brecon*, 29 L. J. Ex. 296), and proceedings under the Interpleader Acts. The 15th sect. of the 23 & 24 Vic. c. 126, provides that in all cases of interpleader proceedings, where the question is one of law and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question, without directing an action or issue, and if he shall think fit, to order that a special case be stated for the opinion of the court. The consent of the parties is immaterial. By sect. 16 error may be brought and prosecuted as in ordinary actions.

To avoid expense of unnecessary proceedings, the 15 & 16 Vic. c. 76, ss. 46–48, enables the parties, after the writ issued, and before judgment, by consent and order of a judge, to state any question or questions of law in a special case for the opinion of the court, without any pleadings; they may enter into an agreement in writing, which is not subject to any stamp-duty, and which must be embodied in the same or a subsequent judge's order, that upon the judgment of the court being given in the affirmative or negative of the question or questions of law raised by the special case a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action; and the judgment of the court may be entered for such sum as shall be so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon the judgment forthwith, unless otherwise agreed, or unless stayed by proceedings in error. If no agreement has been entered into as to costs of the action, the costs follow the event, and are recovered by the successful party. The foregoing are the provisions as to stating a special case without pleadings; but the stat. 3 & 4 Wm. 4, c. 42, s. 25, authorises the parties to agree to a special case after the pleadings are complete, that is, after issue joined. Of course it is only on legal questions of some difficulty that a special case is stated, for otherwise the opinion of the judge at the trial usually decides the cause.

By the 22 & 23 Vic. c. 63, the courts in one part of the queen's dominions may remit cases for the opinion of courts in other parts thereof, for their opinion on questions of law.

At Nisi Prius it frequently occurs that the matter at issue turns upon a mere point of law, and at the suggestion of the judge, and with consent of the parties, a verdict is given for the plaintiff, subject to a case for the opinion of the court in which the record was made up upon the point of law; and according to the decision of the court upon the case, the verdict and judgment are ultimately entered. It used also sometimes to be made part of the terms upon which a case was consented to, that either party should be at liberty to turn it into a special verdict, in order that the opinion of a court of error might be taken upon the point of law, if desired. But a special case could not thus be turned into a special verdict, unless a power to that effect was expressly reserved (*Archbishop of Canterbury v. Robertson*, 2 Dowl. 78), or except by consent of parties, and then, it seems, only by leave of the court; but as error may now be brought upon the

special case (*see* 17 & 18 Vic. c. 95, s. 11, *post*, p. 472. *See* 1 Nev. & M. 181, n.) this stipulation is unnecessary. Also, where a new trial is moved for on a point of law, either reserved at the trial, or on which it is alleged that the judge misdirected the jury, if the point be one of any nicety or difficulty, the court frequently suggests the propriety of having the matter turned into a special case, as the most convenient mode of obtaining a deliberate opinion of the court upon it.

The court will not sanction a case where it appears that the action was not *bonâ fide* brought to try a question really in contest between the parties. *Doe v. Duntze*, 6 C. B. 100; 17 L. J. C. P. 220. The death of one of the parties, after the case has been stated, is no ground for setting it aside. *James v. Crane*, 15 Mee. & W. 379; 15 L. J. Ex. 232.

[1] The case is prepared by the junior counsel in the cause on both sides; it should state with precision the facts proved or agreed upon at the trial, and not merely the evidence of those facts. *Palmer v. Johnson*, 2 Wils. 163. If the counsel cannot agree upon the facts, they may go before the judge, or statements are made out on both sides, and laid before the judge who tried the cause, who will adopt either statement, with such alterations as he may think fit to make in it, or will state a case himself from his notes of the trial. See *Jackson v. Hall*, 8 Taunt. 421. If, after a case is granted or ordered, the defendant refuse to proceed with or settle it, &c., the courts upon application usually order the *postea* to be delivered to the plaintiff (id. *R. v. Smith*, 2 Chit. 398); if the plaintiff refuse, the defendant may apply to set aside the verdict, unless there appear to be sufficient grounds for the plaintiff's refusal. *Cottam v. Partridge*, 10 L. J. C. P. 186. *Medley v. Smith*, 6 Moore, 53. If not duly proceeded with when ordered by a judge, either party may apply to rescind the order. It is not necessary now to move for a *concilium;* but the case may be set down for argument in the special paper at the request of either party four clear days before the day on which it is to be argued, notice being forthwith given to the opposite side. Reg. Gen. H. T. 16 Vic. r. 15. The case must state the facts, not evidence of the facts. *Palmer v. Johnson, supra.* The court has granted a rule for the defendant to admit certain facts necessary to raise the litigated question; and the courts will not, in general, take upon themselves the office of a jury, and draw inferences from the matters detailed or decide upon the conflicting testimony of witnesses, or upon a question of fraud (10 W. R. 1057; 8 Jur. 1059), although a judge's order may so direct, or it be agreed at Nisi Prius. *Whitmore v. Claridge*, 8 Jur. N. S. 1059. *Engstrom v. Brightman*, 5 C. B. 419; 17 L. J. C. P. 142. *Brockbush v. Anderson*, 7 Scott, N. C. 813; 13 L. J. C. P. 102. In practice, the courts frequently allow a term to be inserted giving them liberty to draw inferences.

On a special case by way of appeal from a rule to enter a verdict for the defendant, he is not called upon to take any step towards settling or advancing the case; but if the plaintiff does not do so with due promptitude, the court will compel him to do so under pain of final judgment for the defendant. *Hunt v. Allgood*, 3 F. & F. 155.

A verdict in ejectment having been taken for the plaintiff by consent, subject to a special case, and a long period having elapsed without the plaintiff delivering a case, the court, notwithstanding the alleged insolvency of the defendant, and notwithstanding proceedings in equity were pending as to the property, made absolute a rule to set aside the verdict, and for a new trial, unless within a certain time the plaintiff delivered a case. *Seymour v. Brecon* (*Mayor, &c.*) 29 L. J. Ex. 296.

A verdict and judgment having been taken for a plaintiff, subject to a special case to be settled by a barrister, and the referee having settled it, the defendant obtained a rule to set aside the judgment, on the ground that the plaintiff neglected to take the necessary steps to set the case down for argument. Cause was shown, upon an affidavit stating that the delay had arisen partly from the refusal of the defendant to pay a moiety of the referee's fees for settling the special case, and partly from the fact of the plaintiff's attorney having been, until within two days of the application for the rule, engaged in negotiations for obtaining a loan of money on mortgage for the defendant, to enable him to settle the plaintiff's claim. The court discharged the rule with costs. *Howkins v. Bennet*, 6 C. B. N. S. 386.

Where, in a special case, judgment was given for the defendant upon a point not mentioned in the case or argument, and on a supposed state of facts collected by the court from a document appended to the case, but the reverse of those which really took place, the court refused to stay proceedings or re-consider the case without the defendant's consent, although a statement of the real facts as to this point, contained in the case, when agreed on by the defendant's junior counsel, engrossed and signed by the plaintiff's leading counsel, had been afterwards struck out by the defendant's counsel, because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case; but the statement was never disputed, and the defendant's counsel had been instructed to direct, and had directed, the argument exclusively to another point. *Pike v. Carter*, 3 Bing. 85; 10 Moore, 376.

The case must be signed by counsel for both parties (*Bronckardiere v. Elvery*, 18 L. J. Ex. 381), or by the party himself, if he intends to argue it. *Udney v. East India Co.* 13 C. B. 742; 22 L. J. C. P. 211.

IV. Delivering Copy to Judges; Argument; Judgment.[1]
V. Costs on.[2]
VI. Error on.[3]
VII. At Sessions.[4]

In *Price v. Quarrell* (11 L. J. Q. B. 84; 6 Jur. 604), where the defendant's counsel refused to sign it, the court directed the case to be set down for argument without signature; but after verdict for the plaintiff, with nominal damages, subject to a case if he refuses to proceed, the defendant may apply to set aside the verdict, and have a new trial (*Medley v. Smith*, 6 Moore, 53); or if defendant refuses to complete the case, the *postea*, on application, will be directed to be delivered to the plaintiff. *Lachrin v. Hall*, 2 Moore, 478. *See* 3 Moore, 643. *R. v. Smith*, 2 Chit. R. 398. *Doe v. Rollins*, 2 C. B. 842; 15 L. J. C. P. 186. If the case is incorrectly stated, a motion may be made by either of the parties for leave to amend, or to have a new trial (*Doe v. Reeves*, 1 Burr. 617. *Davila v. Herring*, 1 Stra. 300); and if amendments ordered be not made, the case will be struck out of the paper. *R. v. Lewis*, 2 W. R. 240. A term in a special case that the court should be at liberty to amend the pleadings, gives no additional power beyond that possessed by a judge at Nisi Prius. *Chapman v. Sutton*, 3 D. & L. 646; 15 L. J. C. P. 166. Practically, difficulties as to finding the facts is obviated by the parties agreeing, that if any difference should arise respecting them they shall be bound by a third party named, or to be named; and when there has been a trial, any questions as to the evidence may be decided by reference to the judge's notes.

In the schedule to Reg. Gen. M. Vac. 18 Vic. is given a form, No. 11, of a special case stated for the opinion of the court, under sect. 4 of the 17 & 18 Vic. c. 125, where the allowance or disallowance of a particular item or items depends on a question of law. So also a form, No. 14, of a special case stated by an arbitrator, under sect. 5 of the same act.

Bankruptcy after verdict, subject to a case, will not exempt the plaintiff from the obligation of completing it. *Cottam v. Partridge*, 3 Scott, N. R. 174; 2 Man. & G. 843; 9 Dowl. P. C. 629.

[1] The same rules apply as to delivery of copies of the case to the judges and of the points to be insisted on, and the proceedings to and argument as on demurrer. *See* vol. iv. pp. 43, 44.

In the schedule to Reg. Gen. M. Vac. 18 Vic. forms of judgment for the plaintiff on a special case, stated under sect. 32 of the 17 & 18 Vic. c. 125, of judgment of affirmance by court of error in Exchequer Chamber, of judgment of reversal in like case, and of judgment of court of appeal in Exchequer Chamber, on a disposal of the appeal in the plaintiff's favour, where judgment for him had been given in the court below, under 41st and 42d sections of the 17 & 18 Vic. c. 125.

[2] The costs are the same as in ordinary proceedings: the costs of settling the case are costs in the cause. But where upon the moving of a rule for a new trial the parties agreed to state a special case (nothing being said about costs), but no case is ultimately agreed upon, the costs of such abortive case are not costs in the cause. *Foley v. Botfield*, 16 Mee. & W. 65; 16 L. J. Ex. 3.

[3] By 17 & 18 Vic. c. 125, s. 32, error may be brought upon a judgment upon a special case in the same manner as upon a special verdict, unless the parties agree to the contrary, and the proceedings for bringing a special case before the court of error shall, as nearly as may be, be the same as in the case of a special verdict; and the court of error shall either affirm the judgment or give the same judgment as ought to have been given in the court in which it was originally decided, the court of error being required to draw any inferences of fact from the facts stated, which the court where it was originally decided ought to have drawn.

[4] By 12 & 13 Vic. c. 45, s. 11, at any time after notice of appeal has been given the parties may, by consent and by order of a judge of one of the superior courts, state the facts in a special case for the opinion of such court, and agree that a judgment, in conformity with the decision of such court, and for costs, may be entered on motion by either party at the sessions next or next but one after such decision is given, and such judgment is to be of the same effect as if given by the sessions upon appeal; and by ss. 12 & 13, by order of a judge, or the sessions, with the consent of the parties on the hearing, may refer the matter of the appeal to arbitration; and by sect. 14, if it become abortive, the sessions may be ordered to hear the appeal, or the matter may be referred back to the arbitrator. *Huntley v. Binhook*, 1 E. & B. 787; 22 L. J. Q. B. 277; 17 Jur. 571. Appeals against summary convictions, or an order in bastardy, or matters relating to the revenue, are expressly exempted from these provisions. The sessions may also, in its discretion, state a case for the opinion of the Queen's Bench, and decide the appeal in conformity with the judgment of that court. They are, however, not bound to grant a case, but should exercise their discretion upon application of the unsuccessful party. *R. v. Oulton*, Burr. S. C. 64. Where they have no doubt they ought to refuse it, to avoid useless expense. *R. v. Darley Abbey*, 14 East, 285 (*R. v. Kesteven*, 3 Q. B. 810. *R. v. Preston*, 2 Burr. S. C. 78); nor will a *mandamus* lie to compel the granting, though it may to state one which has already been conceded. *R. v. Justices of Pembrokeshire*, 2 B. & Adol. 391. *See* 9 Dowl. P. C. 120.

SPECIAL Damages.[1]

See vol. iii. p. 546; *ante*, Slander, p. 465.

The court of Queen's Bench has no jurisdiction to review the judgment of the sessions, unless there be a case sent up for their consideration. *Rex v. Justices of Carnarvon*, 4 B. & A. 86. And they will not go into any question not intended to be referred to them by such a case. *Rex v. Aire and Calder Navigation*, 2 T. R. 666. Where one question alone is submitted to the court by the sessions, the court will not consider any other questions. *Rex v. Guildford*, 2 Chit. 284. The court will not send a case down to the sessions to be re-stated, on a mere formal objection, if enough appears to enable them to decide according to the merits of the case. *Rex v. Middlezoy*, 2 T. R. 41. Nor on the affidavit of a person, that the clerk of the peace did not state his evidence truly. *Rex v. Burgh*, 2 Bott's P. L. 747.

The case is ordinarily settled and signed by counsel, and by the chairman upon the concurrence of a majority of the justices. It should contain a positive finding of every fact and conclusion of fact material to the question raised. *See ante*, p. 470, and *R. v. Pilkington*, 5 Q. B. 662. *R. v. Fillongley*, 1 T. 461. *R. v. St. Marylebone*, 16 Q. B. 299. The court is bound by the facts found. *See* Burr. S. C. 57; 4 T. R. 473; 4 B. & A. 624.

The sessions ought not to direct, that, in any particular event or mode suggested, the case shall be sent back to the sessions for final determination. *Reg. v. Worth*, 4 Q. B. 132; 3 Gale & D. 376. S. P. *Reg. v. Justices of Kesteven*, 3 Q. B. 810; D. & M. 113; 1 New Sess. Cas. 151; 13 L. J. M. C. 78; 8 Jur. 445. *Reg. v. Marton-cum-Grafton*, 10 Q. B. 971; 11 Jur. 927; 16 L. J. M. C. 159. *Reg. v. Wistow*, 1 Gale & D. 681.

In stating a case the sessions ought to decide provisionally with reference to what the opinion of the court may be upon the question submitted to it. *Reg. v. Stoke-upon-Trent*, 13 L. J. M. C. 41; 8 Jur. 34, Q. B. They ought not simply to state facts, and ask the opinion of the court, as a jury, upon them; but, having drawn their own conclusions from the facts, they may ask whether, in the opinion of the court, the facts will warrant their finding. *Reg. v. Pilkington*, 1 New Sess. Cas. 90; 13 L. J. M. C. 61; 8 Jur. 267. But they should not ask questions of the court with a view to re-hearing of the case. *Reg. v. West Houghton*, 13 L. J. M. C. 41; 8 Jur. 106, Q. B. See *R. v. Bakewell*, 7 Q. B. 601. When a case had been granted, and the case and certain orders set out therein, and the order of sessions had been brought up by *certiorari*, the court would not entertain any objection, although it went to the jurisdiction of such orders, which was not raised by the case itself. *Reg. v. Heyop*, 2 New Sess. Cas. 270; 15 L. J. M. C. 70; 10 Jur. 200, Q. B. S. P. *Reg. v. Hartpury*, 2 New Sess. Cas. 648; 8 Q. B. 566; 11 Jur. 486; 16 L. J. M. C. 105. The fact of the respondents not having availed themselves of a case granted by the sessions did not preclude them from obtaining a second order during the six months in which they had the power of bringing up the former order by *certiorari*. *Reg. v. Great Bolton*, 1 New Sess. Cas. 636, Q. B. Where a case is granted for the opinion of the court, the party at whose instance the case is granted must either proceed with the case received, waiving any other objections to the order of removal, or must abandon the case, and rely on any other objections which may be raised when the order is brought up by *certiorari*. *R. v. St. Anne's, Westminster*, 2 New Sess. Cas. 517; 8 Q. B. 561; 11 Jur. 124; 16 L. J. M. C. 33. Where an order of justices has been quashed on appeal, subject to a case, and the Queen's Bench directs the case to be re-stated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order, without a notice by one of the parties to the other of an intention to proceed at such sessions, which notice may in such a case be given by the respondents. *Reg. v. Barnes*, 2 Gale & D. 233; 3 Q. B. 437; 6 Jur. 945.

The decision of the sessions will not be disturbed by the court, unless it is necessarily wrong, although they may think the evidence would have authorised a different conclusion (9 B. & C. 894; 3 Q. B. 378); nor where a right decision has proceeded on incorrect grounds. 2 Q. B. 705. A party to a case as offered at the sessions is not bound to accept it (7 Q. B. 387); and, after accepting, he cannot apply for a *mandamus* to hear the appeal. 6 Ad. & E. 109; 3 Q. B. 810. Where a case is reserved by the sessions a *certiorari* is obtained upon the signature of counsel to a motion-paper. The order of sessions and case being returned, the case is entered on the Crown paper, as upon a rule to quash the order. The counsel in support of the order of sessions are heard against the rule (*Reg. v. Holbeck*, 16 Q. B. 404. *See* 7 Ex. 777; 21 L. J. M. C. 225); and then the opposite counsel in support of the rule. Any number of counsel are entitled to be heard. The form of the judgment is to make absolute or discharge the rule; if discharged, the order of sessions is confirmed, and the party bringing up the case is to pay the costs. *R. v. Latchford*, 6 Q. B. 567; 8 Jur. 1094. *R. v. St. Pancras*, 12 id. 298.

The practice, in arguing a case, stated for the opinion of the court under 12 & 13 Vic. c. 45, s. 11, is the same as when a case is sent up by the sessions, and the party supporting the order complained of is not entitled to reply. *Wigton (Overseers) v. Snaith (Overseers)*, 16 Q. B. 496.

[1] These are damages not necessarily resulting from the subject-matter of complaint, nor implied by law, and require to be specially stated in the declaration to prevent a surprise upon the defendant, and

SPECIAL Demurrer. Abolished by 15 & 16 Vic. c. 76, ss. 51, 52. *See* vol. iv. p. 42.

Jury. *See* vol. v. p. 279.

Occupant.[1]

or Restrictive Indorsement. *See* Bills and Notes, vol. ii. p. 445.

Plea.[2]

Pleader.[3]

Property.[4]

Traverse.[5]

Verdict. *See ante*, p. 470 ; *post*, Verdict.

SPECIALTY.[6]

SPECIFIC Fulfilment.[7]

Legacy. *See* Legacy, vol. v. p. 357.

SPECIFICATION of Patent. *See ante*, p. 97.

SPEECHES of Counsel. *See post*, Trial.

SPIRITUOUS Liquors.[8]

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if not so stated the plaintiff will be precluded from giving them in evidence.

[1] A person having a special right to enter upon and occupy lands granted *per auter vie* on the death of the tenant, and during the life of the *cestui que vie*. In the case of a limitation to a man *and his heirs* during the life of *cestui que vie*, the heir succeeds as special occupant. 2 Bl. Com. 259. 1 Steph. Com. 416; Smith, R. & P. P. 475.

[2] A plea in bar, distinguished by this name from the general issue, and consisting of some new affirmative matter, though it may also be in the form of a traverse or denial. Steph. Pl. 52, 162.

[3] The professional occupation of a special pleader is to give verbal or written opinions upon statements made orally or in writing, and to draw pleadings, civil and criminal, and such practical proceedings as may be out of the usual course. The Stamp Act requires they should be members of one of the Inns of Court, and take out an annual certificate.

[4] An interest of a special qualified or temporary kind, distinguishable from an absolute property from the peculiar circumstances under which it is acquired ; such as the property of the finder of a chattel lost until the right owner is discovered, or of a pawnee, or bailee, broker, factor, auctioneer, or sheriff, in goods taken in execution, between the time of seizure and sale. 2 Steph. Com. 73, 74. All such persons may maintain an action either for an injury or breach of contract affecting such special limited interests; but a mere servant of the owner cannot sue. *See* Lush's Pr. 10, 2d edit.

[5] A peculiar form of traverse or denial in pleading, the design of which, as distinguished from a *common traverse*, is to explain or qualify the denial instead of putting it in a direct and absolute form. *See ante*, p. 153, n.

[6] A contract or obligation under seal. *See* Bond, vol. ii. p. 504; Covenant, vol. iii. p. 443; Deed, vol. iv. p. 1.

[7] *See* Mandamus, vol. v. p. 424. The authority given by the 17 & 18 Vic. c. 125, ss. 68–77 ; and recourse in most instances must be had to a court of equity to obtain a specific fulfilment of contracts, &c. Chancery will interpose where damages would not afford compensation, but not where they would completely compensate.

[8] Statutes as to stills, &c., 9 & 10 Vic. c. 90. As to dealers in, 9 & 10 Vic. c. 121; 11 & 12 Vic. c. 121. Sale of on Sunday, &c., 11 & 12 Vic. c. 49 ; 17 & 18 Vic. c. 79. *See post*, Sunday.

The 24 Geo. 2, c. 40, s. 12, passed to prevent tippling, enacts, "that no person shall be entitled to sue for or on account of any spirituous liquors, unless such debt shall have been *bonâ fide* contracted for at one time, to the amount of 20s. or upwards; nor shall any particular item or article in any account on demand for distilled spirituous liquors be allowed and maintained, where the liquors delivered at one time, and mentioned in such article or item, shall

SPLINTS. Whether unsoundness in Horses, *see post*, Warranty.

SPRING Guns.[1] *See* vol. i. p. 357.

SPRINGING Interest, or Use.[2]

STABBING. *See* Murder, vol. v. p. 501.

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not amount to 20*s.* at the least, and that without fraud and covin."

The statute extends to spirits mixed with water (*Scott v. Gillmore*, 3 Taunt. 226); and to a score for grog, beer, and herrings, as to such part as was for the grog, but not to the other items, which consequently may be recovered, see *Gilpin v. Rendle*, 1 Selw. N. P. 61.

In an action for the amount of a tavern bill, the plaintiff is not entitled to recover for any items under twenty shillings for spirits supplied to his guests (*Burnyeat v. Hutchinson*, 5 B. & A. 241); but if a person sell two sorts of spirits at the same time to an amount above twenty shillings, he may recover the price, although the amount of each species of spirits be under twenty shillings. *Owens v. Porter*, 4 C. & P. 367. A publican took from a person, who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account:—*Held*, in an action on the securities, that although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered. *Crookshank v. Rose*, 5 C. & P. 19. Where parties, having cross-demands, settle and balance their accounts, it is no defence to an action brought for the balance that a great part of the amount was for spirituous liquors delivered in quantities under 20*s.* in value. *Dawson v. Remnant*, 6 Esp. 24. It is a defence to an action on a bill of exchange against the acceptor, that it was accepted for the amount of spirits sold to him by the plaintiff in quantities under the value of 20*s.* *Scott v. Gillmore*, *supra*.

Pleas to a declaration on a bill, with counts for goods sold: first, that part of the consideration of the bill was spirituous liquors, sold at different times in quantities less in value than 20*s.*; and secondly, that the plaintiff and defendant had accounted together, and that the latter had given the former a bill for the amount of the goods mentioned in the common counts, which bill is still outstanding and unsatisfied, are issuable pleas, and cannot be treated as nullities, so as to entitle the plaintiff to sign judgment as for want of a plea. *Gaitskill v. Greathead*, 1 D. & R. 359.

A plea to an action of debt for goods sold and delivered, that the sum is claimed for and in respect of spirituous liquors supplied by the plaintiff to the defendant at divers days, &c., and not a debt or demand for or in respect of any other or different matter; and that no part of the said sum was *bonâ fide* contracted by the defendant at any time to the amount of 20*s.* and upwards:—*Held* good, on special demurrer. *See* form, B. & L. 351. A replication *de injuriâ* was held good to such a plea. *Lansdale v. Clarke*, 1 Ex. 78; 16 L. J. Ex. 246.

The statute 24 Geo. 2, c. 40, s. 12, extends to liquors sold by a spirit-merchant to a publican for the purpose of being sold again. (Overruling *Jackson v. Attrill*, Peake, N. P. C. 180.) *Hughes v. Doane* or *Done*, 10 L. J. Rep. N. S. Q. B. 65; 1 Q. B. 294.

The vendor of spirits in small quantities, who has another demand against the vendee, may apply a payment made to him by his debtor to the price of the spirits, unless at the time of payment the debtor direct a different appropriation of it. *Philpott v. Jones*, 4 Nev. & M. 14; 2 Ad. & E. 41. In the absence of such contemporaneous directions by the debtor, the creditor may so apply the payment at any time afterwards. (Id.) And a jury may, upon the trial of an action brought by such creditor against the debtor, find that such appropriation has been made, although in the particulars of demand the plaintiff has stated that the action was brought to recover the amount of his bill, being the whole of his original demand, including the charges for spirits. (Id.)

[1] The 7 & 8 Geo. 4, c. 18, s. 1, makes it a misdemeanor for any person to set or place any spring-gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith. Persons allowing them to continue shall be deemed to have set them. (Sect. 2.) Act not to extend to dwelling-houses, or put with intent to destroy vermin.

[2] This is a use limited to arise on a future event where no preceding estate is limited, and which does not take effect in derogation of any preceding interest. 1 Steph. Com. 502; Barton, s. 22; 1 Shep. Touch. 212. A springing interest in personal estate is an interest by way of bequest or of trust, to take effect at a future time without being preceded by, and without affecting any other interest. Limitations of this kind by way of bequest are usually designated by the general name of executory bequests. Smith's R. & P. P. 305.

STABIT præsumptio donec probetur in contrarium. *A presumption shall stand until proof be made to the contrary.* Wing. *Max.* 712; Hob. 297; Co. Litt. 373, b; 3 Bl. Com. 371.

STACK of Corn. *See* Malicious Injuries, vol. v. p. 413.

STAGE-Coaches. *See* vol. iii. p. 30; as to forging plates, 2 & 3 Wm. 4, c. 120, s. 32; and as to furious driving, 1 Geo. 4, c. 4.

STAKEHOLDER.[1] *See* also Gaming, vol. v. p. 52; Horses, id. p. 50; Interpleader, id. p. 225; *post*, Vendor and Purchaser; Wager.

STALLAGE.[2]

STAMPS.[3]

I. Agreements or Contracts. *See* Contracts, vol. iii. p. 195.

II. Appraisement. *See post*, Valuation.

III. Award. *See* Arbitration, vol. i. p. 499.

IV. Bank of England Notes. *See* vol. ii. p. 137.

V. Bankers' Cash-Notes. *See* Bankers' Cash-Notes, vol. ii. p. 133.

VI. Bankers' Cheques. *See* Bankers, vol. ii. p. 123.

VII. Bills of Exchange and Promissory Notes. *See* Bills of Exchange, vol. ii. pp. 424 to 431 inclusive.

VIII. Bills of Lading are subject to duty of 6*d.* by 5 & 6 Vic. c. 79; and Customs' Bills of Lading to 1*s.* 6*d.* *See* 23 id. c. 22.

IX. Bonds. *See* Bonds, vol. ii. p. 529–531.

X. Cognovit. *See* Cognovit, vol. iii. p. 129.

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XVII. Guarantee. *See* Guarantee, vol. iv. p. 615.

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[1] The following cases were decided before the 8 & 9 Vic. c. 109, s. 18, prohibiting such deposit from being received. *See* vol. iv. p. 597: — If two persons make a wager, and deposit the stakes in the hands of a stakeholder, then, if the wager be legal, neither party can maintain an action against the stakeholder for money had and received to his use, until the event, on which the wager was made, has happened, and has been fully decided (*Marryat v. Broderick*, 2 Mee. & W. 369. *Bland v. Collett*, 4 Camp. 157), unless by consent of both the wager be withdrawn. *Wilkinson et al. v. Godfrey*, 9 Ad. & E. 536. After the wager has been determined, the loser cannot countermand the authority of the stakeholder to pay over the deposits to the winner, nor can he maintain this action against the stakeholder to recover the amount of his own stakes (*Brandon v. Hilbert*, 4 Camp. 37); but the party winning the wager may recover the whole of the money deposited from the stakeholder in this form of action, whether such stakeholder still have the money in his hands or have wrongfully paid it over to the other party (*Pickard v. Bankes*, 13 East, 20): he cannot, however, maintain this or any other form of action against the party who lost the wager, without alleging and proving that the loser prevented him from receiving the stakes from the stakeholder. *Robson v. Hall*, Peake, 127.

If, on the other hand, the wager were illegal, either party might have recovered the amount of his own deposit from the stakeholder in this form of action before the wager was determined (see *Aubert v. Walsh*, 3 Taunt. 277); or, even after the wager was determined, the loser might have sued the stakeholder in this form of action, and recovered the amount of his stake at any time before the stakes were paid over to the winner (*Cotton v. Thurland*, 5 T. R. 405. *Smith v. Buckmore*, 4 Taunt. 474); or even after the stakes have been paid over, if he demanded his stake from the stakeholder before. *Hastelow v. Jackson*, 8 B. & C. 221. But the loser cannot recover his stake thus from the winner himself after the wager has been determined (*Howson v. Hancock*, 8 T. R. 575. See *Lacaussade v. White*, 7 id. 535; *semb. cont. but not law*); the winner, however, might have recovered the whole stakes from the stakeholder, notwithstanding the illegality of the wager. See *Farmer v. Russell*, 1 B. & P. 296. *Tenant v. Elliott*, id. 3. *Applegarth v. Colley*, 12 L. J. Ex. 34; 10 Mee. & W. 723. These rules apply to all other contracts, where money is placed in the hands of a stakeholder to abide the event.

[2] The liberty or right, and the duty paid for the liberty of having stalls in a fair or market, or of removing them from one place to another. *See* Markets and Fairs, vol. v. p. 441; *post*, Tolls.

[3] *See* Tilsley on Stamps; 55 Geo. 3, c. 184; 13 & 14 Vic. c. 97; 16 & 17 id. cc. 59, 63; 17 & 18 id. c. 83.

XVIII. Indentures of Apprenticeship. *See* Apprentice, vol. i. pp. 398–401, inclusive.

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XI. Conveyance, Transfer, &c.[1]

[1] By 55 Geo. 3, c. 184, as amended by 13 & 14 Vic. c. 9, *ad valorem* duties are imposed on every grant, disposition, lease, assignment, transfer, release, renunciation, or other *conveyance*, on the *sale* of lands, tenements, annuities, or *other property, real or personal*, or of any right, title, interest, or claim in, to, or upon any such property; that is, on the principal or only deed of conveyance an *ad valorem* duty, after the rate of one-half per cent (or 1*s.* for every 10*l.*) on the purchase-money, ascending by half-crowns till the purchase-money amounts to 600*l.*, and then by 10*s.* at each step.

There is also a progressive duty on the quantity of words. *See* Progressive Duty, *post*, p. 480.

In order the better to determine the duty, the purchase-money or consideration is to be truly set forth. If any part of the consideration consists of stock or security, its value is to be ascertained as mentioned in the deed, and the *ad valorem* duty charged on such value. If such consideration be a mortgage judgment or other security, the calculation is to be made on the amount of the principal and interest due thereon. *Marquis of Chandos v. Commissioners, &c.* 20 L. J. Ex. 269.

Where the property sold is charged with a mortgage debt or sum of money, such sum is to be deemed part of the purchase-money; and where property is sold in consideration of a redeemable annuity or other periodical payment, the redemption-money is to be deemed the purchase-money. 16 & 17 Vic. c. 59, ss. 10, 11.

The above duties are chargeable on all written instruments under seal operating as an actual transfer of corporeal or incorporeal property, or of realty or personalty, and also on all simple contracts operating as such transfers, not being contracts for the sale of goods and chattels. *Horsfall v. Key*, 2 Ex. 778; 17 L. J. Ex. 266. *Cattle v. Gamble*, 5 Bing. N. C. 46. *Potter v. Commissioners, &c.* 10 Ex. 157. And it would seem that conveyances executed in this country between English subjects of lands in Australia are liable. *Wright v. Commissioners, &c.* 25 L. J. Ex. 49. If separate purchases be embodied in one conveyance, the deed is to be charged with duty on the aggregate sum. *Doe v. Tidbury*, 14 C. B. 304; 23 L. J. C. P. 57. *Willes v. Bridge*, 4 Ex. 193. And if the deed of conveyance contains other matters not incident to the sale, it requires an additional stamp adapted to such other matter. *Wolsely v. Cox*, 2 Q. B. 321.

Exemptions from such Duty.— In order to render the deed chargeable, there must be a *sale*, for money or for stock, of the property operative at law. *Coates v. Perry*, 3 B. & B. 48. Thus, an equitable conveyance not operative at law is not chargeable (*Wilmot v. Wilkinson*, 6 B. & C. 506); nor is a mere agreement to convey, or an admission that a conveyance has already been made. *Toll v. Lee*, 4 Ex. 230. *Phillips v. Morrison*, 12 Mee. & W. 740. So a partition is not a sale. *Henniker v. Henniker*, 1 E. & B. 54. *See* also *Den v. Diamond*, 4 B. & C. 246. *Massey v. Nanny*, 3 Bing. N. C. 480. *Bundy v. Herbert*, 9 B. & C. 396.

XII. Copy.[1]
XIII. Counterpart.[2]
XIV. Deeds.[3]
XV. Delivery Orders and Dock Warrants.[4]
XVI. Foreign Contracts, and Contracts to be Executed Abroad.[5]
XIX. Insurance, Accident.[6]

An assignment of any property, real or personal, not otherwise charged or exempted, is to bear a stamp of 1*l.* 15*s.*, with progressive duty. *See* Progressive Duty, *post*, 480. An assignment of a policy of insurance and of a judgment have been held to come within this provision. *Caldwell v. Dawson*, 5 Ex. 1. *Sanville v. Commissioners, &c.* 23 L. J. Ex. 272.

By 16 & 17 Vic. c. 59, s. 14, transfers of bonds or mortgages given by public companies are exempt from duty if originally stamped with treble duty over and above the single duty.

[1] By 55 Geo. 3, c. 184, a copy attested to be a true copy, or in any manner authenticated or declared a true copy, or made to be given in evidence as a true copy, of any agreement, contract, bond, deed, or instrument of conveyance, or other deed, together with a schedule or indorsement, if made for the security or use of a party or claimant under it, requires the same duty as the original; if for a person *not* a party, or taking under it, a 1*s.* stamp, with progressive duty. An examined copy of a deed produced by a witness at a trial to prove the original, which the opposite party refuses to produce, requires no stamp. *Braythwayte v. Hitchcock*, 10 Mee. & W. 494.

[2] Counterparts or duplicates of any deed or instrument, of any description whatever, chargeable with stamp-duty, not amounting, exclusive of progressive duty, to the sum of 5*s.*, are subjected to the same duty as is charged on the original deed or instrument, including the progressive duty, if any; and where the duty on the original instrument amounts to 5*s.* or upwards, the stamp-duty on the counterpart or duplicate is 5*s.*, with progressive duty according to length. 13 & 14 Vic. c. 97, sched. Duplicate. *See* also 16 & 17 Vic. c. 59, s. 10. *See* also Counterpart, vol. iii. p. 330.

[3] A deed of any kind not otherwise charged nor expressly exempted, is charged with 1*l.* 15*s.*, and a progressive duty. *See* Progressive Duty, *post*, p. 480. An agreement under seal for a lease (*Clayton v. Burtenshaw*, 5 B. & C. 41); a deed indorsed on another as a further security for advances under the first (*Robinson v. Macdonnell*, 5 M. & S. 228); and a conveyance by a debtor to trustees to sell in trust for creditors, with a resulting trust for the debtor (*Coates v. Perry*, 3 B. & B. 48), have been held to come within this provision. But a license to use a patent, though under seal, has been held not to require such stamp. *Chanter v. Johnson*, 14 Mee. & W. 408.

[4] *Delivery Orders*, entitling the person named in the order, or his assigns, or the holder of the order, to the delivery of goods lying in any dock or port, or in any warehouse in which goods are deposited on rent or hire, or upon any wharf, are charged with a stamp-duty of 1*d.*, if the goods are of the value of 40*s.* or upwards, and the order is signed by or on behalf of the owner of the goods, upon the sale or transfer of the property therein. 23 Vic. c. 15, sched. Delivery Order.

By sect. 14 of the above statute this duty, in the absence of any agreement to the contrary, is to be paid by the person requiring the order; and the person of whom it is required may refuse to give the order until the amount of the duty is paid to him.

Dock Warrants, evidencing the title of any person therein named, or his assigns, or the holder thereof, to the property in goods, wares, or merchandise lying in any dock or warehouse, or upon any wharf, signed or certified by or on behalf of the company or person in whose custody the goods to which the warrant relates may be, are charged with a duty of 3*d.* 23 Vic. c. 15, sched. Dock Warrant. But a mere weight-note relating only to the goods mentioned in such warrant is exempt from duty. *Walker v. Bartlett*, 18 C. B. 848; 25 L. J. C. P. 263.

[5] As a general rule the courts take no notice of foreign revenue laws. Thus, an unstamped receipt given in France will be evidence here, though by the French law a stamp was requisite. *James v. Catherwood*, 3 D. & R. 190. But if by the foreign law the contract is *void* without a stamp, it will be void here. *Bristow v. Secqueville*, 5 Ex. 275. Also, if in any British colony it be shown that a stamp is required, it cannot be received here without it. *Clegg v. Levy*, 3 Camp. 167. *Alves v. Hodgson*, 7 T. R. 241. A deed made here to be carried into effect abroad, must be stamped (*Stonelake v. Babb*, 5 Burr. 2673); but otherwise if made in a British ship. *Ximenes v. Jaques*, 1 Esp. 311.

By 13 & 14 Vic. c. 97, s. 13, instruments executed abroad may be stamped in this country, without payment of any additional duty, if brought to the commissioners within two months of its being received in the United Kingdom.

[6] *Contracts of Insurance against Accidents.*—Where the premium does not exceed 2*s.* 6*d.*, are charged with a duty of 1*d.*; when it exceeds 2*s.* 6*d.*, and not 5*s.*, then 3*d.*; and then for every 5*s.* and fractional part of 5*s.*, 3*d.* 23 & 24 Vic. c. 111.

XX. Insurance, Fire.[1]
XXI. „ Life.[2]
XXV. Powers of Attorney, &c.[3]
XXVI. Protests.[4]
XXVII. Proxy.[5]
XXIX. Release.[6]
XXX. Schedules, Inventories, and Catalogues.[7]
XXXI. Settlement.[8]

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[1] The duties on *Contracts for Insurance against Fire* are regulated by 55 Geo. 3, c. 184, and 3 & 4 Wm. 4, c. 23, s. 5.

A policy of insurance on buildings, goods, &c., made by a public company or other person licensed under 22 Geo. 3, c. 48, or by the Royal Exchange or London Insurance Corporation, must be stamped with a 1*s.* stamp, and every such insurance made, renewed, or continued, 3*s.* per cent per annum, and at the same rate for every fraction of a year. Insurances on agricultural produce, farm stock, live or dead, are exempted. The duty must be paid whether the insurance be by a foreign company or an English. 19 & 20 Vic. c. 22.

As to policies for insuring cattle, see *Attorney-General v. Cleobury*, 18 L. J. Ex. 395.

[2] *Life-Insurance Duties* are regulated by 16 & 17 Vic. cc. 59, 63.

The duty is 6*d.* for every 50*l.* and fraction of 50*l.*, where the sum insured does not exceed 500*l.*; 1*s.* for every 100*l.* where such sum does not exceed 1000*l.*; and 10*s.* for every 1000*l.* and fractional part of 1000*l.*, where the sum exceeds 1000*l.*

[3] *Powers of Attorney, Commissions, and Instruments of Procuration*, not specifically charged in the schedules of the Stamp Acts, are subjected to a stamp-duty of 1*l.* 10*s.*, and to the same progressive duty as conveyances. Powers of attorney made by seamen for receiving prize-money are subjected only to a duty of 1*s.* Powers of attorney for the sale, transfer, or acceptance of government stock or funds, not exceeding in value 20*l.*, or for the receipt of any sum of money, or any cheque, note, or draft for money not exceeding 20*l.*, or dividends or interest, or periodical payments not exceeding 10*l.*, require a stamp of 5*s.* 23 Vic. c. 15.

As to what written authority not under seal may amount to a power of attorney, see *Walker v. Remmett*, 2 C. B. 850.

[4] Protest for any bill or note, for

	s.	*d.*
any sum not amounting to . 20*l.* .	2	0
20*l.*, and not amounting to 100*l.* .	3	0
100*l.* „ „ 500*l.* .	5	0
500*l.* or upwards	10	0

Protest of any other kind, 5*s.*; and for every further sheet, or piece of paper, or parchment, on which it is written, a progressive duty of 5*s.*

[5] By 19 & 20 Vic. c. 81, s. 1, a duty of 6*d.* only is payable on a letter or power of attorney, commission, factory, mandate, or like instrument, made for the sole purpose of appointing a proxy to vote at a meeting in the United Kingdom of proprietors or shareholders of any joint-stock company, or other company or society, whose stock or funds are divided into shares, and transferable.

[6] Any instrument of release and renunciation of lands or other property, real or personal, or of any right or interest therein (such instrument not being otherwise charged in the schedule 55 Geo. 3, c. 184, nor expressly exempted from all duty), requires a stamp of 35*s.*, and a progressive duty on the number of words, as in deeds.

[7] By 55 Geo. 3, c. 184, and 13 & 14 Vic. c. 97, *Schedules, Inventories, and Catalogues* of lands or hereditaments, furniture, fixtures, goods or effects, and every schedule, &c., containing any matter of contract, or stipulation whatever, which shall be referred to, in, or by, and be intended to be used or given in evidence as part of, or as material to, any agreement, lease, bond, deed, or other instrument charged with stamp-duty, not exceeding 10*s.*, exclusive of progressive duty, and which are separate and distinct from, and not indorsed on or annexed to, such agreement, lease, &c., are subjected to the same duty, exclusive of progressive duty, as is imposed upon the original agreement, deed, or contract. Where the duty chargeable on such original agreement, deed, or contract, exceeds 10*s.*, exclusive of progressive duty, the duty is 10*s.*, with a further progressive duty according to length.

A public map or parochial document made in pursuance of an act parliament, and deposited for reference in any registry or public office, is not chargeable with this duty. 17 & 18 Vic. c. 83, s. 22.

If a bill of sale refers to a schedule of things sold, but is complete and intelligible without it, it may be read, though the schedule, being unstamped, is inadmissible. *Dyer v. Green*, 14 Mee. & W. 31. *Davies v. Heath*, 3 C. B. 938. *Aliter* if insensible without the schedule. *Weeks v. Maillardet*, 14 East, 568.

[8] Every deed or instrument whereby any definite and certain sum of money, shares, stock, or funds, is settled, or agreed to be settled, upon, or for the benefit of, any person, requires, where the money or value of the property settled does not exceed 100*l.* a 5*s.* stamp, and for every 100*l.* and fractional part of 100*l.* beyond, 5*s.* If the instrument contains any other matter or

XXXII. Shares, Contracts for Purchase of.[1]
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thing besides the settlement of such money or stock, it is chargeable with stamp duty as a separate deed in respect thereof. Where there is more than one deed for effecting the settlement chargeable with a duty exceeding 1*l.* 15*s.*, the *ad valorem* duty is chargeable only upon one of such deeds. 13 & 14 Vic. c. 97, sched. Settlement.

[1] By 23 & 24 Vic. c. 111, sched., every note, memorandum, or writing, relating to the sale or purchase of any government or other public stocks, funds, or securities, or any stocks, funds, or securities, share or shares of or in any joint-stock or other public company, to the amount or value of 5*l.* or upwards, is charged with the duty of one penny. As to the transfer itself, see *Walker v. Bartlett*, 25 L. J. C. P. 263.

[2] By 55 Geo. 3, c. 184, a surrender of a term of years, or of any freehold or uncertain interest in lands, &c., not being of a copyhold or customary tenure, requires a 35*s.* stamp, and a progressive duty. *See* Progressive Duty, *infra*.

An assignment or surrender of a lease, not being on a sale or mortgage, is liable to the *ad valorem* duty on a similar lease, but cannot exceed 1*l.* 15*s.* Where the surrender is expressly in consideration of a renewal *and money*, the *ad valorem* alone shall be charged. 17 & 18 Vic. c. 83; 13 & 14 Vic. c. 97.

[3] A declaration of trust, if not by deed, of or concerning any property, real or personal, not otherwise charged, 35*s.* 55 Geo. 3, c. 184, sched.

[4] *A Progressive Duty* is also imposed on any deed or instrument chargeable with duty, together with a schedule, receipt, or other matter put or indorsed on it, or annexed to it, when they contain 2160 words or more, for every 1080 words after the first 1080; that is to say, if the instrument be chargeable with an *ad valorem* duty not exceeding 10*s.*, a progressive duty of equal amount, and in every other case a progressive duty of 10*s.*

This, however, does not apply where any other progressive duty is expressly charged, or where there is a duty "on each skin, sheet, piece of vellum," &c., or where no progressive duty was chargeable before the 13 & 14 Vic. c. 97, nor does it increase the amount of any progressive duty theretofore charged. 13 & 14 Vic. c. 97, s. 11, sched.

In computing the words it is necessary to begin with the contract, and go on continuously through the effective indorsements and annexed instruments. The signatures and attestation clauses must all be counted (*Linley v. Clarkson*, 1 C. & M. 436), figures taken as words (*Lord Dudley v. Robins*, 3 C. & P. 26); and it has been held, that where a map is annexed the names of all the plans must be counted as words. *Wickers v. Evans*, 4 C. & P. 359.

By 13 & 14 Vic. c. 97, s. 11, however, the words of any document indorsed, annexed, incorporated, or referred to, are not to be counted if it be itself liable to duty and be duly stamped. It would seem also, that a document merely referred to without being annexed need not be counted (*Sneesum v. Marshall*, 7 Mee. & W. 417. *Fishmongers' Co. v. Dimsdale*, 12 C. B. 557); nor need the indorsement on the contract of the date, parties, or purport. *Winder v. Fearon*, 4 B. & C. 663.

[5] The statutes imposing stamp-duties from 5 Wm. & M. c. 21, provide that no instrument requiring a stamp shall be *pleaded or given in evidence* in any court, or admitted in any court to be *good, useful*, or *available* in law or equity, until as well the duty as the penalty (if incurred) shall be paid, a receipt under the hand of the proper officer produced, and the instrument marked or stamped with the lawful stamp. *See* also Bills and Notes, vol. ii. p. 428. And if parties agree to be bound by the terms of another instrument, of itself requiring a stamp, it cannot be looked at without such stamp (*Turner v. Power*, 7 B. & C. 625. *Wallis v. Broadbent*, 4 Ad. & E. 877. *Alcock v. Delay*, 4 E. & B. 660); nor can the contents of an unstamped instrument lost or destroyed be proved by secondary evidence. *R. v. Castlemorton*, 3 B. & A. 588. But now, by 17 & 18 Vic. c. 125, ss. 28–30, upon the production of any document unstamped or insufficiently stamped, the officer of the court may receive the stamp-duty and penalty, and give a receipt for the same, and the document is then admissible in evidence. No new trial is to be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

As to the penalty on stamping agreements under the value of 5*l.*, *see* 23 Vic. c. 15.

[6] An unstamped instrument may, however, be given in evidence for a collateral purpose; that is to say, when it is offered merely to show something independent of the purpose for which the stamp is required, and not for the purpose of giving effect to the instru-

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ment itself; as to show the illegality of plaintiff's claim (*Coppock v. Bower*, 4 Mee. & W. 361), or to refresh the memory of a witness (*Maugham v. Hubbard*, 8 B. & C. 14), or to prove fraud. *Gregory v. Fraser*, 3 Camp. 454. *R. v. Gompertz*, 9 Q. B. 824. *Holmes v. Sixsmith*, 7 Ex. 802; 21 L. J. Ex. 313. *Haigh v. Brooks*, 10 Ad. & E. 309. *Clarke v. Haugham*, 3 D. & R. 323; and 20 L. J. Q. B. 244

[1] A lost deed thirty years old will be presumed to have been stamped. *R. v. Long Buckley*, 7 East, 45. So an order of payment given by defendant to the plaintiff will, as against the defendant, be presumed to have been duly stamped. *Pooley v. Godwin*, 4 Ad. & E. 94. Also where a party refuses to produce an agreement after due notice, it will be presumed as against him to have the requisite stamp. *Crisp v. Anderson*, 1 Stark. 35. But this presumption may be rebutted by the party giving secondary evidence of the contents, proving that it was not stamped. *Crowther v. Solomons*, 758. And if it be shown to have been at one time unstamped, the presumption is that it continued so. *Closmadeuc v. Carrell*, 25 L. J. C. P. 216.

[2] It lies on the party objecting to secondary evidence of a lost document to show that it was *not* stamped, and if be uncertain, secondary evidence is admissible; but if it be shown to have been at one time unstamped, the presumption is that it continued unstamped, until the presumption be rebutted by some evidence *contrà*, so as either to prove the stamping, or to leave it altogether uncertain. *Closmadeuc v. Carrell, supra.* But it is now unnecessary for the opposite party to object to the admission in evidence of a document on the ground of its not being stamped; nor can the revenue now be defrauded by his not doing so, as by the C. L. P. Act, 1854, s. 28, it is provided "that upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court, whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp-duty, and the penalty required by statute, together with the additional penalty of 1*l.* shall have been paid." *See* also Effect of Want of Stamp, *ante*, p. 480.

By sect. 31, no new trial shall be granted by reason of the ruling of the judge that the stamp upon any document is sufficient, or, that the document does not require a stamp. If the judge receive the document (*Raisen v. Grant*, 29 L. J. Ex. 20), he ought not therefore to reserve the question; but if he reject it (*Siordet v. Ruszinski*, 25 L. J. C. P. 2; 17 C. B. 251), there may be a new trial. *Whitehouse v. Hammond*, 27 L. J. Ex. 295. *Semble*, the question as to stamp may be reserved by consent. *Eames v. Smith*, cited 17 C. B. 251.

[3] If by law a stamp cannot be subsequently affixed, evidence as to when the stamp was affixed is admissible. *Green v. Davies*, 4 B. & C. 235. But where the commissioners are not prohibited from subsequently affixing a stamp, if the instrument bear a proper stamp at the trial, it is sufficient; nor will the court inquire whether any penalty has been paid. *Rogers v. James*, 7 Taunt. 147. *R. v. Preston*, 5 B. & Adol. 1028.

Bills of exchange and promissory notes cannot be stamped after completion. 31 Geo. 3, c. 25, s. 19; but by 37 Geo. 3, c. 136, s. 2, they may be, if the stamp be of sufficient value but of a wrong denomination. *See* Byles on Bills, 98.

By 16 & 17 Vic. c. 95, s. 3, adhesive stamps may be used for drafts or receipts.—By sect. 4, must be cancelled by the person using them.—By sect. 5, parties guilty of fraud in using them are to forfeit 20*l.* to the queen. *See* also 23 Vic. c. 15, s. 14.

By id. c. 63, s. 10, adhesive stamps may be affixed to life policies.—By sect. 11, bill stamps may be used for receipts, *et contra.*—By sect. 13, must be used for bills drawn abroad and cancelled.

[4] When the subject-matter of the instrument is joint, though several persons may be interested in it, one stamp is sufficient. Thus an agreement by three persons, in consideration that A. would pay a certain debt, to indemnify him to the extent of a certain sum, to be paid separately by each, only requires one stamp. *Ramsbottom v. Davis*, 4 Mee. & W. 584. And an agreement by several to do certain things for a common purpose, notwithstanding they may have several interests, and subject themselves to separate liabilities, only requires one stamp. *Davies v. Williams*, 13 East, 232. *R. v. Louth*, 8 B. & C. 247. And so a bond by several obligors in a penalty conditioned for the performance of certain acts by each. *Bowen v. Ashley*, 1 N. R. 274. *Baker v. Jardine*, 13 East, 235. *Goodson v. Forbes*, 6 Taunt. 171. And if the contract, though effecting several purposes, carries into operation only one transaction, one stamp alone is sufficient. *Worthington v. Warrington*, 5 C. & B. 635. Thus, where a debtor compounds with his creditors, and each creditor executes, though the deed is in fact the separate deed of each creditor, yet the whole being one transaction, one stamp alone is sufficient. *Bowen v. Ashley, supra.* And where an agreement refers to another document, and the two papers form, in fact, but one agreement, one stamp is enough. *Peate v. Dicken*, 1 C., M. & R. 422.

XLIII. Where more than One Stamp is Required.[1]
XLIV. Re-Stamping after Alteration.[2]

STAMPING Document at Trial *See ante*, p. 481, n.

STANDARD Weight. *See post*, Weights and Measures.

STANNARY Courts.[3]

STATED Account. *See* Account Stated, vol. i. p. 116; and *Kennedy v. Broun*, 32 L. J. C. P. 137.

STATUTE. *See* also particular heads as to the subject-matter of the statute: as Frauds, Statute of, vol. iv. p. 535; Limitations, Statute of, vol. v. p. 392.

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[1] But where an instrument, though on one sheet, &c., is made to answer several unconnected purposes, it must bear a distinct stamp in respect to each. *Worthington v. Warrington*, *supra*. Thus, if a lease also contains a guarantee by a third party as surety for the payment of the rent, the guarantee is ancillary to the lease, and the lease stamp suffices (*Price v. Thomas*, 2 B. & Adol. 218. *Pratt v. Thomas*, 4 C. & P. 554); but if the lease be under seal, and the guarantee refers to the payment of the price of goods and chattels covenanted to be bought and sold, or any matter not ordinarily or necessarily incident to the lease, there must be a deed stamp as well as a lease stamp. *Wharton v. Walton*, 7 Q. B. 474. *Lovelock v. Franklyn*, 8 id. 381. So, if several leases are granted to different lessees (*Doe d. Day*, 13 East, 241), or several notices of different causes of action made to different parties, separate stamps are required. *R. v. Reeks*, 2 Ld. Raym. 1445. So, an agreement and lease on one sheet must have both a lease and an agreement stamp, unless the agreement is strictly ancillary to the lease and the two form part of one entire transaction. *Wharton v. Walton*, *supra*. So, where two lots were put up to auction, and the purchaser signed an agreement to buy two lots at separate prices: — *Held*, that two stamps were requisite. *Watling v. Horwood*, 12 Jur. 48. And where a paper contains several contracts, and thereby requires several stamps, and only one is impressed, that stamp will be held applicable merely to the contract in respect of which it was impressed. *Powell v. Edmund*, 12 East, 6. And if it is uncertain to which it applies, the instrument is wholly inadmissible. *Shipton v. Thornton*, 9 Ad. & E. 331. But as to the uncertainty to which the stamp relates evidence may be taken, and the position of the stamp may also be looked to for the purpose of ascertaining in respect of what it was affixed. *Day v. Doe*, 13 East, 241. *R. v. Reeks*, *supra*. *Perry v. Bouchier*, 4 Camp. 80.

[2] If after execution the contract be varied in any material part, it becomes a new contract, and requires a fresh stamp (*Enthover v. Hoyle*, 21 L. J. C. P. 100; 13 C. B. 373); but while a contract is *in fieri*, and not completely executed, an alteration may be made without a fresh stamp. *Jones v. Jones*, 1 C. & M. 721. And an alteration by consent of all parties in a part not material does not render a fresh stamp necessary. *Byrom v. Thompson*, 11 Ad. & E. 31. *Farquhar v. Southey*, M. & M. 14. *Sawtell v. London*, 5 Taunt. 359. So, the place at which a bill of exchange is made payable may be altered with the consent of the acceptor (*Jacob v. Hart*, 6 M. & S. 142); but if it be altered in any material part it is a new bill, and must be re-stamped. *Bathe v. Taylor*, 15 East, 416. *Cowie v. Halsell*, 4 B. & A. 197. *See* Alteration, vol. i. p. 308. A deed admitted under a judge's order cannot be objected on account of any alterations in it. *Freeman v. Steggel*, 14 Ad. & E. (N. S.) 202.

[3] Courts held for the administration of justice among the miners or tinners in Devonshire and Cornwall. 3 Bl. Com.

V. Construction of (*continued*).

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XIII. Mode of Pleading a Statute, p. 494.

I. Definition of.[1]

II. Classification of.[2]

(A) *Ancient and Modern.*[3]

(B) *Public and Private.*[4]

80; 3 Steph. Com. 448. *See* Collier on Mines.

[1] A law made with all the formalities of legislation. It must be assented to by the sovereign, and duly entered on the parliamentary roll. A statute was thus distinguished from an ordinance, which was perfected by the royal assent on the parliament roll without further entry. Hales' *History Common Law*, 13; Runnington's edit. Stats. Statute law is the express written will of the Queen and Houses of Parliament, rendered authentic by the prescribed forms and solemnities. The earliest statutes extant in printed books are those of Henry III.

[2] As to statutes consolidating and amending acts relating to certain portions of the criminal law, *see* 24 & 25 Vic. cc. 94–100, and *see* 24 & 25 Vic. c. 101, for promoting the revision of the statute law, by repealing certain enactments which have ceased to be in force or have become unnecessary, is provided for, and the 26 & 27 Vic. c. 125, recites that, with a view to the revision of the statute law, and particularly to the preparation of an edition of the statutes, comprising only enactments which are in force, it is expedient that divers acts and parts of acts which have ceased to be in force otherwise than by express and specific repeal, should be expressly and specifically repealed; and that the acts mentioned in the schedule have so ceased to be in force to the extent specified in the third column of the schedule, it is enacted, that the acts mentioned in the schedule to that act shall be repealed to the extent specified in the third column of the schedule, except as to any operation already effected by or act done under any enactment therein comprised, or as to any right, title, obligation or liability already acquired or accrued under any such enactment. This masterly designed and executed revision is completed to the reign of James II. The act is to be cited as the Statute-Law Revision Act, 1863.

[3] The statutes from Magna Charta down to the end of Edw. II., comprise what have been termed the *veteram statuta*; those from the commencement of Edw. III. the *nova statuta*.

Great amendments have been recently made in the ancient commercial law. The 24 & 25 Vic. c. 95, repeals the enactments consolidated in the statutes 24 & 25 Vic. c. 94, relating to accessories to and abettors of indictable offences; 24 & 25 Vic. c. 96, for larceny and other similar offences; id. c. 97, for malicious injuries to property; id. c. 98, for forgery; id. c. 99, as to the coin; and id. c. 100, relating to offences against the person.

[4] Statutes are either public or private. The general description of public acts is, that they relate to the interests of the public at large, and private to individuals or an individual only, and their legal distinction is, that in the case of general public acts the judges are bound judicially to take notice of them; but in the case of private acts they must be *pleaded* or *given in evidence* as private documents of property, or in proof of an existing right, unless there be a clause declaring they shall be judicially noticed. But *see* 13 & 14 Vic. c. 21, s. 7; *post*, p. 484, qualifying this rule.

An act relating to a *class* of private persons is not a public statute (1 Salk. 168); but an act relating to trade in general (1 T. R. 125); or giving a penalty which vests in the Crown or a common informer (Skin. 469); or concerns the legislature (1 Chitt. Rep. 453); or the Crown, the prince, or heir-apparent (8 Co. 76; 8 id. 28) is; all acts relating to prelates, nobles, and great officers of state who are of the queen's council (4 id. 126); or the clergy or their pro-

(C) *Public, Local, and Personal.*[1]

(D) *Remedial and Penal.*[2]

(E) *Permanent or Temporary.*[3]

perty (id. 76, a); or concerning official persons in general, the national revenue or bankrupts, are public acts. Private statutes are such as regard only specific traders, or relate to a particular place or town, or to one or more different counties, or for colleges only in the universities. For the convenience of citation the printed statutes are divided into—"Public general acts;" "Local and personal, declared public, and to be judicially noticed;" "Private acts printed by the queen's printer, and whereof the printed copies may be given in evidence;" "Private acts not printed."

A statute may be private in one part and public in another (12 Mod. 249; id. 613; Hob. 227; id. 24; Skin. 429; 2 T. R. 569), and may bind infants (29 L. J. C. P. 35), and operate as a private conveyance. (Id. 43; id. 190.

An estate act is to be construed according to the intention of the legislature, clearly expressed therein; and its validity cannot be questioned on the suggested ground that all the parties who ought to have been, were not, before parliament during its discussion, or that parliament assented to it under a false impression, imposed upon them by interested parties in the absence of other parties equally interested. *Hope-Scott v. Earl of Shrewsbury*, 6 C. B. (N. S.) 1; 6 Jur. N. S. 472; 29 L. J. C. P. 190; affirmed by Exchequer Chamber.

Acts empowering companies to levy a charge upon the public must, where the meaning is doubtful, be construed favourably for the public. *Stockton, &c. Railway Co. v. Burnett*, 11 Clark & Fin. 598; 8 Scott, N. R. 641.

Where a public company is created by act of parliament, with liabilities and duties cast upon it, and privileges and rights are granted to the persons dealing with it, the party imposing duties on the company must be taken to know the provisions of the statute, although it is a private act. *Cahill v. London and North-Western Railway Co.* 7 Jur. N. S. 1164; 30 L. J. C. P. 289; 9 W. R. 653: *Erle, C. J.*

By 13 & 14 Vic. c. 21, s. 7, every act made after the commencement of that act (by sect. 8, 18th November, 1847) shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared.

Where an act is limited in its operations to a particular place, and is expressed to be for the interest of a particular class of individuals, and the parties interested are empowered in general terms to do certain acts, the court will not construe this as a power to interfere with the rights of strangers to the act, unless the intention of the act to affect such rights can be collected from the express words or by necessary implication.

The question whether an act be public or private is to be resolved not by any formal considerations, *ex. gr.* whether there be a clause declaring it shall be deemed a public act, but by the substance and nature of the case. *Dawson v. Paver*, 16 L. J. Rep. N. S. Ch. 274; 5 Hare, 415.

Whether an act of parliament is to be deemed a public act, binding on all the queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act. 5 Hare, 415; 16 L. J. Ch. 274.

A party interested in the subject-matter of a private act of parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice given to him. *Edinburgh Railway Co. v. Wauchope*, 1 Clark & Fin. 710.

[1] These, in their object and operation, are merely local or limited, but they are nevertheless considered and treated as public acts, by virtue of a clause generally at the conclusion of them, which enacts that they shall be taken as public acts, and so be admitted in all the courts. Of these, therefore, the judges are bound to take notice judicially, as in the case of mere public acts. *See* 13 & 14 Vic. c. 21, s. 7, *supra*.

[2] Public statutes are either remedial or penal. A remedial statute has for its object either to redress some existing grievance, or to introduce some regulation or proceeding conducive to public good, and is either affirmative or negative, as it prescribes or prohibits anything in particular to be done or omitted. It is in words mandatory or prohibitory alone, in which it differs from a penal statute, which enforces what it enacts by means of a penalty. The remedy, therefore, for breach of a remedial statute is by an action for damages, sustained from such a breach, at the suit of the party grieved; that for breach of a penal statute by an action of debt for the penalty; or, in more concise terms, the legal distinction between remedial and penal statutes is, that the former gives relief to the party aggrieved, the latter imposes penalties upon offences committed. There is, however, a third description of acts in which the party's remedy is partly remedial and partly penal, such as that given by stat. 29 Eliz. c. 4, for extortion by sheriffs in levying executions by *fieri facias*, which gives to the party grieved the penalty of treble damages, and 40*l.* a moiety to the queen, and the other moiety to him that will sue for it. 1 B. & C. 299. *Woodgate v. Knatchbull*, 2 T. R. 148.

[3] Every act to which at the time of its

III. Time of Operation:[1] Prospective or Retrospective.[2]

IV. To Whom, How, and Where they Extend.

(A) *As to the Crown.*[3]

passing no period is fixed is taken to be a perpetual law, and to continue until repealed; but where it is limited, it continues in force only during the time mentioned, and if not continued or revived, it expires: this is called a "temporary act." "Next session of parliament" means the one subsequent to that for which the statute was limited. Vent. 22. A temporary act, when made perpetual by a subsequent act, is in effect perpetual *ab initio*. 1 Al. & Nap. 131, n.

[1] Much controversy formerly arose as to from whence a statute was to commence. To prevent these conflicts, the 35 Geo. 3, c. 13, enacted, "that the clerk of the parliament shall indorse in English on every act of parliament which shall pass after the 8th of April, 1793, immediately after the title of such act, the day, month, and year, when the same shall have passed and have received the royal assent; and that indorsement shall be taken to be part of the act, and to be the date of its commencement where no other commencement is mentioned." See *Panter v. Attorney-General*, 6 Bro. P. C. 486. *Lutless v. Holmes*, 4 T. R. 660. *Attorney-General v. Pougett*, 2 Price, 381.

[1] Although in an act of parliament it is expressly enacted that it shall commence and take effect from a day named, yet, if the royal assent be not obtained until a day subsequent, the provisions of a particular section, in its terms prospective, do not take effect until such subsequent day. *Burn v. Carvalho* (in error), 4 Nev. & M. 893.

[2] Statutes are *primâ facie* deemed to be prospective only (7 Moore, P. C. C. 239; 15 Jur. 257); and a retrospective effect will not be given unless the act, by precise and unambiguous words, manifestly shows that such was the design of the legislature. *Thompson v. Lack*, 3 C. B. 540; 16 L. J. C. P. 75. *Marsh v. Higgins*, 9 C. B. 551; 19 L. J. C. P. 297. *See* also 8 Ex. R. 352; 22 L. J. Ex. 109; 11 Mee. & W. 344, 517; 8 Ex. 368; 4 id. 729.

The exception to the general rule, that a statute is not to have a retrospective operation, especially so as to affect a vested right, must depend upon the words of the statute, or the special nature of each case. *The Ironsides*, 31 L. J. Adm. 129.

Sect. 32 of the 21 & 22 Vic. c. 90, which enacts, that after the 1st January, 1850, no person shall be entitled to recover any charge for medicine, attendance, &c., unless he prove at the trial that he is registered under the act, is prospective only, and does not apply to charges for such services rendered prior to that date. *Wright v. Greenroyd*, 1 B. & S. 758; 8 Jur. N. S. 98; 31 L. J. Q. B. 4. *See* vol. v. p. 483.

The 19 & 20 Vic. c. 97, s. 1, does not operate retrospectively, so as to prevent the goods of any execution debtor being bound by a *fieri facias* lodged with the sheriff before the act came into operation. *Williams v. Smith*, 4 H. & N. 559; 5 Jur. N. S. 1107; 28 L. J. Ex. 286.

Where a payment has been made (of interest or principal) on a promissory note by one of the co-contractors before the passing of the 19 & 20 Vic. c. 97, an action may be maintained by the holder of the note against any other of the co-contractors within six years after such payment, notwithstanding sect. 14 of that statute, as that section has no retrospective effect. *Jackson v. Woolley*, 4 Jur. N. S. 656; 27 L. J. Q. B. 448, Ex. Ch.

The rule that statutes ought not to be construed retrospectively, unless an intention in the legislature that they should be so construed distinctly appears, does not apply to statutes which only affect the procedure or practice of courts of justice. *Wright v. Hale*, 6 Jur. N. S. 1212, Ex.; 6 H. & N. 227; 30 L. J. Ex. 40.

The 23 & 24 Vic. c. 126, s. 34, which enacts, that when the plaintiff in any action for an alleged wrong, in any of the superior courts, recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify, &c., should be construed retrospectively, so as to apply to actions commenced before and tried after the statute came into operation. (Id.)

[3] The Crown is not bound by an act of parliament except expressly named (*In re Gorham*, 10 C. B.; 19 L. J. C. P. 200), unless there be equivalent words, or the prerogative be included by necessary implication. By sect. 8 of the 11 Geo. 4 & 1 Wm. 4, c. 70, writs of error upon any judgments given by the Queen's Bench, Common Pleas, or Exchequer, shall be returnable by the judges and barons, or judges only of the other two courts; in the Exchequer Chamber: — *Held*, that the Crown was bound by this enactment, and therefore a writ of error lies upon a judgment for the Crown in a petition of right to the Exchequer Chamber. *Baron de Bode v. Reg.* (in error), 13 Q. B. 364; 14 Jur. 970, Ex. Ch. It is questionable whether, when an act of parliament transfers jurisdiction from one court to another, or grants an extension of the jurisdiction of an existing court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein. *London Corporation v. Attorney-General*, 1 H. L. C. 440; Plowd. 240; 11 Co. 71; 2 Lutw. 681.

(B) *As to Infants.*[1]

(C) ,, *Scotland, Wales, and Ireland.*[2]

(D) ,, *Guernsey, Jersey, &c.,*[3] *and the Colonies.*[4]

V. Construction of.

(A) *General Rules.*[5]

But though not named, the Crown is bound by acts made for the advancement of religion or learning, or maintenance of the poor. Cases in Parker's Rep. 4.

Implied clauses limiting the acts of the Crown are repealed by subsequent statutes, unless expressly re-enacted. *Attorney-General v. Le Merchant*, 2 T. R. 201, n.

[1] Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law, from the general purpose and design of the law, and the subject-matter of it. Thus, the Statute of Limitations and of Fines would have bound infants, &c., without an express exception. *Beckford v. Wade*, 17 Ves. jun. 92.

[2] All statutes of the United Kingdom extend to Wales, and it has been enacted, perhaps superfluously, by 20 Geo. 2, c. 42, s. 3, that, where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be deemed to comprehend Wales and Berwick-upon-Tweed. So all statutes of the united parliaments comprehend Berwick-upon-Tweed, whether named or not. So all statutes passed since the 1st May, 1707, of a general nature, extend to Scotland, unless the act declares "that it does not extend to Scotland."

Since the union of Great Britain and Ireland, Jan. 1, 1801, Ireland has stood in the same situation as Scotland, forming an integral part of the dominions of the Crown, and represented in the parliament of the United Kingdom; it being provided by the acts of union (39 & 40 Geo. 3, c. 67 (Eng.), and 40 Geo. 3, c. 38 (Ir.), that the United Kingdom should be represented in one and the same parliament: all acts, therefore, passed since 40 Geo. 3 (Ir.), which are of a general nature, or on subjects which apply equally to the whole of the kingdom, are held in practice to extend to, and to include, Ireland, in cases even where Ireland is not expressly named, if the provisions are such as can be carried into execution in Ireland.

[3] Guernsey, Jersey, Alderney, Sark, and Man, are not bound by any statute, unless specially named.

[4] They are either where the lands are claimed by right of occupancy, by finding them desert and uncultivated, and peopling them from the mother-country, or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties: in the former, all the English laws then in existence applicable to their own situation and the condition of an infant colony, are immediately then in force, except those applicable to particular classes, as poor and bankrupt laws, tithes, &c.; and as regards acts passed subsequently to the acquisition of the colony, those only affect it in which it is expressly named or virtually included. *See* the law fully stated by Lord Mansfield, Cowp. 204; 2 Dwarris, 998; and *Calvin's case*, 7 Rep. 176.

An act of a colonial legislature, where English law prevails, is governed by the same rules of construction as prevail in England respecting statutes *in pari materiâ;* and English authorities upon an act are authorities for the interpretation of a colonial act *in pari materiâ*. *Catterall v. Catterall*, or *Sweetman*, 1 Rob. Eccl. Rep. 580; 9 Jur. 951. See *Australian Bank v. Nias*, 16 Q. B. 717; 20 L. J. Q. B. 284.

[5] The general law of the country is not altered or controlled by partial legislation, made without any special reference to it. *Denton v. Lord Manners*, 4 Jur. N. S. 151; 27 L. J. Ch. 199. Affirmed on appeal, 4 Jur. N. S. 714; 27 L. J. Ch. 623.

The intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Bridges*, 1 H. L. Ca. 1. They should be construed according to the intent of the parliament which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature. *The Sussex Peerage*, 11 Clark & Fin. 86.

When the intention of the legislature can be collected from the statute itself, words may be modified, altered, or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intention. *Quin v. O'Keefe*, 10 Ir. C. L. Rep. 393.

Where one clause of an act of parliament directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter. *De Winton v. Brecon (Mayor, &c.)*, 26 Beav. 533.

Where an act of parliament directs that, under certain circumstances, one or other of two things shall be done, the party to do the act has the option of doing which act he pleases. *Reg. v. South-Eastern Railway Co.* 3 H. L. C. 471; 1 C. L. R. 932; 17 Jur. 901.

A municipal corporation is included in the words "every person and persons," and may

(B) *Must be according to the Intention.*[1]
(C) „ *from the whole taken together.*[2]
(D) *When to be Strict.*[3]
(E) „ *Liberal.*[4]
(F) „ *Equitable.*[5]

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exercise the powers given by the act. *The Corporation of Newcastle v. the Attorney-General*, 12 Clark & Fin. 402.

In public acts, where there are no negative words, the courts will allow, *ex necessitate*, a latitude of construction. *R. v. Sparrow*, 2 Stra. 1123.

In 5 T. R. 201, *per Buller, J.*, there is an essential difference between expounding modern and ancient acts of parliament. In ancient times the legislature used, and I believe wisely, to pass laws in general and few terms; they were left to the courts of law to be construed so as to reach all cases within the mischief to be remedied. But in modern times great care has been taken to mention the particular cases in the contemplation of the legislature, and the courts are not permitted to take the same liberty in construing them as they did the ancient statutes. The latter are to be construed with reference to the state of things at the time of their passing. See *Williams v. Adams* 1; Macq. H. L. C. 120; *Montrose Peerage*, id. 401. When an act is supposed to be founded on the report of commissioners, it is not to be referred in court as a guide in construing the statute. *See* 18 Jur. 1002; 3 Drew, 21–24.

[1] The interpretation must be according to the intention (*Williams v. Pritchard*, 4 T. R. 2); and the end contemplated is to be collected from the express words of the particular clauses in each act, and from the object or intention which it is recited are proposed for passing it; and where the object or intention is clear, the judges will not admit it to be controlled by the letter or wording of any particular clause, for every statute is to be expounded, not according to the letter, but to the intention of the maker of it. See *Fordyce v. Bridges*, 1 H. L. C. 1.

Where the enacting words are express, plain, and clear, they ought to be understood according to their general and natural signification and import only, unless that by such an explanation a contradiction or inconsistency should arise on the statute by reason of some subsequent clause, from whence it might be inferred that the sense of the parliament was otherwise. Park. Rep. 233; Hob. 97. The language is to be construed according to its ordinary grammatical sense. *Smith v. Bell*, 10 Mee. & W. 378. The preamble may be used to explain but not to control the enacting part (*Crespigny v. Wittenoom*, 4 T. R. 790), and is not to be resorted to where the words are clear, definite, and precise. See *Main and Cammell*, Loft, 783. *R. v. Sutton*, 4 M. & S. 532. *See post*, p. 490.

Where a statute requires a majority consisting of a certain proportion of the votes of persons present at a meeting to render valid an act, there must be the specified proportion of those present actually voting for the act, and those who refuse to take any part in the proceedings cannot be considered as absent. *In re Ratepayers of Eynsham*, 18 L.J.Q.B. 210; 12 Q.B. 398, n. It is doubtful whether the rule of construction that words may be rejected which lead to manifest absurdity can properly be applied to acts of the legislature. *Miller v. Solomons*, 7 Ex. 475; 21 L. J. Ex. 161. See *Beaden v. King*, 9 Hare, 522. As to supplying words, *see* 29 L. J. M. C. 65.

[2] See *Chance v. Adams*, 1 Ld. Raym. 77. *Mill v. Wilkins*, 6 Mod. 62.

[3] Penal statutes are to be construed strictly. *Cone v. Bowles*, 1 Salk. 205. In such an enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense must plainly appear. *Stephenson v. Higginson*, 3 H. L. C. 638.

Where an act of parliament interferes with private rights and private interests it ought to receive a strict construction, so far as those rights and interests are concerned. *Hughes v. Chester and Holyhead Railway Co.* 8 Jur. N. S. 221; 31 L. J. Ch. 97; 10 W. R. 219; 7 L. T. (N. S.) 197, L. J. *See* 12 Ir. C. L. R. 35, Q. B.

[4] Although remedial statutes are to be construed liberally, they ought not to be construed to extend to cases out of the letter of them, or as declared in the preamble (Argument in *Bradley v. Clark*, 5 T. R. 197); but all statutes made *pro bono publico* shall have a liberal construction. *Pierce v. Hopper*, 1 Stra. 253. Or, as expressed by Lord Coke, "the judges should put such a construction on a statute as may redress the mischief, guard against subtle inventions and evasions for the continuance of the mischief *pro privato commondo*, and give life and strength to the remedy *pro bono publico*, according to the true intent of the makers of the law."

[5] Some statutes are, however, in some respects penal, and in others remedial. In such case, if the extending of such statutes by an equitable construction be more advantageous than prejudicial to the greater part, it may be so extended. This rule establishes the principle, that, where an act proposes to give a remedy for a grievance suffered by any person, and to prevent or punish it under a penalty, in which case it is both remedial and penal, the construction shall be to give full effect to the remedy, by extend-

(G) *When the Words of a Statute may be Extended.*[1]

(H) *Where there are General and Special Words in the same Clause or Clauses.*[2]

(I) *Legislative Interpretation of Particular Words.*[3]

(J) *Affirmative and Declaratory,*[4] *Imperative or Permissive.*[5]

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ing the penalty to cases within the spirit of the act, though not within the letter, and not contrary to the words of it. *Hammond v. Webb*, 10 Mod. 282. So, the statute against simony, which is both penal in one respect and remedial in another, has had a liberal construction. *Attorney-General v. Sudell*, Pre. in Ch. 215. But by the term "penal statutes" is not meant statutes only prohibiting the doing of anything under a penalty, in the popular sense of those words; it extends to all statutes inflicting punishment for breach of a statute, whether corporal or otherwise.

The construction is not to be equitable where the statute gives a new jurisdiction (*Warwick v. White*, Ex. Bunb. 106); or is of a private application. *Moore's case*, 2 Ld. Raym. 1028. By "an equitable construction" is meant such an interpretation as is calculated to give effect to the object for which the statute was passed, though not precisely within the enacting words. A case not within the letter of a statute is sometimes holden to be within the intent, because it is within the mischief for which a remedy is provided.

[1] The general words in one clause may be restrained by a particular clause in the same statute. *Wiseman v. Cotton*, 1 Lev. 79. By construction the words of the statute may be extended. Thus, in stat. 9 Edw. 3, c. 3, though executors only are named, it has been held to extend to administrators, because they are within the equity of the statute.

[2] 1st. In the case of a proviso: if the proviso of a statute be directly contrary to the purview of it, the proviso is good, and not the purview, because the latter words declare the intentions of the legislature; it is, in fact, an exception to the general terms of the act. *Attorney-General v. the Governor of Chelsea Waterworks*, Fitz. 195. 2d. When there is a saving clause in a statute, which is repugnant to the purview or enacting part of it, it is void. 1 Co. Rep. 47; Plowd. 564. But if a saving clause in a statute may be construed consistently with the purview or enacting part of the statute, though it may restrain or qualify it, it shall be construed with it, and the construction taken from both together, for such will be a construction giving effect to all the words of the statute. *Thenby v. Flelluor*, 10 Mod. 113; Jones, 339. *Rex v. Pratt*, 10 Mod. 115. 3d. To attain the true construction of a statute, *Lord Coke* says, four things are necessary to be considered and understood: 1. What the common law was before. 2. What was the mischief for which the common law had not provided. 3. The remedy provided by the statute. And, 4. The true reason of the remedy. *Miles v. Williams*, 1 P. Wms. 252; 10 Mod. 245; 3 Co. Rep. 83; Hob. 97; 11 Mod. 150. 4th. So, the true construction of an act is to be collected from applying the same meaning to words and phrases which have been used in former statutes, and they are to be taken in the same sense as they have been construed above. *Rex v. Barlow*, Salk. 609; Co. Litt. 391; 2 Inst. 434; 3 Inst. 91; 2 Stra. 828; 1 T. R. 49. 5th. Where an act enacts any matter or thing, it tacitly gives the right of carrying it into effect by all legal means. *Reg. v. Simpson*, 10 Mod. 248. *Rex v. Steventon*, 2 East, 362. 6th. All acts made *in pari materiâ* are to be taken together as if they were but one law. Therefore, if there are many statutes, all relating to the same subject or matter, they should all be taken together in construing any one of them. *Ex-parte Carruthers*, 9 East, 44.

[3] The 13 & 14 Vic. c. 21, s. 4, enacts, that in all acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided; and the word month to mean calendar month, unless words be added showing lunar month to be intended; and county shall be held to mean also county of a town or of a city, unless such extended meaning is expressly included by words; and the word land shall include messuages, tenements, and hereditaments; houses, buildings of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure; and the words oath, swear, and affidavit, shall include affirmation, declaration, affirming, and declaring, in the case of persons allowed by law to declare instead of swearing. This mode of interpreting statutes was, by sect. 8, to take effect from the commencement of the then next session of parliament, which was on the 18th day of November, 1847.

For definition of words used in conveyance of property by deed, *see* 7 & 8 Vic. c. 76; 8 & 9 Vic. c. 106.

[4] Affirmative words in a statute do not take away the common law, a former custom, or a prior statute. 2 Inst. 395; 2 Dwar. 712. Declaratory acts extend to others besides the persons or things named. Thus, where one of the superiors only is mentioned, it applies to the others. 2 Inst. 256; 2 Dwar. 713.

[5] Permissive words are in some instances

(K) *Accumulative,*[1] *Directory,*[2] *and Restrictive.*[3]

VI. Repealing, Continuing, and Reviving.[4]

construed as obligatory, as where a statute directs the doing of an act, to effectuate justice the word "may" is construed as "shall." *R. v. Hockwald Commissioners*, 2 Chit. Rep. 251. *R. v. Barlow*, Salk. 609. Hence the word "may," in the 13th section of the County Courts Extension Act, 13 & 14 Vic. c. 61, which provides that, in certain cases, the court or a judge at chambers may, by rule or order, direct that the plaintiff shall recover his costs, is not used to give a discretion, but to confer a power upon the court or judge, and the exercise of such power depends, not upon the discretion of the court or judge, but upon proof of the particular case out of which such power arises. *M'Dougal v. Paterson*, 11 C. B. 755; 6 Ex. 337, n.; 15 Jur. 1108; 21 L. J. C. P. 27. S. P. *Crake v. Powell*, 2 E. & B. 210; 16 Jur. 365; 21 L. J. Q. B. 183. Overruling *Jones v. Harrison*, 2 Prac. Rep. 257; 15 Jur. 337; 20 L. J. Ex. 166; and *Palmer v. Richards*, 20 L. J. Ex. 323.

An act for making a railway recited that the formation of the railway would be beneficial to the public, and that the company was willing to execute it, &c., these words of the act are enabling, not obligatory, there being nothing in the subject-matter or context to require that they should be construed as compulsory. *York and North Midland Railway Co. v. Reg.* (in error), 1 E. & B. 858; 7 Railw. Cas. 459; 1 C. L. R. 119; 17 Jur. 690; 22 L. J. Q. B. 225, Ex. Ch. *See* also *R. v. Tithe Commissioners*, 14 Q. B. 459. *Cole v. Greene*, 7 Scott, N. R. 682; 13 L. J. C. P. 30. *Chapman v. Milvain*, 19 L. J. Ex. 228; 5 Ex. 61. *Stead v. Cary*, 1 C. B. 496; 14 L. J. C. P. 177.

In all cases where jurisdiction is given to a court of justice by act of parliament, by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the court a discretion in the exercise of that jurisdiction. *In re Bridyman*, 1 Drew, & Sm. 164.

When a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party to the agreement from receiving such expenses, or impose a penalty upon him for so doing. *O'Brien v. Dillon*, 9 Ir. Com. Law. Rep. 318.

[1] When a statute confers a right, and annexes penalties for its infringement, an action for damages will not lie to the party aggrieved. *Stevens v. Jeacocke*, 11 Q. B. 731; 17 L. J. Q. B. 163. *See post*, p. 492.

[2] Acts are sometimes only directory, and not compulsory. The guiding test seems to be whether there are only affirmative words, and no negative or forbidding enactment. See *R. v. Woolstanton*, 1 Bott, 610. *R. v. Leicester*, 7 B. & C. 12. *R. v. Birmingham*, 8 id. 29; 2 Stra. 1123; 9 Dowl. P. C. 1001; 13 East, 352; 6 Ad. & E. 603. *R. v. Mayor of Rochester*, 27 L. J. M. C. 45; 29 id. Q. B. 23.

An overseer who neglects or refuses to make out, sign, and deliver the burgess-list to the town-clerk, on or before the 1st day of September in every year, as required by the 5 & 6 Wm. 4, c. 76, s. 15, and 20 & 21 Vic. c. 50, s. 7, is liable to the penalty imposed by sect. 40 of the first act, although he has made out, signed, and delivered such list on or before the 5th of September, the provision as to the time being imperative and not directory only. *Hunt v. Hibbs*, 5 H. & N. 123; 29 L. J. Ex. 222.

[3] Occasionally the expressions used are restrictive, and exclude all persons and things except those expressly named, *expressio, unius est exclusio alterius*. *R. v. Cunningham*, 5 East, 478. See *The Warden of St. Paul's v. The Dean*, 4 Price, 78; and vol. iv. p. 408.

[4] By 48 Geo. 3, c. 106, where bills for continuing expiring acts shall not pass before the acts expired, such acts shall be continued from their expiration, except as to penalties.

If an expired statute be afterwards revived by another act, the law derives its force from the first. *Shipman v. Henbest*, 4 T. R. 109. The bare recital in a statute is not sufficient to repeal the positive provisions of a former statute. *Dore v. Gray*, 2 T. R. 365. No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception; and in this respect there is no valid distinction between matters of form and substance. *Miller's case*, 3 Wils. 420; 1 Black. 451. *R. v. Denton*, 16 Q. B. 832; 21 L. J. Q. B. 387.

Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed. *Warren v. Windle*, 3 East, 205. *See* 13 & 14 Vic. c. 21; *post*, p. 490.

Where a repealing statute is repealed, the first statute is, after the day on which the third statute takes effect, revived *ab initio*, and not merely as from that day. *Phillips v. Hopwood*, 5 M. & Rob. 15; 10 B. & C. 39.

An act, from its passing, repealed a former act, which ousted clergy from a certain offence, and imposed a new punishment on the same offence, from and after its passing: —*Held*, that an offence committed before the passing of the new act, but not tried till after, was not liable to be punished under either of these statutes. *Rex v. M'Kenzie*,

VII. Titles, Preambles, and Recitals.[1]

R. & R. C. C. 429. *See* 1 Leach, C. C. 271; 2 East, P. C. 609.

A reviving statute re-enacts the provisions of the expired law, and is in fact the statute in force. *Rex v. Phipoe*, 2 East, P. C. 599; 2 Leach, C. C. 673. S. P. *Rex v. Morgan*, 2 East, P. C. 601.

A local act is not, in the absence of any indication of intention to the contrary, repealed by a subsequent public general act. *Fitzgerald v. Champneys*, 2 Johns. & H. 31; 7 Jur. N. S. 1006; 30 L. J. Ch. 777; 9 W. R. 850. S. P. *Parnell v. Wolverhampton Waterworks Co.* 4 L. T. (N. S.) 513, C. P.

The rule of construction, that a general act of parliament does not repeal or affect a prior special act of parliament without express words of reference, applies to the Church-Building Acts. (Id.) Therefore, a local act, for regulating the ecclesiastical arrangements of the parish of St. Pancras, was held not to be affected by 2 & 3 Vic. c. 49. (Id.) The insertion in a general act of a saving clause, providing that the act shall not apply to a special case which had previously been regulated by a special act not otherwise referred to, will not prevent the application of the above rule of construction. (Id.)

If there be two affirmative statutes inconsistent and incompatible with each other, the earlier statute is repealed by the later one. *O'Flaherty v. M'Dowell*, 6 H. L. C. 142; 4 Jur. N. S. 33. But by 13 & 14 Vic. c. 21, s. 5, where any act repealing in whole or in part any former act is itself (*i. e.* by sect. 8, from and after the 18th day of November, 1847) repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added reviving such act or provisions. And by sect. 6, whenever any act shall be made, repealing in whole or in part any former act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last-made act.

An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together. *Ex-parte Warrington*, 3 De Gex, M. & G. 159; 17 Jur. 430; 22 L. J. Bank. 33.

A repealed statute *in pari materiâ* with an existing one may properly be referred to for the purpose of construing the latter. *Ex-parte Copeland*, 2 De Gex, M. & G. 914; 17 Jur. 121; 22 L. J. Bank. 17.

Clauses which limit in any way the right of the Crown must be considered as repealed by subsequent statutes, unless expressly re-enacted. *Attorney-General v. Newman*, 1 Price, 438.

A contract declared by a statute to be illegal is not made good by a subsequent repeal of the statute. *Jacques v. Withey*, 1 H. Black. 65.

When two acts come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other. *R. v. Middlesex Justices*, 2 B. & Adol. 818. And where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. *Daw* or *Dow v. Metropolitan Board of Works*, 12 C. B. (N. S.) 161; 8 Jur. N. S. 1040; 31 L. J. C. P. 223; 6 L. T. (N. S.) 353.

By a local act, a penalty of 200*l.* was imposed on any gas or other company for suffering any impure matter to flow into any stream, to be sued for by common informer. Afterwards, by sect. 21 of the Gasworks Clauses Act (10 & 11 Vic. c. 15), a like penalty is imposed for the same offence, such penalty to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act:—*Held*, that the latter provision was *pro tanto* a repeal of the former. *Parry v. Croydon Commercial Gas Co.* 11 C. B. (N. S.) 579.

Where a later statute describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, and giving an appeal when there was no appeal before, the offence must be prosecuted under the later statute. *Michell v. Brown*, 5 Jur. N. S. 707; 28 L. J. M. C. 53, Q. B.

[1] The title of a statute is no part of the law (*R. v. Williams*, 1 Black. 85. *Hunter v. Nockolds*, 1 Mac. & G. 640; 19 L. J. Ch. 177); but in cases of doubtful construction of a statute the title may be referred to. *See* 12 Ir. Rep. C. L. 35. Although the preamble is generally the key to the construction, yet it does not always open all the parts of it, as sometimes the legislature, having a particular mischief in view, which was the primary object of the statute, merely state that in the preamble, and then go on in the body of the act to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble, nor perhaps then in immediate contemplation. *Mann v. Cammel*, Lofft, 783. *Wilmot v. Rose*, 3 E. & E. 563; 23 L. J. Q. B. 281; 4 Jur. 518.

Strong words in the enacting part of a statute may extend it beyond the preamble (*Pattison v. Bankes*, Cowp. 543); nor can the preamble control the enacting part, which is clear. *Crespigny v. Wittenoom*, 4 T. R. 793. S. P. *Lees v. Summersgill*, 17 Ves. jun. 508. Although, if doubts arise on the words of the enacting part, it may be resorted to. (Id.) Preamble may extend, but cannot restrain, the effect of an enacting clause. 28 L. J. C. P. 285; 5 Jur. 1216. If the enactment part of a statute will bear only one interpretation, the preamble shall not confine it; but if it is doubtful, the preamble may be applied to

VIII. Exceptions and Provisoes.[1]

IX. Different Statutes or Parts on the same Subject.[2]

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throw light upon it. *Mason v. Armitage*, 13 Ves. jun. 36.

A mere recital in a statute, either of fact or law, is not conclusive, and the court is at liberty to consider the fact or the law to be different from the statement in the recital. *R. v. Haughton*, 1 E. & B. 501; 22 L. J. M. C. 89; 17 Jur. 455. As to correcting a date by the recital, *see* 7 Q. B. 317; 15 Mee. & W. 1; 15 L. J. Ex. 57.

The mere recital in a subsequent statute of an intention to repeal a former specific statute, will not operate by implication to repeal the former statute. In order to accomplish such a repeal there must be a clause to that effect in the latter statute. *Mahony v. Wright*, 10 Ir. Com. L. Rep. 420, Q. B.

A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. *Hughes v. Chester and Holyhead Railway Co.* 1 Drew & Sm. 524; 9 W. R. 760.

A recital in an act will not bind those who are not within its enacting part. *Edinburgh and Glasgow Railway Co. v. Linlithgow* (*Magistrates*), 3 Macq. H. L. C. 704. And it is doubtful whether recitals in a private act are evidence at all of the facts stated in them. *Shrewsbury Peerage*, 7 H. L. C. 1.

[1] Where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Churchill v. Crease*, 2 Moo. & P. 415; 5 Bing. 177, 180. And where the enacting clause creates a power to do certain acts, "except in the places thereinafter mentioned," and the exceptions are only specified in succeeding clauses, the party claiming under a right derived from such power need not negative such exceptions. *Ward v. Bird*, 2 Chit. 582.

Where an enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso, containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration. *Steel v. Smith*, 1 B. & A. 94. See *Bousfield v. Wilson*, 16 Mee. & W. 185; 16 L. J. Ex. 44. *Lawton v. Hickman*, 9 Q. B. 563; 16 L. J. Q. B. 20, 10 Jur. 543); nor where the exceptions are mentioned in a subsequent proviso (*Spieres v. Parker*, 1 T. R. 141); nor where exceptions are contained in a subsequent statute; in which case it must be shown as a matter of defence that the defendant comes within them. *Rex v. Hall*, 1 T.R. 320. But where an exception is in the enacting clause, giving a right or a forfeiture, the party suing for the right or forfeiture must negative the exception in his declaration, &c.; therefore, in a *sci. fa.* on a judgment against a person who had been twice a bankrupt under stat. 5 Geo. 2, c. 30, s. 9, which says, "the future estate and effects of such person shall be liable to his creditors, unless the estate shall produce sufficient to pay 15*s.* in the pound," &c., it is necessary for the plaintiff to aver that the bankrupt's estate has not paid 15*s.* in the pound. *Gill v. Scrivens*, 7 T. R. 27. And see *Macmurdo v. Smith*, id. 518. See *In re Von Boven*, 9 Q. B. 669; 16 L. J. M. C. 4. *Thibault v. Gibson*, 12 Mee. & W. 88; 13 L. J. Ex. 2. And there is no difference in respect of declarations and subsequent pleading as to negativing exceptions. *Palk v. Force*, 12 Q. B. 666; 17 L. J. Q. B. 299. See *Pilkington v. Cooke*, 16 Mee. & W. 615. *Wrightup v. Greenacre*, 10 Q. B. 1; 16 L. J. Q. B. 246. In general, a right cannot be raised out of a mere exception in a statute. *Advocate* (*Lord*) *v. Hamilton*, 1 Macq. H. L. C. 46.

[2] Statutes on the same subject must be construed together (*Anon.* Lofft, 398. *Doe v. Yarborough*, 7 Moore, 258; 1 Bing. 24. *R. v. Palmer*, 1 Leach, C. C. 352, 355; 2 East, P. C. 898); and are to be read as one act. *M'Williams v. Adams*, 1 Macq. H. L. C. 120. By sect. 3 of the 19 & 20 Vic. c. 108, that act and the 9 & 10 Vic. c. 95, are to be read as one act. "That clause is frequently inserted in modern acts of parliament, but if the two acts be *in pari materiâ* the construction would be the same without it." *Per Lord Campbell, C. J.*, in *Waterlow v. Dobson*, 27 L. J. Q. B. 55.

In construing acts of parliament the court must take into consideration, not only the language of the preamble, or any particular clause, but of the whole act; and if, in some of the enacting clauses, expressions are to be found of more extensive import than in others, or than in the preamble, the court will give effect to those more extensive expressions, if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect. *Doe d. Bywater v. Brandling*, 7 B. & C. 643; 1 M. & R. 600.

If any part of a statute be obscure, and other passages in the same act will elucidate that obscurity, recourse may be had to such context for that purpose. *Rex v. Palmer*, 1 Leach, C. C. 352, 355; 2 East, P. C. 898.

If it be doubtful whether a statute declaring an act, instrument, or contract void, makes it voidable only, but another clause in the same statute imposing a penalty on such act, instrument, or contract, supplies a clear test that it is *ipso facto* void. *Gye v. Felton*, 4 Taunt. 876.

X. Right of Crown to Control.[1]

XI. Admissibility of Evidence to Explain, and whether Conclusive of Facts therein Recited.[2]

XII. Enforcing Obedience to.

(A) *When a particular Mode is Prescribed.*[3]

(B) *By Indictment or Information.* *See* vol. v. p. 106, n.

(C) „ *Action.*

(*a*) *Form of, and Declaration in.*[4]

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[1] The Crown cannot control a statute, even by its royal license. *Toulman v. Anderson*, 1 Taunt. 227.

[2] An ambiguous usage under a statute may be explained; but *secus* where not ambiguous. *Rex v. Hogg*, 1 T. R. 728. *Rex v. Scot*, 3 id. 602. *Rex v. Aire and Calder Navigation*, 2 id. 660. *Rex v. Miller*, 6 id. 268.

A statute is conclusive of public matter recited therein as existing, and the courts must notice their existence *ex-officio* (*Rex v. Sutton*, 4 M. & S. 532), but a misstatement that a situation of things exists under a former statute does not create them. *Brazennose College, Oxford, v. Bishop of Salisbury*, 4 Taunt. 831.

If the mode of proceeding to enforce obedience to a statute be specified, that prescribed form must be adopted (*Rex v. Wright*, 1 Burr. 543), although it be a new one. *Hartley v. Hooker*, Cowp. 523. But if the offence was antecedently punishable by the common law, and a statute directed a particular remedy for the same offence, they are cumulative. *Rex v. Davis*, cited 2 Burr. 802. But where general powers are given to any persons for a public purpose, but from which an individual may receive an injury, if the mode of redressing that injury is pointed out by the statute, or the way in which compensation is to be made, the jurisdiction of the courts above is ousted in case of any injury, and the party cannot proceed by action. *Plate-Glass Co. v. Meredith*, 4 T. R. 794.

[3] The 7 & 8 Vic. c. 112, s. 18, required that every ship navigating between the United Kingdom and any place out of the same shall keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and in case any default be made in keeping such medicines, the owner of a ship is liable to a penalty at the suit of any person, which is to be applied in part to the informer, and the residue to the Seaman's Hospital Society: —*Held*, that the penalty was recoverable for a breach of the public duty created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board a vessel to maintain an action for special damage resulting to him from the breach of the duty. *Couch v. Steel*, 3 E. & B. 402; 2 C. L. R. 940; 18 Jur. 515; 23 L. J. Q. B. 121. *Stevens v. Jeacocke*, 11 Q. B. 731; 12 Jur. 477; 17 L. J. Q. B. 163.

By a local act for the improvement of the pilchard fishery within the bay of St. Ives, the passing out of one stem into another was prohibited under a penalty; other sections contained specific prohibitions, and for each case a specific penalty, with a specific mode of recovering it before magistrates, was provided. A declaration showed that the plaintiff, having a right under the act, and in the exercise of it being about to enclose fish in his net, was obstructed by the defendant's capture of them in another net:—*Held*, in arrest of judgment, that the action would not lie, the right being created by statute, and a specific remedy for its infringement being provided by the same statute. (Id.) S. P. *Reg. v. Bent*, 1 Den. C. C. R. 157; 2 C. & Kir. 179. And we have seen in general, where a statute confers a right, and annexes penalties for its infringement, an action for damages will not lie against a party infringing the right. *See ante*, p. 489.

[4] If a statute prohibit a thing under a penalty, and prescribe no mode of recovery, an action of debt will lie for it at the suit of the party entitled to the penalty. 1 Roll. Abr. 598, ss. 18, 19. The penalty is usually given at large, either to any person who will sue for the same, or part is given to the queen, or to the poor, or to some public use, and the other part to the informer or prosecutor; in which latter case the action is called a *qui tam* action. Where, however, a statute creates a penalty, and gives one moiety to the queen, and the other to a common informer, the queen may sue for the whole, unless the informer have already commenced a *qui tam* action for it (*R. v. Hymen*, 7 T. R. 536); and in such a case the queen may recover the penalty by an information filed by the attorney-general in the Court of Queen's Bench. (Id.) Immediately on commencing the suit by the informer, the right to his portion of the penalty vests in him; and although the queen may pardon the offence, as far as respects her share of the penalty, she cannot deprive the informer of his. *Grosset v. Ogilvie* (in error), 5 Bro. P. C. 527.

Where a statute requires certain qualifications in persons acting under it, and provides that, in an action for penalties for acting without qualification, the defendant shall prove that he was duly qualified, it is sufficient to allege in the declaration that the defendant was not qualified, without speci-

fying in what his disqualification consisted. *Cook v. Swift*, 3 D. & L. 67; 14 Mee. & W. 235; 14 L. J. Ex. 361.

The venue must be laid in the county in which the offence was committed. 31 Eliz. c. 5, s. 2; 21 Jac. 1, c. 4, s. 2. And if laid in a wrong county, the defendant may plead that the supposed offence was not committed in that county (35 Eliz. c. 5, s. 2); or if the plaintiff, under the general issue, fail to prove the offence to have been committed in the county laid, the defendant shall be found not guilty. 21 Jac. 1, c. 4, s. 2. See *Smith v. Bond*, 11 Mee. & W. 549. *See* form, B. & L. 17, 135.

The enactments of the 31 Eliz. c. 5, s. 2, and the 12 Jac. 1, c. 4, s. 2, requiring that, in actions on penal statutes, the venue shall be laid in the county where the offence was committed, do not apply to actions of debt brought by the party grieved to recover a penalty expressly given to him, as for extortion, under the 1 & 2 Ph. & M. c. 12, s. 2. *Fife v. Bousfield*, 6 Q. B. 100; 2 D. & L. 481; 8 Jur. 731; 13 L. J. Q. B. 306.

Where no time is limited by the statute creating the offence, the action, where the penalty is given to the queen alone, must be commenced within two years after the offence committed; but where the penalty is given to the queen, and any other person who will sue for the same, there the action must be commenced by the informer within one year next after the offence committed, or in default of his suing within that time, the queen may sue for the penalty within two years after that year ended. 31 Eliz. c. 5, s. 5.

The declaration must allege the offence to have been committed *contra formam statuti* (*Lee v. Clarke*, 2 East, 333); otherwise it will be bad even after verdict (*Wells v. Iggulden*, 3 B. & C. 186), and judgment may be arrested. *Fife v. Bousfield*, 13 L. J. Q. B. 306. No damage is laid, for no damages are recoverable. If there be any exception in the statute creating the offence which would furnish a good defence to the defendant if he came within it, then, if that exception be embodied in the clause creating the offence and giving the penalty, the plaintiff must negative it by averment in his declaration (*Spiers v. Parker*, 1 T. R. 141. *Gill v. Scrivens*, 7 id. 27); but if it be in any other clause in the statute, or if, although in the enacting clause, it be by way of proviso at the end of it, and not incorporated with the enacting clause by any words of reference, it is not necessary to negative it in the declaration, but the defendant, if he would take advantage of it, must show by evidence that he comes within the exception. *Steel v. Smith*, 1 B. & A. 94. *Thibault v. Gibson*, 12 Mee. & W. 88.

[1] By stat. 21 Jac. 1, c. 4, s. 4, if any information, suit, or action, shall be brought or exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same as, if pleaded, would have been good matter in law to discharge the defendant as to such information, suit, or action. This section extends to all actions for penalties, whether created by subsequent or previous statutes. *Jones v. Williams*, 4 Mee. & W. 375. The penalty given by stat. 11 Geo. 2, c. 19, s. 4, to a landlord, of double the value of goods fraudulently removed to avoid a distress, is within this section (Id.); so is the action of debt on stat. 2 & 3 Edw. 6, c. 13, s. 1, for the treble value of tithes not set out. *Earl Spencer v. Swannell*, 3 Mee. & W. 154. Also, actions within this statute are not affected by the new rules of pleading, as far as relates to the general issue, and the evidence under it: and therefore *nil debet* is still a good general issue in debt on penal statutes within this section (*Earl Spencer v. Swannell, supra*); so is not guilty. 21 Jac. 1, c. 4, s. 4, *supra*. *Semb. Jones v. Williams, supra*. And see *Coppin v. Carter*, 1 T. R. 462; Bull. N. P. 197.

It will be no objection to the plea that it is intituled with the names of the parties, without the addition of *qui tam*, &c. to the plaintiff's name. *Dale v. Beer*, 7 East, 333. As to a plea of a former recovery for the same penalty, *see* Bull. N. P. 197. This latter defence must be specially pleaded. *Bredon v. Harman*, 1 Stra. 701.

The evidence for the plaintiff, under the general issue will consist of proof of the offence stated in the declaration, in the same manner as upon an indictment. The defendant may, under this plea, give evidence either a denial of the charge stated in the declaration, or any matter of excuse or justification, which, if specially pleaded, would be a good defence to the action. 21 Jac. 1, c. 4, s. 4, *supra*.

A local paving-act established certain property qualifications for the commissioners, and required them to take an oath. It then enacted that if a person, not being qualified, or not having taken the oath, should act as a commissioner, he should forfeit a certain sum. And it provided that a party sued for the penalty should prove that he was at the time of acting "qualified as aforesaid," and that it should not be necessary for the plaintiff to give any other proof than that the party acted as a commissioner. A plaint was levied in a county court to recover the penalty for having acted as a commissioner, not being duly qualified to act; and at the trial the defendant, having proved his property qualification, the plaintiff required proof to be given that he had taken the oath:—*Held*, that such proof was not ne-

XIII. Mode of Pleading a Statute.[1]

STATUTE Merchant and Statute Staple.[2]

Roll.[3]

STAYING and Setting Aside Proceedings. *See* also irregularities and titles applicable to particular Proceedings; as, Attachment, &c.

I. As to Staying Proceedings, p. 495.

(A) *In General*, p. 495.

(*a*) *On Payment of Debt and Costs*, p. 495.
(*b*) *In Action on Bail-Bonds. See* vol. ii. p. 80.
(*c*) *In Action on Bills and Notes*, p. 496.
(*d*) *In Actions on Bond. See* vol. ii. p. 525.
(*e*) *In Actions on Judgments*, p. 496.
(*f*) *In Actions of Detinue or Trover*, p. 496.
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(*h*) *In Actions in Replevin*, p. 496.
(*i*) „ *where no Debt due*, p. 496.

(B) *Where Proceedings are contrary to Good Faith, or Unauthorised*, p. 497.

(C) *In Frivolous Actions*, p. 497.

I. As to Staying Proceedings (*continued*).

(D) *Pending Error or Proceedings Abroad*, p. 497.

(E) *Where there is an Agreement to Refer*, p. 497.

(F) *Where Two or more Actions are brought for the same Cause, or Costs of former not Paid*, p. 498. *See* also Consolidation, vol. iii. p. 174.

(G) *Where Criminal Proceedings are pending*, p. 499.

(H) *Time and Mode of making Application, and Effect of Rule or Order*, p. 499.

II. Setting Aside Proceedings, p. 499.

(A) *When, and within what Time*, p. 499.

(B) *As to Costs of*, p. 500.

(C) *Amending an Application to set aside Proceedings. See* vol. i. p. 324.

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cessary, and that the plaintiff, not having proved that the oath had not been taken, was rightly nonsuited. *Tupper v. Newton*, 14 C. B. 114; 2 C. L. R. 85.

A party suing for penalties for the violation of an act of parliament will not have the discretion of the court exercised in his favour if the action be merely within the letter of the act, and not its spirit. *Ex-parte Swift*, 3 Dowl. P. C. 636.

If, in a penal action, the verdict is in favour of the defendant, the court will not entertain a motion to set it aside as against evidence. *Preston v. Collins*, 2 Jur. 329, Ex. S. P. *Hall v. Green*, 9 Ex. 247; 2 C. L. R. 427.

[1] A statute passed in a session of parliament begun in the second, and continued in the third year of a king's reign, must not be pleaded as passed in the second and third years of the reign, although such act be recited in a later statute as "passed in the second and third years," &c. *Rex v. Biers*, 3 Nev. & M. 475; 1 Ad. & E. 327.

To a declaration for work and labour the defendant pleaded, that the work consisted of an appraisement of personal property, which the plaintiff appraised in expectation of reward to be therefore paid by the defendant to him, without being duly licensed according to 46 Geo. 3, c. 43:— *Held*, that the plea was sufficient, without stating that the plaintiff did the work as an appraiser, as it followed the words of the statute. *Palk v. Force*, 12 Q. B. 666; 12 Jur. 797; 17 L. J. Q. B. 299.

There is no parliament roll for the 29 Eliz. The statute respecting extortion by sheriffs' officers must be pleaded as of the 28th. *Savage v. Smith*, 2 Bl. 1102. *Bryant v. Withers*, 2 M. & S. 123. *Rumsey v. Tuffnell*, 2 Bing. 257.

In an action upon the 3 & 4 Wm. 4, c. 15, s. 2, for penalties for the representation of a dramatic piece of the plaintiff, at a "place of dramatic entertainment," without his consent, it is sufficient to describe the offence in the words of the act. *Lee v. Simpson*, 3 C. B. 871. *Semble*, that when the title of a statute is not correctly set out in an indictment, but is so described as to enable the court to know with certainty what statute is referred to, no objection to the indictment on account of the variance would be sustained. *Reg. v. Westley*, 1 Bell, C. C. 193; 29 L. J. M. C. 35.

[2] A security formerly entered into by a defendant before a chief magistrate of a trading town, according to the statute *De Mercatoribus*, 13 Edw. 1, now repealed by 26 and 27 Vic. c. 125. *See post*, Warrant of Attorney.

[3] A roll upon which an act, after receiving the royal assent, was formerly entered. Hale's Hist. Com. Law. The first begins with Magna Charta, and ends with Edw. 3. *See* 1 Dwarr. on Statutes, p. 22.

I. As to Staying Proceedings.

(A) *In General.*

(*a*) *On Payment of Debt and Costs.*[1]

[1] If the plaintiff disputes neither the cause of action nor the amount of debt or damages, as stated in the declaration, he may apply by summons (in the first instance), or move the court to stay the proceedings upon payment of the demand and costs. And even in cases where the amount claimed is disputed, it is not unusual to obtain a summons, calling upon the plaintiff to show cause why, upon payment of a certain sum (namely, the sum actually due, which, it is thought, he can recover) and costs, the proceedings in the action should not be stayed. If, on attending before the judge, the plaintiff's attorney refuse to receive the amount mentioned in the summons, the judge indorses "No order, the plaintiff claiming a largersum;" and in the event of the plaintiff proceeding with his action, the defendant should plead and pay the money into court. If, subsequently, the plaintiff elects to take the money out of court, he can only obtain an order to do so on the terms of paying the defendant his costs subsequent to the summons to stay, the defendant paying the antecedent costs to the plaintiff (*James v. Raggett*, 2 B. & A. 776), unless the plaintiff can satisfy the judge that the larger sum was really due, and of his reason for accepting the smaller sum. *Watson v. Coleman*, 7 Man. & G. 422. *Gower v. Elkins*, 6 Dowl. P. C. 335. *Walton v. Brown*, 28 L. J. Ex. 38. If the plaintiff consents to an order in the terms of the summons, an immediate order to tax the costs should be obtained. On taxation, they become payable immediately, and if not paid the action may be proceeded with. *Haynear v. Batch*, 8 Moore, 102. *Smith v. Smith*, 2 N. R. 673. Frequently it is arranged that time should be given, and if the money be not paid at its expiration the plaintiff should be at liberty to sign judgment.

By Reg. Gen. H. T. 1853, r. 153, 156, 157, if the defendant has appeared by attorney, the consent to the order must be given by his attorney, or agent; in cases where the defendant has not appeared, or has appeared in person, he must attend the judge and give his consent in person, or else his written consent (if he does not appear before the judge in person) must be attested by an attorney acting on his behalf. The attestation may be in this form:—"Witness, A. B. &c. attorney for the defendant." These precautions as to judge's orders are, however, unnecessary where the defendant is a barrister, conveyancer, special pleader, or attorney. *See* 14 Mee. & W. 335.

An order, where time is given, can only be by consent of the plaintiff. *Kirby v. Smith*, 2 Dowl. P. C. 218; 2 C. & M. 315. *Norton v. Fraser*, 2 Man. & G. 916. It does not require a stamp. *Bray v. Manson*, 8 Mee. & W. 668. *Baker v. Flower*, id. 670. *Thorn v. Neald*, 2 Q. B. 726. *Stevens v. Miller*, 3 Man. & G. 228. Pending the order the plaintiff cannot take any step, even if the defendant be about to quit the country. *Ball v. Stanley*, 6 Mee. & W. 396.

Where a defendant applied to stay the proceedings on payment of half the debt, and the costs, the plaintiff as to the other moiety being a trustee for the deceased person of whom the defendant was administrator; the court held that they could not grant the rule. *Barlow v. Leeds*, 1 Har. & W. 479; 5 Nev. & M. 426. So, in an action for principal and interest due on a promissory note, the defendant applied to stay proceedings on payment of the interest and costs only, the payee having indorsed on the note that, if interest were paid on stipulated days during her life, the note should be given up; but the court held that they had no power to grant the rule. *Steele v. Bradfield*, 4 Taunt. 227. So, where the writ of summons was served on the 11th April, and on the 22d May a judge made an order to stay the proceedings on payment of the sum indorsed on the writ and costs, although the plaintiff then claimed a further sum; the court rescinded the order, holding that after four days from the service of the writ the defendant was not entitled to a stay of proceedings upon payment of the sum indorsed, if the plaintiff claimed any further amount. *Bowdidge v. Slaney*, 2 Bing. N. C. 142. But if by the plaintiff indorsing on his writ a larger sum than is due the defendant be misled, and prevented from settling the action, and the plaintiff afterwards claim a less sum by his particulars, the court will stay the proceedings on payment of the latter sum and the costs of the writ only, provided the application be made in time. *Elliston v. Robinson*, 2 C. & M. 343. The court, however, will modify the rule when circumstances require it. Where the plaintiff sued as trustee, under circumstances of some suspicion, the court stayed the proceedings on payment of the debt into court, and of the costs to the plaintiff. *Jones v. Bramwell*, 3 Dowl. 488. And where a defendant, after application by the plaintiff's attorney, paid the plaintiff the debt demanded, without knowing that a writ had been sued out, nor had the plaintiff said anything to him about it, and the attorney afterwards proceeded in the action for his costs; the court upon application stayed the proceedings without costs. *Rook v. Wasp*, 5 Bing. 190; and see *Morrison v. Summers*, 1 B. & Ad. 559. And on the other hand, as this order to stay proceedings is a matter of favour, not of right, the judge in granting it may put the defendant under such terms as the justice of the case may require. *Jones v. Shepherd*, 3

(*c*) *In Actions on Bills and Notes.*[1]
(*e*) „ *on Judgments.*[2]
(*f*) „ *of Detinue and Trover.*[3]
(*g*) „ *of Trespass for Taking Goods.*[4]
(*h*) „ *in Replevin.*[5]
(*i*) „ *where no Debt Due.*[6]

Dowl. 421. But in no case will the court stay the proceedings merely upon an affidavit showing that there is no debt due, or otherwise negativing the cause of action. *Smith v. Curtis*, 2 Dowl. 223. Nor will the court stay the proceedings upon payment of a sum of money in an action of *assumpsit* for unliquidated damages. *Fisher v. Pyne et al.* 1 Man. & G. 265. And the application, even in cases where the court will grant it, cannot be made until after the plaintiff has declared (*Reynolds v. Sherwood*, 8 Dowl. 183; 9 L. J. Ex. 136), and the money have been paid into court. *Gover v. Elkins*, 3 Mee. & W. 216; 6 Dowl. 335.

By making the application to stay proceedings upon payment of debt and costs, or even obtaining the order, the defendant does not waive his right to object to any previous proceeding which is void, and not merely an irregularity. See *Siggers v. Sansom*, 2 Dowl. 745.

When a writ of summons has been amended, after plea in abatement, under sec. 38 of the 15 & 16 Vic. c. 76, the person or persons named in the plea may stay proceedings against himself or themselves, by payment of the debt and the costs of the writ within four days of service upon him or them. *Measom v. Mountcastle*, 1 F. & F. 721.

[1] In actions upon bills of exchange or promissory notes, the court will stay the proceedings upon payment of the amount of the bill or note, with interest, and the costs in that action. *Smith v. Woodcock*, 4 T. R. 691. Formerly, in actions against the acceptor of a bill or maker of a note, the court, in addition, required him to pay the costs in any other actions which might have been brought by the same plaintiff against other parties to the bill or note (Id. *per Cur.*), unless it appeared clearly that the other actions were brought for the purpose of creating costs, or the like. *Hodson v. Gunn*, 2 D. & R. 57. But now, by Reg. Gen. T. 1 Vic., it is ordered, "that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note; the defendant shall be at liberty to stay the proceedings on payment of the debt and costs in that action only." If, however, after payment of the bill by one of the other parties, the acceptor insist on the plaintiff proceeding in his action against him, in tending to contest his liability, he has a right to do so, and the court will not interfere to prevent him. *Lewis v. Dalrymple*, 3 Dowl. 433.

[2] In debt on judgment, the court have stayed proceedings on payment of the amount of the judgment and costs (*Thomas v. Edwards*, 2 Anst. 558; and see *Simpson v. Stone*, 2 W. Black. 785); and they would probably now stay the proceedings without costs. *See* stat. 43 Geo. 3, c. 46, s. 4, and cases, vol. v. p. 275.

[3] In detinue or trover for title-deeds or chattels, if no special damage be alleged, the court in fit cases will stay the proceedings, on delivering up the deeds, &c., and payment of costs. Or if the defendant wish to deliver up part of the deeds, having a lien on the remainder, or the like, he will in proper cases be allowed to do so, and the court will order, that if the plaintiff thereupon consent to stay the proceedings he shall be paid his costs up to that time, otherwise that the deeds returned shall be struck out of the declaration. *Phillips v. Hayward*, 3 Dowl. 362.

[4] In trespass for taking goods, where no special damage was laid, the court have ordered that on restoring the goods, and paying the costs, the proceedings should be stayed. *Pickering Trustee*, 7 T. R. 53. But they have refused to do so upon payment of the sum for which the goods sold, or even upon restoring the goods, where the parties could not thereby be placed in as good a situation as before the property was taken. *Gibson v. Humphrey*, 1 C. & M. 544; and see *Knot v. Barker*, 3 Anst. 896. *Woodgate v. Baldock*, id. 256. So, where the sheriff removed and sold goods under a *fi. fa.* without paying the rent due to the landlord, of which he had notice, and the landlord brought an action against him, the court refused to stay the proceedings on payment of the sum for which the goods were sold. *Calvert v. Joliffe*, 2 B. & Adol. 418.

[5] In replevin, if the defendant wish to stay proceedings, the court, if no special damage be laid, will allow him to do so, on payment of the costs of the action and replevin, and delivering up the replevin bond. *Banks v. Brand*, 3 M. & S. 525. If the plaintiff desire to do so, the court will stay them on payment of the rent, and single costs up to the time of the application. *Hopkins v. Shrole*, 1 B. & P. 382. *Vernon v. Wynne*, 2 H. Black. 24. *Anon.* 1 Ld. Raym. 429.

[6] Proceedings will not be stayed in an action of debt upon affidavits denying its existence (*Smith v. Curtis*, 2 Dowl. P. C. 223), or disputing the claim.

(B) *Where Proceedings are contrary to Good Faith,*[1] *or Unauthorised.*[2]

(C) *In Frivolous Actions.*[3]

(D) *Pending Error or Proceedings Abroad.*[4]

(E) *Where there is an Agreement to Refer.*[5]

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[1] When an action or proceeding is satisfactorily shown to be in opposition to good faith, or in contravention of some binding arrangement, proceedings will be summarily stayed. *Cocker v. Tempest*, 7 Mee. & W. 502. *Sturges v. Lord Curzon*, 7 Ex. 17. *Philpot v. Thompson*, 2 D. & L. 18. *Cates v. West*, 2 T. R. 183. *Apothecaries' Co. v. Harrison*, 12 Ad. & E. 642.

In an action for libel, the attorney for the defendant had agreed with the attorney for the plaintiff that the action should be settled by the defendant writing a letter of retractation, and such letter had been sent just before the spring assizes, with a condition that the letter which formed the libel should be given up, which had not been done, and the plaintiff not having been privy to the agreement, had afterwards changed his attorney and given notice of trial for the summer assizes:—*Held*, that the settlement having been conditional was not binding, and that the lapse of time was not sufficient to preclude the plaintiff from going on. *Webster v. Acton*, 11 W. R. 114, Q. B.

[2] As to where an attorney acts without authority, *see* vol. ii. p. 41. When a wife living separate from her husband institutes an action in his name, without his authority, the court on application will stay the proceedings until the wife give the husband an indemnity, to the satisfaction of the master, against costs. *Morgan et ux. v. Thomas*, 2 C. & M. 388. See *Chambers v. Donaldson*, 9 East, 471. *Harrison et ux. v. Almond*, 1 Har. & W. 519; 4 Dowl. 321. So, where a wife sued her husband in the names of the executors of her trustee, upon a deed of separation, the court allowed her to proceed in the action upon giving security to the executors against the costs of the action, to the satisfaction of the master. *Archard v. Coulsting*, 6 Man. & G. 75. So, if one of two partners become bankrupt, and the other make use of the names of the assignees jointly with his own, in an action against a debtor of the firm, the court will order the solvent partner to give the assignees an indemnity. See *Whitehead et al. v. Hughes*, 2 C. & M. 318. So, where the assignee of an insolvent, who was *cestui que trust*, brought an action in the names of the trustees, first tendering an indemnity as to costs, the court of Exchequer stayed the proceedings until the plaintiffs should be indemnified. *Spicer v. Todd*, 2 C. & J. 165. In general, application should be made for indemnity before applying to the court.

[3] Where an action is brought in one of the superior courts for a sum under 40*s.* (*see* 6 Edw. 1, c. 4); and this appears from the admission of the plaintiff (*Melton v. Garment*, 2 N. R. 84), or his attorney (*Kennard v. Jones*, 4 T. R. 495), or from the affidavit of the defendant uncontradicted by the plaintiff (*Wellington v. Arters*, 5 T. R. 64. See *Dowling v. Powell*, 2 Dowl. N. S. 1025: but see *Lowe v. Lowe*, 1 Bing. 270. *Oulton v. Perry*, 3 Burr. 1592), the court will stay the proceedings, unless the cause of action be of such a nature (*Lowe v. Lowe*, 8 Moore, 220) that there appear to be no remedy for it elsewhere. *Harwood v. Lester*, 3 B. & P. 617. *Eames v. Williams*, 1 D. & R. 359. In an action for a debt tried before the under-sheriff, where the plaintiff recovered under 40*s.*, *Wightman, J.*, refused to stay the proceedings on payment of the amount of the verdict without costs, although the debt might have been sued for in the county court; the statute 43 Eliz. c. 6, s. 2, which enables a judge at Nisi Prius to certify, in order to deprive the plaintiff of costs in such a case, does not extend to trials in inferior courts, and this motion, if granted, would have the same effect. *Salmon v. Tugman*, 2 Dowl. N. C. 977; 12 L. J. Q. B. 268. S. P. *Batchelor v. Dudley*, 2 Man. & G. 333. Nor will the courts interfere where the sum to be recovered is reduced by tender or payment into court below the sum of 40*s.* *Nurdin v. Fairbank*, 5 Ex. 738. By 23 & 24 Vic. c. 126, s. 28, a judge may refuse to interfere in proceedings to attach debts where, from the smallness of the amount to be recovered, or of the debt sought to be attached or otherwise, the remedy sought would be worthless or vexatious.

[4] The court will generally stay the proceedings in an action on the judgment in the original action, pending error. Bail in error must first be put in and perfected before the application can be made. *Abraham v. Pugh*, 5 B. & A. 903. The court, however, will not stay proceedings in an action on a foreign judgment, merely because an appeal is pending upon the judgment in the foreign court. *Alivon v. Furnival*, 3 Dowl. 202. Nor is it any ground for staying proceedings in an action here, that proceedings are pending between the parties for the same cause of action in the United States. *Cox v. Mitchell*, 7 C. B. (N. S.) 55; 6 Jur. N. S. 225; 29 L. J. C. P. 33.

[5] At common law parties could not divest the courts of jurisdiction by any previous agreement to refer future differences (*Crisp v. Banbury*, 8 Bing. 394); but by 17 & 18 Vic. c. 125, s. 11, vol. i. p. 465, this, it has been shown, may now be done, and the court will stay proceedings where an action is brought in contravention of an agreement to refer. *See* 28 L. J. Ch. 230; id. Ex. 212; 28 L. J. Q. B. 164.

(F) *Where Two or more Actions are brought for the same Cause,*[1] *or Costs of former not Paid.*[2] *See* also Consolidation, vol. iii. p. 174.

[1] If two actions for clearly (27 L. J. Ex. 426) the same cause of action, between the same parties, be pending at the same time, or brought in another of the superior courts, the court in which the second action is pending will in general, upon application, stay the proceedings in it. *Doe v. Brenton*, 6 Bing. 469. But where it appeared that the first action had been brought by an attorney, wholly unauthorised to do so by the plaintiff, the court refused to stay the proceedings in the second action, as the plaintiff could have no control over the first. *Souter v. Watts*, 2 Dowl. 263. So, where an ejectment was brought in the Common Pleas for a forfeiture, and an application was made to stay the proceedings in it on the ground that another ejectment for a forfeiture between the same parties, to recover the same premises, was pending in the Court of Queen's Bench, the court refused to interfere, as the acts of forfeiture appeared to be distinct, and occurred at different times. *Doe v. Gustard*, 2 Dowl. N. S. 615; 4 Man. & G. 987. *Marsh v. Newell*, 1 Taunt. 109. So, where the court set aside an execution, on the ground that the action had been settled, and afterwards the plaintiff brought an action on the judgment; the court upon application stayed the proceedings in this latter action. *Philpot v. Thompson et al.* 13 L. J. Q. B. 231. But the court refused to stay the proceedings in an action merely because a previous suit to try the title to the same property was pending in an inferior court. *Smidt v. Ogle*, 6 Taunt. 74. Nor will the court stay the proceedings in an action merely because the plaintiff has filed a bill in equity for discovery and relief respecting the same matter (*Murphy v. Cadell*, 2 B. & P. 137); or to stay the judgment and execution in an action until another action should be tried, although it was sworn that material evidence would be adduced at the latter trial, which could not be had at the former (*Yates et al. v. Dublin Steam-Packet Co.* 6 Mee. & W. 77); or on the ground that a former action for the same debt had been settled, as they would not try upon affidavits whether the two actions were for the same debt: it was the subject of a plea to the action, and not of an application to stay the proceedings. *Ross v. Jacques*, 8 Mee. & W. 135; 10 L. J. Ex. 306. See *Wade v. Simeon*, 1 Man. G. & S. 610, 11. And the court have refused to make a plaintiff, who had an action and an indictment pending against the defendant for the same assault, elect as to which he would prosecute. *Jones v. Clay*, 1 B. & P. 191. But where an action was brought for the infringement of a patent, and a *scire facias* was at the same time pending to repeal it, the court, on terms, stayed the proceedings in the action until the *scire facias* should be determined. *Smith v. Upon*, 6 Man. & G. 251.

Where several actions were brought against several persons for the same debt, who (if liable at all) were liable jointly, and the defendant in one action paid the debt and the costs in that action, the court upon application stayed the proceedings in the other actions without costs. *Carne v. Legh*, 6 B. & C. 124.

Where a man, having a right to sue several persons for one specific damage, recovers and receives satisfaction in an action against any one of them (*Bird v. Randall*, 3 Burr. 1354, the court upon application will stay the proceedings. *Semb.* Id. So if a man, from some mistake or omission, recover only nominal damages, if he bring another action against the same party for the same cause of action, the court will stay the proceedings. *Longridge v. Brewer*, 1 Bing. 307. *Lamb v. Nutt*, 1 Tidd, 572. So where, at the trial of a cause, a juror was withdrawn at the suggestion of the judge, and the plaintiff afterwards commenced another action for the same cause, the court upon application stayed the proceedings. *Moscati v. Lawson*, 1 Har. & W. 572. But if the second action be not for the same cause, the court will not interfere, however vexatious the action may be. See *Dicas v. Jay*, 6 Bing. 519. *Smith v. Rolt*, 2 Dowl. 62. As to such applications in *qui tam* actions, see *Harrington v. Johnson*, Cowp. 744; and see *Pechell v. Layton*, 2 T. R. 512, 712.

[2] If a man claiming title to lands bring ejectment, and fail, and afterwards bring another ejectment, the court will in general stay the proceedings in the second action until the costs of the first shall be paid. And whether the second action be by the same party or of his heir (*Doe d. Feldon v. Roe*, 8 T. R. 645. *Doe v. Harland*, 10 Ad. & E. 761), or other person claiming through him, such as his assignee, &c. (*Doe v. Law*, 2 W. Black. 1180. *Doe d. Standish v. Roe*, 5 B. & Adol. 878), or whether others may have been added as plaintiffs in the second action, or not (*Fairclaim v. Thrustout*, 8 T. R. 646), or whether the second action be against the same or a different defendant, or for the same or different premises, provided it appear to be brought to try the same title in substance (*Keene v. Angel*, 6 T. R. 740. *Doe v. Shadwell*, 7 Dowl. 527. *Doe v. Harland, supra.* See *Doe v. Snead et al.* 2 Dowl. & L. 119; 13 L. J. Q. B. 252), or whether the second action be brought in the same or a different court (*Doe v. Stevenson*, 3 B. & P. 22), is immaterial. And although many years had intervened between the first and second action. *Keene v. Angel, supra. Doe v. Law*, 2 W. Black. 1158. But proceedings will not be stayed merely because the cause of it might have been included in a former action (*Neale v. Ellis*, 1 D. & L. 163), or on the

(G) *Where Criminal Proceedings are pending.*[1]

(H) *Time and Mode of making Application, and Effect of Rule or Order.*[2]

II. Setting Aside Proceedings for Irregularity.

(A) *When, and within what Time.*[3]

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ground that plaintiff had filed a bill for an injunction. *Vandersteegen v. Witham*, 6 Mee. & W. 457.

[1] The courts have refused to stay the proceedings in an action until after the trial of an indictment for perjury, founded upon the affidavit to hold to bail (*Johnson v. Wardle*, 3 Dowl. 550), or preferred against one of the plaintiff's witnesses. *Warwick v. Bruce*, 4 M. & S. 140. And in an action for slander, imputing felony, where the plaintiff obtained a verdict, the court refused to stay judgment or execution, although it appeared that the plaintiff had since been convicted of the felony imputed to him, it appearing also that the defendant was examined as a witness against him. *Symons v. Blake*, 2 C., M. & R. 416.

Where a person indicted for felony sued a banker for money he had deposited with him, and which was thought to be the produce of the felony, the court upon application stayed the proceedings, to give time for the trial of the indictment. *Deakin v. Praed*, 4 Taunt. 825.

[2] The application to a judge, which ought to precede moving the court to stay proceedings, should be as promptly as possible, to avoid the incurring by the plaintiff of further costs. The 15 & 16 Vic. c. 76, s. 226, directs that in case any action, suit, or proceeding, shall be commenced, sued, or prosecuted, in disobedience of any writ of injunction, rule, or order, in any other court than that by which such injunction may have been issued, or rule or order made, upon the production to any such court or judge of the said order, &c., the court or judge shall stay all further proceedings contrary to any such injunction, rule, or order, and all further proceedings shall be null and void: Provided always, that nothing herein shall abridge or vary the liability of any person to an attachment for contempt.

Rules *nisi* are frequently drawn up with a stay of proceedings; and in such cases the opposite party is precluded from taking any step whatever in the cause until the rule is disposed of: he cannot even obtain a rule to discontinue his action. *Murray v. Silver*, 14 L. J. C. P. 168. So, a judge's summons is a stay of proceedings from the time it is attendable; and if followed by a second summons, will continue to be a stay of proceedings until it is disposed of. *See* Judge's Orders, vol. v. p. 258.

[3] In the defence of an action, one of the first things to be attended to on the part of the defendant is the regularity of the proceedings; for, if they are irregular, the courts on motion will set them aside. An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner. Thus, an irregularity in the process, the declaration, the pleading, the trial or inquiry; or, if notice be not given in due time, or in a proper manner, the defendant may apply to a judge or move the court to set aside the proceedings; and if in custody, for his discharge, on entering a common appearance; or if he has given bail to the sheriff, the bail-bond may be delivered up to be cancelled. A judgment by default is irregular when the defendant in an action has not been served with a copy of process; or when it is signed before the lapse of the proper time, or without giving notice to plead before the time for pleading is expired, or after a plea has been regularly delivered or filed. 4 Taunt. 818. The application to set aside a judgment must be made within a reasonable time after the defendant knew of the irregularity. *See supra.* And when an execution is irregular, the defendant may move to set it aside, and that he be discharged out of custody, or that the money levied may be restored to him.

The summons need not, in general, be supported in the first instance by affidavit, but motions to the court must be founded upon an affidavit stating the irregularity complained of; and if the irregularity lie in any process or notice, a copy of such process or notice should be annexed to the affidavit. If the court be satisfied from the affidavit that the proceedings are irregular, they will grant a rule *nisi*, and afterwards, if sufficient cause be not shown against it, they will make the rule absolute. The rule *nisi*, when obtained, suspends the proceedings for all purposes until the rule be disposed of. 4 T. R. 176. The summons to set aside proceedings for irregularity must state the several objections intended to be insisted upon. Reg. Gen. (H. T.) 1853, r. 136.

No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time: nor if the party applying has taken a fresh step after knowledge of the irregularity. Reg. Gen. (H. T.) 1853, r. 135. Thus, an irregularity in the order to hold to bail must be taken advantage of before bail has been perfected (1 East, 81; 1 B. & P. 132; 2 Stra. 1077); or even put in (1 East, 330; 6 Taunt. 185; 6 M. & S. 230); and before plea (7 T. R. 376); or

(B) *As to Costs of.*[1]

STEALING. *See* Larceny, vol. v. p. 311.

STEAM Engine. *See* Malicious Injuries, vol. v. p. 479; *ante*, p. 10, n.[1]; p. 16, n.[6].

STERLING: Current or Standard Coin.

STET Processus.[2] *See* Discontinuance of Action, vol. iv. p. 73.

STICKING up Declaration, Rules, &c. in the Master's Office.[3]

STOCK: Government and Public Bodies. *See* Stock-Broker and Stock-Exchange, *post*, p. 502.

I. Nature and General Properties of, p. 501.
II. Transfer of, p. 501. And *see* Bank of England, vol. ii. p. 135.
III. Dividends. *See* id. p. 136; and *Partridge v. Bank of England*, 9 Q. B. 396, 399; 13 L. J. Q. B. 396; 15 id. 395, Ex.

judgment by default and notice of executing a writ of inquiry (8 T. R. 77, n); in process before appearance (1 B. & P. 250; 1 Stra. 155; 1 Bing. 132); or before the declaration has been taken out of the office (1 H. Black. 222; 2 Stra. 1072); or in notice of declaration before plea, or before taking out a summons to stay proceedings upon the bail-bond. 1 B. & P. 342; 8 Taunt. 591.

A writ issued under the 15 & 16 Vic. c. 76, s. 18, was served, on the 17th of September, upon a British subject residing out of the jurisdiction of the court. On the 27th of October the plaintiff obtained an order for leave to proceed, and filed a declaration on the 28th, charging the defendant with a breach of promise of marriage; but the affidavit upon which the order was obtained was not so framed as to bring the case within the statute: — *Held*, that, in order to take advantage of the irregularity, it was incumbent on the defendant to apply within a reasonable time, according to the exigency of r. 133, H. T. 1853, and that the irregularity was waived by taking the declaration out of the office. *Bayne v. Slack*, 3 C. B. (N. S.) 363; 4 Jur. N. S. 192; 27 L. J. C. P. 14.

Where a defendant pleaded to a *scire facias* pending a rule he had obtained to set it aside for irregularity, the court held that he waived the irregularity by his plea (1 D. & R. 181); and the rule is the same as to prisoners. 1 T. R. 191. A prisoner who is supersedable for not being declared against in time, waives the irregularity by afterwards pleading (1 East, 77); but this must be understood only of proceedings which are merely irregular, for if a proceeding be defective and void, the defect is not waived by any subsequent proceeding of the defendant. *Taylor v. Phillips*, 3 East, 156.

If the party who has committed the irregularity be satisfied that he has no sufficient cause to show against the rule, he may save some expense by serving the opposite party with a notice acknowledging the defect, desiring him not to proceed to make the rule absolute, and offering to pay the costs already incurred; or if he perceive the defect before the other party has moved for a rule to set aside the proceeding, he may prevent all expense by a similar notice.

[1] If the rule to set aside proceedings for irregularity be made absolute it is always with costs, unless opposed in the first instance, or unless some very strong grounds be shown to the court for ordering it otherwise. So, if discharged, when obtained to set aside with costs, it is understood to be discharged with costs, unless the court give special directions to the contrary (Reg. Gen. H. T. 1853); but on staying them as defective, the costs are in the discretion of the court.

If the irregularity be trivial, or the application ought to have been made to a judge at chambers, no costs will be given (*Ikins v. Plevin*, 5 Dowl. P. C. 594. *Roberts v. Lemon*, 6 Scott, 576); or if the objection be vexatious, the applicant will have to pay the costs. *Duke of Brunswick v. Harmer*, 5 C. B. 218.

[2] "Let the process stay or stand:" an entry on the record similar to a *nolle prosequi* (vol. v. p. 539, n. [3]). It can only be by consent of the parties, and by permission of the court or a judge; no judgment being given, each party pays his own costs. This course is frequently pursued at the recommendation of the court in trifling actions, or where the plaintiff or defendant is insolvent, or where from the relationship of parties further litigation should cease. No action can afterwards be brought for the same cause.

[3] By Reg. Gen. (H. T.) 1853, r. 162, where the residence of a defendant is unknown, rules, notices, and other proceedings may be stuck up in the office, but not without previous leave of the court or a judge. This is never granted without an affidavit detailing the efforts that have been made to discover the defendant, and that he has not appeared by attorney. The rule or order is, that a copy shall be left at his last known place of residence, and another stuck up in the master's office, and that this be deemed good service.

IV. Actions for not Accepting, Transferring, or Replacing, p. 501.
V. Duties and Liabilities of Bank of England as to Bank Stock. *See* vol. ii. p. 137, n.
VI. Inspection of Bank Books relating to. *See* id.
VII. Stock-Jobbing, against, Repealed, p. 502.
VIII. Forging Transfers of Stock or Power of Attorney, &c. *See* vol. iv. p. 505; False Entries in Books of Public Funds, id. p. 506; Personating Owners of Stock, id. p. 505.
IX. Charging Stock with Judgment Debt, &c. *See* vol. v. p. 269, and Attachment of Debt, vol. i. p. 579.

I. Nature and General Properties of.[1]
II. Transfer of.[2] *See* Bank of England, vol. ii. p. 135.
IV. Actions for Stock Sold, and not Accepting, Transferring, or Replacing.[3]

[1] Stock is a chose in action. *Rex v. Capper*, 5 Price, 217. It has no locality in a legal sense, except for purposes of probate and administration. (Id.) It cannot be sued for as money. *Nightingale v. Devisme*, 2 W. Black. 684. And an agreement to pay a percentage upon the day on which any *money* should be covered by the defendant through the means of the plaintiff's information, does not entitle the plaintiff to the stipulated reward upon the transfer of stock in consequence of such information. *Jones v. Brinley*, 1 East, 1; 3 Esp. 205. The interest in a stock is nothing but a right to receive a perpetual annuity, subject to redemption. *Wildman v. Wildman*, 9 Ves. jun. 177. *Omnium* is stock. *Brown v. Turner*, 7 T. R. 630; 2 Esp. 631. S. P. *Olivierson v. Coles*, 1 Stark. 496.

Stock purchased in the joint names of two sisters, and a balance to their joint account at their bankers, belong to them as tenants in common, notwithstanding they had contributed equally, the source whence the funds were derived being by rents of land, of which the two were tenants in common. *Robinson v. Preston*, 4 K. & J. 505; 4 Jur. N. S. 186; 27 L. J. Ch. 395.

[2] By 8 & 9 Vic. c. 97, s. 1, stock in the Bank of England of a deceased person may be transferred by his executors or administrators, notwithstanding any specific bequests; and the bank may require all the representatives who have proved the will to join in the transfer. By sect. 2 the bank is not now obliged to register any specific bequests; but before transfer of stock, or receipt of dividends upon stock standing in name of deceased person, the bank may register names of the deceased party, and of his executors or administrators.

The 24 Vic. c. 5, s. 7, facilitates the transfer of stock and payment of dividends.

The 25 Vic. c. 7, provides for the mutual registration and transfer of India stock at the Bank of Ireland.

The 25 Vic. c. 21, relates to transfers at the Bank of Ireland.

The 23 id. c. 15, provides for the stamping powers of attorney for transfers, &c.; and 23 & 24 id. c. 111, sched., as to subjecting contract-notes to stamp of 1*d.*

A power of attorney for the transfer of government stock is a deed within the meaning of 2 Geo. 2. c. 25; and as to forgeries, see *Rex v. Fauntleroy*, 2 Bing. 413; 10 Moore, 1; 1 C. & P. 421; 1 R. & M. C. C. 52. *R. v. Wait*, 1 Bing. 121; 7 Moore, 473; and Forgery, vol. iv. p. 505.

A *feme covert*, executrix, having obtained an order for the protection of her property under the 20 & 21 Vic. c. 85, is entitled to a transfer of stock standing in the name of her testator, without the concurrence of her husband. *Bathe v. Bank of England*, 4 K. & J. 564; 4 Jur. N. S. 505; 27 L. J. Ch. 630. *See* 21 & 22 Vic. c. 108, s. 7.

One of two trustees of stock sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and some time afterwards absconded:—*Held*, that the Bank of England was compellable in a court of equity to reinvest the stock in the name of the other trustee. *Soloman v. Bank of England*, 14 Sim. 475.

[3] *Indebitatus assumpsit* lies for stock in the public funds sold and transferred. *M'Callan v. Mortimer*, 7 Mee. & W. 20; 9 id. 636. A party whose stock has been sold under a forged power of attorney may recover the value as money had and received from the purchaser. *March v. Keating*, 1 Bing. N. C. 198. Money lent is not sustainable if the loan were effected by a transfer of stock, for stock is not money (Ch. Cont. 508; but see *Samuel v. Banbury*, 2 C. B. 803); nor will money had, &c., lie to recover the value of stock improperly transferred to defendant, and still standing in his name. Ch. Cont. 525.

The declaration for not transferring stock must aver the name of the proposed transferror. *Gregory v. East India Co.* 14 L. J. Q. B. 220; 9 Jur. 687. Stock cannot be sued for as money. *Nightingale v. Devisme, supra.*

In an action upon a contract for the sale of stock, the declaration ought to show the manner of transferring the stock, and the time and place at which it is usually transferred. *Stapleton v. Shelburne (Lord)*, 1 Bro. P. C. 217.

In case for not accepting stock, to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock, which he refused, can only be satisfied by showing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the

VII. Stock-Jobbing.[1]

STOCK-Broker[2] and Stock-Exchange.

transfer was to be made, until the close of the transfer books. *Bordenave v. Gregory*, 5 East, 107. *Bordenave v. Bartlett*, 5 East, 111. But where it appeared that the plaintiff tendered the stock on the day agreed on for making the transfer, and the defendant refused to accept it:—*Held*, that the plaintiff need not wait until the end of the day, but might sell the stock to a third person immediately after the tender and refusal. *Dorriens v. Hutchinson*, 1 Smith, 420.

A declaration alleged that the plaintiff was possessed of transferable stock, and at the proper time for transferring the same, and after previous notice to defendants, requested them to transfer his stock to a proper person about to be named by him, yet they (before the plaintiff had named the person to whom he was desirous of transferring the stock) refused to transfer to any person whatsoever:—*Held*, that in order to charge the defendants with a breach of duty in not transferring, it should have shown that the plaintiff had named, or at least was ready to name, the party to whom he wished to transfer, and that the declaration was bad on general demurrer. *Gregory v. West India Co.* 7 Q.B. 199; 9 Jur. 686; 14 L.J.Q.B. 220.

On a failure of a contract to replace stock, it seems, though the measure of damages is the price at the day when it ought to have been replaced (*Josling v. Irvine*, 30 L. J. Ex. 78), or at the day of the trial, at the option of the plaintiff (*M'Arthur v. Seaforth*, 2 Taunt. 257. *Shepherd v. Johnson*, 2 East, 211. *Harrison v. Harrison*, 1 C. & P. 413. *Forrest v. Elwes*, 4 Ves. 493. *Vaughan v. Wood*, 1 Mylne & K. 403), yet the highest price at any intermediate day cannot be given. *M'Arthur v. Seaforth, supra.* And if, after the appointed time to replace the stock, and while the market was rising, defendant offered to replace the stock, the criterion of damages would be the value of the stock at the time of the tender, and not the increased value at the time of the trial. *Shepherd v. Johnson, supra.* See *Ripley v. Maclure*, 4 Ex. 345; also 2 E. & B. 678. In such an action it is not a legal damage that plaintiff was prevented completing an advantageous contract. 1 Ch. Pl. 296.

Upon a contract to replace stock, and pay dividends in the meantime, although the jury gave damages for the value of the stock and the amount of the damages, yet on affirmance of the judgment in error, the measure of increase is not the further damages that may have accrued, but interest upon the damages given as the value of the capital stock. *Dwyer v. Gurry*, 7 Taunt. 14.

[1] Stock-jobbing was made illegal by 7 Geo. 2, c. 8 (made perpetual by 10 Geo. 2, c. 8), declaring that all contracts entered into, upon which any premium or consideration shall be given for liberty to put upon, or to deliver, receive, accept, or refuse, any public or joint-stock, or other public securities whatsoever, and also all wagers and all contracts in the nature of putts and refusals relating to the then present and future price or value of any such stock or securities, are null and void.

This act is wholly repealed by 23 Vic. c. 28, from 14th June, 1860, which recites that the prior acts imposed unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities.

A reference to a very few of the cases decided on the repealed enactments will suffice.

Time-bargains at the Stock Exchange are where neither buyer nor seller has any stock, but the buyer agrees nominally to buy stock of the seller at a certain day, viz. 1000*l.* When the day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent on the 1000*l.* as the stock has fallen; but if the stock has risen, the seller pays the buyer in a similar way. 1 C. & P. 13.

Jobbing *in omnium* was within the 7 Geo. 2 (*Brown v. Turner*, 7 T. R. 630; 2 Esp. 631. *Olivierson v. Coles*, 1 Stark. 496); but dealing in foreign funds was not, the statute relating merely to stock of this country and jobbing in the British funds (*Henderson v. Bise*, 3 Stark. 158. See *Patterson v. Powell*, 9 Bing. 320. *Wells v. Porter*, 2 id. N. C. 722. *Oakley v. Rigby*, id. 732. *Elsworth v. Cole*, 3 Mee. & W. 31. *Robson v. Fallowes*, 3 Bing. N. C. 392. *Morgan v. Pebler*, id. 457); nor is gambling in foreign funds illegal at common law (id.); nor in railway shares. *Hewett v. Price*, 4 Man. & G. 355.

Many of the contracts relating to bargains in the funds may be within the 8 & 9 Vic. c. 109, s. 18, and therefore null and void. *See* stat. vol. iv. p. 597.

[2] A party who employs a stock-broker to transact business for him, is bound by the Stock Exchange rules, or rules at a particular place, relative to the mode of transacting business, whether he knew of the usage or not. *Bayliffe v. Butterworth*, 5 Rail. Ca. 283; 1 Ex. 425; 11 Jur. 1019; 17 L. J. Ex. 78, S. P. *Pollock v. Stables*, 12 Q. B. 765; 5 Rail. Ca. 352; 17 L. J. Q. B. 352. *Bayley v. Wilkins*, 7 C. B. 886; 13 Jur. 833; 18 L. J. C. P. 273. *Sutton v. Tatham*, 10 Ad. & E. 27. *Bowlby v. Bell*, 3 C. B. 284.

The usage of the Stock Exchange is that brokers are responsible to each other for all engagements entered into by them on behalf of third parties. A person employed a broker there to sell scrip, but on the day of settlement made default, and the purchaser having compelled the broker to pay the differences, the latter may recover the amount in an action for money paid to the use of his employer. (Id.)

A share-broker employed to purchase shares or scrip does not undertake to pro-

STOLEN Bill. *See* Bills and Notes, vol. ii. p. 485.

Goods, Receiving. *See* vol. v. p. 321.

Helping to,[1] or Offering Reward for.[2]

STOP Order. *See* vol. v. p. 269.

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cure them absolutely, and at all events, but only to use due and reasonable diligence to endeavour to do so. *Fletcher v. Marshall*, 15 Mee. & W. 775; 10 Jur. 528.

There is no warranty or undertaking either on the part of a broker employed to buy shares or scrip, or on the part of the principal who employs him, that the article, which merely passes through the broker's or the principal's hands, is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market. *Lambert v. Heath*, 15 Mee. & W. 486; 15 L. J. Ex. 298. *Mitchell v. Newhall*, 45 Mee. & W. 308; 15 L. J. Ex. 292. *Westropp v. Solomon*, 8 C. B. 373.

An unlicensed broker employed to purchase scrip on the Stock Exchange in London, and paying the price to the seller according to the usage of the Stock Exchange, may recover the amount of such payment from his employers (*Lindo v. Smith*, or *Smith v. Lindo*, 4 Jur. N. S. 974; 27 L. J. C. P. 535, Ex. Ch.); *secus* of his commission on the purchase. See *Mocatta v. Bell*, 24 Beav. 505; 4 Jur. N. S. 76; 27 L. J. Ch. 237.

We have seen (*ante*, p. 502) that every principal who employs a stock or share-broker to transact business for him in the stock or share-market is bound by the rules of the Stock Exchange and the mode of doing business, whether he knew of the usage or not; therefore, where the defendant employed the plaintiff, a share-broker, to sell shares for him, and, by mistake, directed the plaintiff to sell 250 shares, meaning 50, and the plaintiff sold the shares, and before the arrival of the time appointed for the transfer and delivery of them the price advanced, and the broker was obliged to buy 200 shares at the advanced cost price to make good the requisite number, and pay the loss on the transaction out of his own pocket. *Sutton v. Tatham*, *ante*, p. 502.

Where the defendant neglected to furnish or deliver to a purchaser shares which he had directed the plaintiff to sell for him, and the plaintiff was consequently, by the custom of the Stock Exchange, compelled to buy shares at an increased price, an action was held to be sustained to recover the difference between the price received by the plaintiff from the purchaser and the sum he had been compelled to pay to get the shares. *Bayliffe v. Butterworth*, 1 Ex. 425; 17 L. J. Ex. 79. *Bayley v. Wilkins*, 7 C. B. 886.

Where the defendant placed in the hands of the plaintiff, a stock-broker, for sale, certain securities, purporting to be genuine and available bonds, saleable on the Stock Exchange, and the plaintiff sold them, and received the purchase-money, and handed it over to the defendant, after which it was discovered that the securities were spurious documents, perfectly worthless and unsaleable, and the stock-broker was obliged to take back the bonds and refund the money, an action was successfully brought by him to recover from the defendant the amount previously paid him. *Young v. Cole*, 4 Scott, 480; 3 Bing. N. S. 730.

A stockbroker, having an order to purchase shares in a foreign railway, bought a letter of allotment. There were no shares in the market, and the practice of the Stock Exchange was to buy and sell letters of allotment as shares, in that railway. In an action for the value and broker's commission:—*Held*, that the jury were properly directed to consider whether the order was to buy that which was sold in the market as shares, or to wait till the actual shares were procurable. *Mitchell v. Newhall*, 15 Mee. & W. 309; 15 L. J. Ex. 292. *Tempest v. Kilner*, 3 C. B. 249; 15 L. J. C. P. 10. *Lambert v. Heath*, 15 Mee. & W. 486; 15 L. J. Ex. 297. *Keele v. Wheeler*, 7 Man. & G. 665.

The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank, cannot confer a title upon the transferee. *Taylor v. Great East Indian Railway Co.* 28 L. J. Ch. 709; 5 Jur. 1087. See *In re Swann*, 7 C. B. 400; 31 L. J. Ex. 25.

[1] By 7 & 8 Geo. 4, c. 29, s. 58, every person who shall corruptly take any money or reward, directly or indirectly, under pretence or on account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall, by any felony or misdemeanor, have been stolen, taken, obtained or converted, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony; and shall be transported for life, or not less than seven years; or imprisoned (with or without hard labour) for not more than four years; and if a male, be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

[2] By sect. 59, if any person shall advertise a reward for the return of any property which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property; or

STOPPAGE in Transitu.[1]

I. Definition and Nature of the Right, p. 504.
II. By Whom and when Exercised, p. 504.
III. How to be Exercised, p. 505.
IV. „ long Right continues, p. 505.
V. Plea of, p. 505.

I. Definition and Nature of the Right.[2]

II. By Whom and when Exercised.[3]

shall promise or offer in any such public advertisement to return to any pawnbroker or other person, who may have bought or advanced money by way of loan upon any property, every such person shall forfeit 50*l.* for every such offence to any person who shall sue for same.

[1] This is the privilege of a vendor, when he sells goods on credit to another, of resuming the possession of them while they are in the hands of a carrier or middleman, in their transit to the consignee or vendee, and before they arrive into his actual possession, or at the destination which he has appointed for them, on his becoming bankrupt or insolvent. 2 Kent's Com. 549. See 2 Steph. Com. 122; 2 Smith, L. C. 431; Russell on Factors, 218; Smith on Contracts, 339; Blackburn on Contracts of Sale, 201.

[2] It has been succinctly described as a legal right in the nature of an equitable lien. *Oppenheim v. Russell*, 3 B. & P. 50. It is adopted by the law for the furtherance of substantial justice, and does not, as has been conceived, proceed on the ground of rescinding the contract; because, if the vendor afterwards offer to deliver the commodity, he may recover the price in an action for goods sold and delivered, which he could not do if, by the stopping *in transitu*, the contract was totally rescinded. *Hodgson v. Loy*, 7 T. R. 440. *Feise v. Wray*, 3 East, 93. *Kymer v. Suwercropp*, 1 Camp. 109. *Edwards v. Brewer*, 2 Mee. & W. 375. Still, whether it operates as a revesting of the possession or a rescinding of the contract, and the revesting of the right of property is problematical (see *Clay v. Harrison*, 10 B. & C. 106), the exercise of the right is limited to instances in which the bankruptcy or insolvency of the consignee has occurred. *The Constitution*, 3 Rob. Ad. Ca. 324. *Wilmhurst v. Bowker*, 2 Man. & G. 792. See *Morton v. Abercromby*, 30 Sc. Jur. 193. *Wentworth v. Outhwaite*, 10 Mee. & W. 436. *Van Castell v. Booker*, 2 Ex. 705. *Bloxam v. Sanders*, 4 B. & C. 941. *Valpy v. Oakley*, 16 Q. B. 481.

The word "insolvency," in relation to this subject, is equivocal. It may mean a general inability to pay debts (*Biddlecombe v. Bond*, 4 Ad. & E. 332), or actual bankruptcy, or formal application to the court. It has been sometimes assumed that "stopping payment" sufficed (*Virtue v. Jewell*, 4 Camp. 31); but there the vendees became bankrupt, though not till after the stoppage *in transitu* had taken place. In *Newsom v. Thornton*, 6 East, 17, the notice was given to the carrier before the bankruptcy of the vendee, but after he had stopped payment; and *Lord Ellenborough*, in his judgment, rests the right to stop on the insolvency of the consignee. Probably it may be correctly stated that the term "insolvency" (for the exercise of this right by a a vendor) is satisfied by general inability to pay, evidenced by stoppage of payment.

The mere failure of the vendee to comply with a condition subsequent, gives the vendors no right to stop the goods *in transitu* in the hands of the carriers after the property has once vested in the vendees. And see *Key v. Cotesworth*, 7 Ex. 595. *Wilmhurst v. Bowker*, 7 Man. & G. 882, Ex. Ch.

The stoppage of part of the goods will not revest the property in the whole, though the subject of one entire contract. *Wentworth v. Outhwaite*, *supra*. See *Jones v. Jones*, 8 Mee. & W. 431; and *post*, p. 505. This right exists although the vendor has received the acceptance of the purchaser, and has not tendered it back. *Edwards v. Brewer*, *supra*.

Although the vendee may have become insolvent, still, if the state of his accounts with the vendor be such that the vendor is, upon the whole, indebted to the vendee, he cannot stop *in transitu* goods of less value consigned to the vendee on account of the balance, for the delivery of them to the vendee's representatives can in that case be productive of no injustice; and if the balance against him be occasioned by the vendee's being under acceptance for his accommodation, he cannot stop *in transitu* until the bills are paid. *Virtue v. Jewell*, *supra*.

[3] The person who stops goods *in transitu* must not be a mere surety for their price; one, for instance, who has, at the request of the vendee, accepted bills drawn by the vendor for their purchase-money. *Siffken v. Wray*, 6 East, 371. See *Sweet v. Pym*, 1 id. 4.

A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procured upon his own credit, without naming the trader here, and shipped to him at the original price, charging his commission: — *Held*, that the correspondent abroad is so far a vendor as between him and the trader here, that, on the bankruptcy of the latter, he may stop the goods *in transitu* by procuring the bill of lading from the bankrupt's brother; and this though the trader here had, before his bankruptcy, accepted bills drawn on him by his correspondent for the amount of the goods, such acceptances provable under his commission amounting, at most, to part payment for the goods, which does not take

III. How to be Exercised.[1]
IV. ,, long Right continues.[2]
V. Plea of.[3]

away the vendor's right to stop *in transitu*. *Feise v. Wray*, 3 East, 93.

Where goods are consigned on the joint account of the consignor and consignee, the former may stop them *in transitu*. *Newsom v. Thornton*, 6 East, 17.

As to the authority of an agent to countermand the selling of goods, and the effect of subsequent confirmation by the principal, see *Nicholls v. Le Feuvre*, 2 Bing. N. C. 81. *Bird v. Broom*, 4 Ex. 786.

The seller may stop the goods in every sort of passage till they reach the hands of the buyer. The general rule is, that the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee. *Stokes v. La Reviere*, cited in *Ellis v. Hunt*, 3 East, 466. *Jackson v. Nicholl*, 5 Bing. N. S. 516. *Mills v. Ball*, 2 B. & P. 461. The principle to be deduced from the cases is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination (*Coates v. Railton*, 6 B. & C. 427: *per Bayley, J. Edwards v. Brewer*, 2 Mee. & W. 375. *Smith v. Goss*, 1 Camp. 282. *Mills v. Ball*, 2 B. & P. 457); and evidence may be adduced to show that the consignee has not taken possession of the goods as owner. *James v. Griffin*, 2 Mee. & W. 623.

[1] It is not obligatory on a party seeking to exert the right to stop goods *in transitu* to make an actual seizure, it suffices to give notice to the carrier in whose hands they are. Where goods were sent from Sheffield by waggon to the purchaser in London, and when at the waggon-office there the provisional assignee of the vendee, who had become bankrupt, put his mark upon them, he being unable to remove them in consequence of an attachment, the *transitus* was held to be at an end. *Ellis v. Hunt*, 3 T. R. 464. *Foster v. Frampton*, 6 B. & C. 107. It has been ruled that the possession of the vendee, to defeat the right, must be a possession obtained on the completion of the voyage. *Holst v. Pownall*, 1 Esp. 240; but see *Mills v. Balls, supra. Oppenheim v. Russell*, 3 B. & P. 54. *James v. Griffin*, 2 Mee. & W. 631, *per Parke, B.* And a mere demand by the vendee, without any delivery before the voyage has completely terminated, will not destroy the right. *Jackson v. Nicholl*, 5 Bing. N. C. 519. If one has been in the habit of using the warehouse of a wharfinger as his own, and depositing his goods there, the arrival of the goods at that warehouse will put an end to the *transitus*. *Richardson v. Goss*, 3 B. & P. 127. *Leeds v. Wright*, id. 320. *Rowe v. Pickford*, 8 Taunt. 83. *Dodson v. Wentworth*, 5 Scott, N. R. 821.

Where goods were ordered to be sent by sea, and the ship-master gave a receipt to the vendee, purporting that the goods were received from him, the right of stoppage was determined; the vendors, by empowering the carrier to give the receipt, recognised the right of property in vendee. *Noble v. Adams*, Holt, N. P. 248: but see *Craven v. Ryder*, Holt, P. C. 100; 6 Taunt. 433. *Ruck v. Hatfield*, 5 B. & A. 632. *Bird v. Brown*, 19 L. J. Ex. 154. *Von Castell, ante*, p. 504.

[2] The period during which the right to stop the goods continues is, as we have seen, co-extensive with that of their transit from the vendor to the purchaser. Hence, in cases where the legality of a resumption of this sort is questioned, the point disputed generally is, Whether at the time of seizure by the vendor the transit of the goods had or had not determined? Consequently, the delivery of part of goods sold under one entire contract will operate as a delivery of the whole, if it appear to be so intended, and destroys the right of stoppage. *Slubey v. Heyward*, 2 H. Black. 504. *Hammond v. Anderson*, 1 N. R. 69. *Crawshay v. Eades*, 1 B. & C. 183. *Dixon v. Yates*, 5 B. & Adol. 313. *Bunney v. Poyntz*, 4 id. 570. *Tanner v. Scovell*, 14 Mee. & W. 28. Where a carrier, having landed a part of the goods on the wharf of the consignee, resumed them, and took the whole to his own premises, in order to secure his own demand for freight, this was held not to be such a delivery as to put an end to the consignor's right. *Crawshay v. Eades*, 1 B. & C. 181.

The negotiation of a bill of lading will defeat the vendor's right to stop *in transitu*. But the negotiation of a bill of lading or other instrument by way of pledge, defeats only the legal right to stop *in transitu*, for in equity the vendor may, by giving notice to the pledgee, resume his former interest in the goods subject to the pledgee's claim, and will be entitled to the residue of their proceeds after the pledgee's demand has been satisfied out of them, or to the goods themselves, if it be satisfied *aliunde* (*In re Westzinthus*, 5 B. & Adol. 817), notwithstanding the pledgee may have other demands against the consignee. The indorsement, therefore, of a bill of lading as a pledge for a specific sum, though it transfers the property in the goods, will only bar the right of the consignor to stop *in transitu* to that extent; and in a court of equity he may recover from the indorsee the difference between the sum for which the pledge was made and the sum realised by their sale, although the indorsee has other claims upon the consignee. *Spalding v. Reading*, 6 Beav. 376. See *Hennekey v. Earle*, 8 E. & B. 410.

[3] Where goods are lodged in dock, the indorsement of the dock-warrant for a valu-

STORES.

STRANDING. *See* Insurance, vol. v. p. 199.

STRICT Settlement.[1]

STRIKING a Jury. *See* vol. v. p. 281, n.

out Counts or Pleas. *See ante*, p. 143, n.[3].

out Parties on the Record. *See* vol. v. p. 333.

STULTIFY.[2]

SUB-Agent. *See* Principal and Agent, *ante*, p. 220.

SUBPŒNA. *See post*, Witness.

SUB Contractu. *See* Negligence, vol. v. p. 517.

SUBJECT.[3]

SUBMISSION. *See* Arbitration, vol. i. p. 436.

SUBORNATION.[4]

SUBSCRIBING Witness. *See* vol. ii. p. 3.

SUBSEQUENT Conditions. *See* vol. iii. p. 166.

Demand. *See post*, Tender, p. 518.

Felony.[5]

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able consideration will destroy the right of stoppage (*Spears v. Travers*, 4 Camp. 251. *Zwinger v. Samuda*, 7 Taunt. 265. *Reyser v. Suse*, Gow, 58); so will the change of mark from A. to B. on goods in a warehouse. *Stoveld v. Hughes*, 4 East, 308. *Swanwick v. Sothern*, 9 Ad. & E. 895. So, where goods in the hands of a warehouseman were sold, and the vendor gave a delivery order to the purchaser, which was lodged with the warehouseman, and he transferred the goods in his book to the vendee:—*Held*, that the right to stop was gone. *Harman v. Anderson*, 2 Camp. 242 So, where a warehouseman sold goods, and received warehouse rent from the purchaser. *Hurry v. Mangles*, 1 id. 452. Where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange still running, accepted by the consignee for him, goods shipped on account of this balance cannot be stopped by the consignor upon the consignee becoming insolvent before the bills are paid. *Virtue v. Jewell*, 4 id. 31. If anything is to be previously done on the part of the seller to ascertain the amount of the price or quantity, &c., as by weighing, &c., the vendor may stop them. *Withers v. Lyss*, id. 237. *Shepley v. Davis*, 5 Taunt. 617. *Busk v. Davis*, 2 M. & S. 397; Abb. Ship. by Shee. 379. *Jones v. Jones*, 8 Mee. & W. 431. *Sheridan v. New Quay Co.* 28 L. J. C. P. 58.

[1] A settlement of an estate upon a parent for life, with remainder to his first and other sons successively in tail, including the appointment of trustees to preserve contingent remainders. *See* Atherley on Marr. Settlements, 93.

[2] It is a maxim in regard to transactions merely voidable, that no man shall be allowed to stultify himself; that is, to plead his own mental infirmity in a court of justice. 1 Steph. Com. 441. Mr. Serjeant Stephen thus qualifies this maxim, which is stated by Blackstone in broader terms, without reference to the distinction between void and voidable transactions. Id. note, 2 Bl. Com. 291, 292. But *see* Drunkenness, when pleadable, vol. iv. p. 144; and Lunacy, vol. v. p. 408, n.

[3] One who is under the protection and power of a government and laws. One who owes allegiance to a government. A person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country.

[4] The offence of procuring another to commit perjury. Arch. *Cr. Law*, 74. Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal. 4 Bl. Com. 137. To render the offence of subornation of perjury complete, either at common law or under the statute, the false oath must be actually taken. 3 Mod. 122; 1 Leach, 455, n.; 2 Russ. on Crimes, 596, 2d ed.; *ante*, p. 127.

[5] If any person shall be convicted of a felony not punishable with death, committed

SUBSEQUENT Promise to take Case out of Stat. of Limitations. *See* vol. v. p. 396, n.[1].

SUBSTITUTED Contract.[1] *See* also vol. i. p. 99.

SUBTRACTION of Tithes. *See post*, Tithes.

SUCCESSION.[2]

SUCCESSION Duty.[3]

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after a previous conviction for felony, transportation for life, or not less than seven years, or imprisonment (with or without hard labour; 7 & 8 Geo. 4, c. 28, s. 9) for not more than four years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment. Id. s. 11. At the trial the prisoner is tried for the second felony without mention of the first; and if he be convicted, then the jury are called upon to decide whether he was formerly convicted of another felony (Id. s. 11; 14 & 15 Vic. c. 19. Arch. *New Cr. Law*, 624; and see *R. v. Shuttleworth*, 21 L. J. M. C. 36); the evidence of which is a certificate of the conviction, and proof that the prisoner is the same person who was so tried. 7 & 8 Geo. 4, c. 28, s. 11.

[1] This is a good plea in bar before breach, without any performance or satisfaction, which is required to constitute a valid plea of accord and satisfaction after breach. *See* Law and Form, *Taylor v. Hilary*, 1 C. & M. 741; Accord and Satisfaction, vol. i. p. 104. It must be specially pleaded. *Filmer v. Burnaby*, 2 Man. & G. 539. *Phillips v. Affalo*, 12 L. J. C. P. 49. *See* Lush. Pr. 25, 2d ed., and Alteration, vol. i. p. 309. It is always competent for parties at any time before breach by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it. *Goss v. Nugent*, 5 B. & Adol. 65. This cannot be done without the consent of both parties. *Franklin v. Miller*, 4 Ad. & E. 599, 606. *Jett v. Cassanet*, 4 Man. & G. 899. If the original agreement was by deed, it can only be altered or discharged by an instrument under seal (*Rippinghall v. Lloyd*, 5 B. & Adol. 742. *West v. Blakeway*, 2 Man. & G. 729. *Spence v. Healey*, 8 Ex. 668. *Smith v. Trowsdale*, 3 E. & B. 83); or where the law requires it to be in writing, an alteration or substitution by parol would be unavailing (*Marshall v. Lynn*, 6 Mee. & W. 109. *Giraud v. Richmond*, 2 C. B. 835); but otherwise where it is in writing merely by consent of parties.

[2] Succession is the devolution or transmission of real or personal property on the death of and from persons in a corporate character to other persons who succeed them in that character. Real estates pass from corporations to their successors, as they do from natural persons to their heirs. Chattels real and personal, whether the word successors is used or not, pass by succession by the common law in the case of the sovereign and all aggregate corporations, who, in judgment of law, never die, and of such single corporations as are heads of an aggregate body whom they represent, which never dies, such as a master of an hospital, or a dean. And they may so pass by special custom in the case of certain other sole corporations for some purposes. But generally no such right of succession exists in the case of sole corporations, because, if a chattel interest granted to a sole corporation and his successors were allowed to devolve to such successors, the property thereof must be in abeyance from the death of one owner until the appointment of the successor, and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner; but a man's right therein when once suspended is gone for ever. 2 Bl. Com. 430, 432; Co. Litt. 9, a (1); 46, b.; Watts' Conv. 3d ed. by Prest. 258. And hence, if a lease for years is made to a bishop, parson, or other sole corporation and his successors, it will go to the executors of the lessee. Co. Litt. 46, b.; 2 Bl. Com. 431; Smith's R. & P. P. 437; Watts' Conv. 3d ed. by Prest. 258.

[3] By the Succession-Duty Act, 16 & 17 Vic. c. 51, real property is now made liable to a succession duty (sect. 2), payable by eight half-yearly instalments (sect. 21); and for the purpose of succession duty leaseholds are to be considered as real estates. (Sect. 1.) And it is payable on all interests in personal estate, even though created by deed. (Sect. 2.) The duty arises on a succession upon the death of any person dying after the 19th of May, 1853, even though under a deed or will executed before that time (ss. 2, 54), and it is to be a first charge on the interests of the successor. (Sect. 42.) *See* Archbold's *Succession-Duty Act;* Shelford's *Probate, Legacy, and Succession-Duty Acts;* Thring's *Succession-Duty Act.*

A successor entitled to a reversion before the act is liable to duty. *Wilcox v. Smith*, 3 Jur. N. S. 604; 26 L. J. Ch. 596. The purchase of a charge by a father for his daughter, he is the predecessor. *Re Jenkinson*, 3 Jur. 279; 26 L. J. Ch. 241. Settlement by tenant for life and tenant in tail, the latter is the predecessor. *Attorney-General v. Sibthorp*, 3 H. & N. 424; 28 L. J. Ex. 91. Gifts to children by will where the father died before the 9th April, 1805. *Attorney-General v. Fitzjohn*, 27

SUGGESTION. *See* Bond, vol. ii. p. 504; Death, vol. iii. p. 555.

of Death. *See* vol. i. p. 11; Marriage, &c. id. on Record.

Error. *See* vol. iv. pp. 250, 251.

further Breaches. *See* Bond, vol. iii. p. 523.

Right to Execution. *See* Revivor, *ante*, p. 343.

SUICIDE.[1] As to Life Insurance, *see* vol. v. p. 178.

SUING in Another's Name.[2]

Formâ Pauperis. *See ante*, p. 111.

Person or by Attorney.[3]

SUIT, Termination of. *See* Malicious Prosecution and Arrest, vol. v. p. 419.

SUMMARY Conviction. *See* Conviction, vol. iii. p. 216.

SUMMARY Proceedings on Bills and Notes. *See* vol. ii. p. 487.

SUMMING up. *See post*, Trial.

SUMMONS, and Judge's Order. *See* vol. v. p. 258.

Writ of. *See post*, Writ of Summons.

SUNDAY.[4] *See* Holidays, vol. v. p. 50.

L. J. Ex. 79; 2 H. & N. 465. Allowance to be made in ascertaining value of succession, income, expense of collecting rents, and losses by bad tenants (*Re Elwes*, 28 L. J. Ex. 46; 3 H. & N. 719); or for property relinquished, or of which the successor has been deprived. *See* 29 L. J. Ex. 19; 11 Ex. Rep. 452.

[1] In criminal law, the feloniously killing of one's self; the deliberate and intentional destruction of one's self by a person of years of discretion and in his senses; self murder. 4 Bl. Com. 189. In a larger sense, the voluntary killing of one's self, from whatever cause. *See* 5 Man. & G. 639; 3 M., G. & Scott, 450.

If two persons mutually agree to commit suicide together, and accordingly take poison, or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. *R. v. Dyson*, R. & R. 523. *R. v. Alison*, 8 C. & P. 418.

An attempt at self-destruction is an indictable offence, and punishable as a misdemeanor.

[2] We have seen that, in general, actions must be brought in the name of the parties with whom the contract has been made, and by or against the persons whose interests in chattels real or personal, or real estate, are affected. *See* Chose in Actions, vol. iii. p. 98, n.; Parties to Actions, *ante*, p. 62. But as between trustee and his *cestui que trust*, although the action must be in the name of the former, and the courts of law cannot compel him to allow his name to be used; still, if an action be brought in his name, the court will only stay proceedings till an indemnity is provided to the satisfaction of the master. *Doe v. King*, 2 Dowl. P. C. 880. *Archard v. Coulsting*, 6 Man. & G. 1575. *See* also 4 Ad. & E. 809; 13 Mee. & W. 702; 9 Ex. 486. *See post*, Trustee, p. 588.

[3] Everybody, with the exception of infants and married women, is entitled to sue or defend in person; the retainer and employment of an attorney is wholly optional. Infants must sue or defend by *prochein amy*, or guardian. *See* vol. v. p. 145. A married woman, when sued alone, must appear in person, and plead her coverture. Lunatics and outlaws (*see* 4 & 5 Wm. & M. c. 18, s. 3) may appear by attorney or in person. Where no committee of the former has been appointed, proceedings may be taken or defended by his wife or next friend. See *Rock v. Slade*, 7 Dowl. P. C. 22.

[4] Most nations have decreed one day in seven holy. Among Christians, it is commonly called *Dies Dominica*, or Lord's Day, on account of our Saviour's appearance on that day after his resurrection. The first civil law that was issued for the observance of this day combined it with that of the seventh-day, sabbath, and other festivals.—Eusebius, *Life of Constantine*. It was followed by several imperial edicts in favour of this day, which are extant in the body of Roman law, the earliest being that of Constantine the Great, dated March 7th, 321.—*Corpus Juris Civilis*.

The Sabbath-day was ordained to be kept

I. Statutory Enactments.[1]

II. When included in the Computation of Time.[2]

III. Legal and other Proceedings on.[3]

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holy in England from Saturday at three in the afternoon to Monday at break of day. 4 Canon, A.D. 960.

[1] By 1 Eliz. and 3 Jac. 1, all persons having no lawful or reasonable excuse to be absent are to resort to their parish church or chapel accustomed on Sundays and holy-days, or forfeit twelve pence, to be recovered before justices.

The 1 Car. 1, c. 1, prohibits sports on Sundays. The 3 Car. 1, c. 1, enacts that no carrier with any horse or horses, nor waggonman, carman, wainman, nor drover, shall travel on Sunday under a penalty of twenty shillings; and prohibits butchers from killing on that day. The 29 Car. 2, c. 7, s. 1, enacts that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, or business, or work of their ordinary callings on Sunday (works of necessity and charity only excepted), and prohibits the sale and hawking of goods and wares. Sect. 2 prohibits drovers, horse-coursers, waggoners, butchers, higglers, and their servants, from travelling, and the use of boats, wherries, lighters, or barges, except on ordinary occasions. Sect. 3 exempts dressing of meat, &c. in families, dressing and selling of meat in cooks'-shops or victualling-houses, and crying milk before nine and after four.

By 10 & 11 Wm. 3, c. 24, ss. 13, 14, mackerel may be sold before and after divine service; and forty watermen may ply on the Thames between Vauxhall and Lime-house.

By 6 & 7 Wm. 4, c. 37, bakers are prohibited from baking or selling on Sunday after half-past one o'clock in the afternoon. *See* 26 & 27 Vic. c. 40, regulating bake-houses.

By 3 & 4 Wm. 4, c. 31, election of officers of corporations and other public companies on days happening to fall on a Sunday, is to take place on Saturday or Monday. By 5 & 6 Wm. 4, c. 70, s. 30, if any day appointed by the Municipal Corporation Act shall fall on a Sunday, the business is to be done on the Monday following. By 11 & 12 Vic. c. 42, s. 4, justices may issue search-warrants, or warrants of apprehension in criminal cases, on Sunday. 27 Hen. 6, c. 5, prohibits the holding of fairs and markets on Sundays, except the four Sundays in harvest; and 13 & 14 Vic. c. 23, repeals this exception. 11 & 12 Vic. c. 49, and 16 & 17 Vic. c. 79, regulate the sale of beer and spirituous liquors on Sunday. *See post*, p. 511.

[2] *Term.*—By the stat. 1 Wm. 4, c. 3, s. 3, in case the day of the month on which any term according to the last-mentioned act is to end shall fall on a Sunday, then the Monday next after such day shall be deemed and taken to be the last day of the term. Sunday, when it is the first day, is counted as a part of the term, notwithstanding that no judicial act can be done, or supposed to be done, on that day. *Doe v. Roe*, 1 C. & J. 483. *See post*, Terms of Court, p. 525.

Rules and Practice.—By Reg. Gen. H. T. 1853, Pr. in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. This rule does not apply to a writ of summons specially indorsed. *Rowberry v. Morgan*, 9 Ex. 730.

Sunday is computed in the seven days allowed for an application to justices to state a case, although it be the last day. *Peacock v. Reg.* 4 C. B. 26, Ex.; 27 L. J. C. P. 224. *See* as to the Nuisance Act, 29 L. J. M. C. 23. It is excluded from the twenty-four hours within which a putative father must give notice of appeal. 17 L. J. M. C. 111.

In time for Pleading.—As the days are not expressed by the act to be eight clear days, it is reckoned exclusively of the first day and inclusively of the last, unless the last day happen to fall on a Sunday, in which case the time shall be reckoned exclusively of that day also.

In Scire Facias.—Sunday is not reckoned one of the days for the writ to be in the sheriff's office. 1 B. & A. 528.

Bills of Exchange.—Bills falling due on Sunday are payable, and should be presented on the Saturday. *Tassell v. Lewis*, 1 Ld. Raym. 743. Under 18 & 19 Vic. (the Bills of Exchange Act) Sunday is not included in the days for appearance if it is the last. 1 F. & F. 906.

Money Payable on Sunday.—The defendant consented to a judge's order to pay debt and costs by instalments on the 25th of every month, and in default the plaintiff to be at liberty to sign judgment. The day on which the fourth instalment fell due was on a Sunday, and the defendant tendered the money to the plaintiff on the Monday after; the latter refused to accept it, and then signed judgment. The court made absolute a rule to set aside the judgment, on the ground that it was not authorised by the judge's order reasonably construed. *Morris v. Barrett*, 29 L. J. C. P. 102.

In *Hobdell v. Miller*, 6 Bing. N. C. 292, where the arbitrator made an order for the defendant to pay the debt on a particular day, which fell on a Sunday, *Tindal, C. J.* said:—"As to payment on Sunday, if the defendant pays on Monday, he will not be attached. *See* Charter-Party, vol. iii. p. 79.

[3] *Process.*—By sect. 6 of 29 Car. 2 no writ,

IV. Contracts made on; when Illegal, and how Pleaded.[1]

process, warranty, order, judgment, or decree, except in cases of treason, felony, or breach of the peace, shall be served or executed on the Sunday; and if so served the service shall be void to all intents and purposes. And it cannot be made good by any subsequent waiver of the defendant. *Taylor v. Phillips*, 3 East, 155. But delivery of process by post on Sunday is not a service within the act. *R. v. Leominster*, 31 L. J. M. C. 95. An arrest cannot be made on a Sunday, even upon a *capias utlagatum* (Barnes, 319), or for non-payment of a penalty upon conviction. 1 T. R. 265. And the statute extends to all notices on which rules are made; and hence it has been holden that service of notice of plea filed on a Sunday is void. 8 East, 547.

Where A. was arrested at the suit of B., and discharged, the sheriff, not knowing that there was also a detainer in his office at the suit of C., and on the Sunday following he was arrested at C.'s suit, the court discharged him out of custody (5 T. R. 25), considering the arrest on the Sunday as an original taking, or as a retaking after a voluntary escape. Barnes, 373. See *Samuel v. Buller*, 1 Ex. 349; 17 L. J. Ex. 34. But after a negligent escape the defendant may be retaken on a Sunday, and that either by the officer upon fresh pursuit, or by virtue of an escape-warrant (2 Ld. Raym. 1028; 2 Salk. 626; 6 Mod. 95, S. C.); and a detainer by another creditor is not vitiated by the original arrest being on Sunday, if no collusion. 15 L. J. M. C. 113. Bail may take their principal on a Sunday in order to surrender him (6 Mod. 1; Atk. 239; but *see* 2 Bl. Rep. 1273), for this is not by virtue of any process at all. And it should seem that process of contempt, being of a criminal nature, may be served upon that day. 12 Mod. 348; 1 Atk. 55; Willes, 459. But a rule *nisi* for an attachment for non-payment of money pursuant to the master's allocatur cannot be so served. 8 T. R. 86.

A writ of summons tested on a Sunday is a nullity. *Corrall v. Foulkes*, 5 D. & L. 262. It has been questioned whether an affidavit sworn on Sunday is void. *Doe v. Williamson*, 3 D. & L. 328; 15 L. J. Q. B. 39. The exception in the 29 Car. 2, c. 7, s. 6, that process may be executed on the Lord's-day in cases of treason, felony, or breach of the peace, extends to all indictable offences, and is not restricted to treason and felony, and such misdemeanors as involve an actual breach of the peace. *Rawlins v. Ellis*, 16 Mee. & W. 172; 10 Jur. 1039; 16 L. J. Ex. 5. Service of notice of appeal on Sunday is void. *R. v. Justices of Middlesex*, 17 L. J. M. C. 111. *Semble*, where jurors cannot agree, court may be adjourned till Sunday. *R. v. Newton*, 3 C. & Kir. 85; 13 Q. B. 716. An appointment of overseers on that day is, it seems, invalid. Lofft, 618; Cowp. 139. An inlistment on Sunday is legal. *Wolton v. Gavin*, 16 Q. B. 48; 20 L. J. Q. B. 73.

[1] The 29 Car. 2 (*see ante*, p. 509, n. [1]) invalidates a sale of goods on Sunday in the ordinary course of the trade or business of the party attempting to enforce such contract. *Fennell v. Ridler*, 5 B. & C. 406. *R. v. Whitnash, Inhabitants of*, 7 B. & C. 602. But not either by the statute or common law, if the sale is not made in the exercise of the trade or ordinary calling of the vendor or his agent. *Drury v. Delafontane*, 1 Taunt. 131. *Blocksome v. Williams*, 3 B. & C. 233.

An agreement entered into on a Sunday, by which an attorney renders himself personally liable for the settlement of his client's debt, is not a work in his ordinary calling. *Peate v. Dicken*, 1 C., M. & R. 422. Nor is a guarantee given on Sunday by one trader to another for the faithful services of a clerk or traveller (*Norton v. Powell*, 4 Man. & G. 42) invalid. The statute only contemplates the case of persons exercising their trades, &c. on a Sunday; and therefore, where A. sent a mare to S., a farmer, to be covered by a stallion belonging to him, and the mare was taken to S.'s stables, and covered accordingly, on a Sunday:—*Held*, that the contract was not void, it not having been made by S. in the exercise of his ordinary calling. *Scarfe v. Morgan*, 4 Mee. & W. 270. As the stat. 29 Car. 2, c. 7, s. 5, prohibits only the labour, business, or work done in the course of a man's ordinary calling, it does not apply to a contract of hiring; and, therefore, such a contract for a year, made on Sunday, between a farmer and a labourer, is valid, and service under it confers a settlement. *R. v. Whitnash*, 7 B. & C. 596; 1 Moo. & R. 452.

Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—*Held*, that the bill was not void under the statute. *Begbie v. Levi*, 1 C. & M. 180; 1 Tyrw. 130.

An apprentice to a barber in Scotland, bound "not to absent himself from his master's business on holidays and week-days, late hours or early, without leave," went away on Sundays, without leave:—*Held* by the Lords, reversing the interlocutor of the Court of Session, that the apprentice could not be lawfully required to attend his master's shop on Sundays. All sorts of handicraft are illegal in England as well as in Scotland, not being works of necessity, or mercy, or charity. *Phillips v. Innes*, 4 Clark & Fin. 234.

The contract, in order to bring it within the statute, must be completed on the Sunday. Therefore, if a parol contract for a horse be entered into on a Sunday, and it is not delivered, nor anything paid until a subsequent day, the contract is valid; for, under the Statute of Frauds, there was no binding contract on the Sunday. *Blocksome v. Williams*, 3 B. & C. 232. And where there is a delivery and acceptance within the Statute of Frauds before the Sunday, the contract will not be void, although the

V. Licensed Victuallers subject to Special Regulations as to.[1]

SUPERSEDEAS.

I. As to Prisoners. *See* vol. v. p. 245.

II. ,, Proceedings in Error being by Execution. *See* vol. iv. p. 251.

SURPLUSAGE in Pleading. *See ante*, p. 141, n.[1].

SUR-REBUTTER—SUR-REJOINDER. *See ante*, p. 137, n.

SURVIVING Plaintiff or Defendant.[2]

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vendor may not have sent away the goods from his premises until that day. *Beaumont v. Brengeri*, 5 C. B. 301. If defendant keep goods sold on Sunday, and afterwards promise to pay for them, he will be liable on a *quantum meruit*. *Williams v. Paul*, 6 Bing. 653. *Smith v. Sparrow*, 4 id. 84. In the former case a defendant had bought and received some cattle of the defendant, a drover, on the Sunday, kept them, and afterwards expressly promised payment. *Williams v. Paul*, 6 id. 653; commented on in *Simpson v. Nicholls*, 3 Mee. & W. 240.

The statute does not apply, and the purchaser may avail himself of the contract, if he did not know that the vendor was exercising his ordinary calling on the Sunday, although the vendor be on that ground unable to sue thereon (*Blocksome v. Williams*, 3 B. & C. 232; 5 D. & R. 82; 1 Taunt. 135); though this appears to have been doubted. *Fennell v. Ridler*, 5 B. & C. 406; 8 D. & R. 204.

A coach proprietor having refused to carry the plaintiff because there was no other passengers, he hired a post-chaise to go to his destination :— *Held*, that the proprietor was liable for the chaise-hire, notwithstanding the contract was made on a Sunday. *Sandiman v. Breach*, 7 B. & C. 96. The stat. 3 Car. 1, c. 1, and 29 Car. 2, c. 7, do not make it illegal for stage-coaches to travel on a Sunday. (Id.)

A railway company is bound to deliver a traveller's luggage left by him on Sunday. *Stallad v. Great Western*, 2 B. & S. 419. *The statute must be pleaded*, but it need not conclude "*contrà formam statute*." *Peate v. Dickens*, 1 C., M. & R. 422. *Norton v. Powell*, 4 Man. & G. 42.

If the defendant plead that the goods were sold by the plaintiff on a Sunday in the course of his ordinary trade and calling, it will be no replication to say that the plaintiff had retained, and not returned the goods; but the plaintiff must show and prove a subsequent promise to pay for them. *Simpson v. Nicholls*, *supra*; and see *Williams v. Paul*, *supra*.

[1] The 18 & 19 Vic. c. 118, s. 1 (which is set out in vol. i. p. 281, n.), repeals the 17 & 18 Vic. c. 79 (the act for regulating the sale of beer, &c. on the Lord's-day). The cases on the earlier statutes need only be referred to. *R. v. Whitely*, 3 H. & N. 143; 27 L. J. M. C. 217. *Smith v. Vaux*, 6 L. T. 46.

The 11 & 12 Vic. c. 49, is not repealed by 17 & 18 Vic. c. 70, or 18 & 19 Vic. c. 118, but still regulates the closing of houses for the sale of wine, spirits, beer, or other fermented or distilled liquors during the morning service, the 18 & 19 Vic. c. 118, applying only to the afternoon service. *Harris v. Jenns*, 9 C. B. (N. S.) 152; 30 L. J. M. C. 183.

Three persons having walked on a Sunday a distance of four miles from a town for amusement or exercise, called at an inn, in which they were admitted and served with liquor between the hours of three and five in the afternoon. They afterwards returned to the town, two by omnibus and the third on foot :— *Held*, that they were travellers within the meaning of the 18 & 19 Vic. c. 118, s. 2, and that, therefore, the innkeeper ought not to be convicted for opening his house to them for the sale of liquor contrary to that act. *Taylor v. Humphreys*, 7 Jur. N. S. 1288; 30 L. J. M. C. 242; 9 W. R. 705; 4 L. T. (N. S.) C. P. 514. See *Stewart v. Cumberland*, 1 E. & E. 401. *Finch v. Blundell*, 5 L. T. 672.

It is, we have seen (vol. i. p. 281), a question of fact who is a traveller within the exceptions in the statute. But where a man goes to a place a short distance from his home for the mere purpose of taking refreshment, he is not such a traveller; but one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is. *Taylor v. Humphreys*, 10 C. B. (N. S.) 429; 30 L. J. M. C. 242. And where a person went to a beerhouse, the door was shut, the landlady said she could not draw, it was past the hour, but she said she would give A. a drop of beer, which she did. She refused money, but said, "You may send me some greens," which was done : — *Held*, there was no evidence to justify a conviction for selling beer after the hours prescribed by the act for closing. *Petherick v. Sargent*, 6 L. T. (N. S.) Q. B. 48.

[2] As to death of co-plaintiff or co-defendant *pendente lite*, see vol. i. p. 9. Upon the death of one joint-contractor (one of several partners, for instance), the whole legal interestin or liability on the contract survives, and the survivor alone can sue or be sued, the per-

SWEARING. *See* Affidavit, vol. i. p. 240; Affirmation, id. p. 265; Oath, *ante*, p. 19; *post*, Witness.

T.

TABLE of Costs. *See* vol. iii. p. 314.

TACK. In Scotch law, a contract, whereby the use of anything is set or let for hire or a reserved rent, called the tack-duty. Tacksman, a tenant or lessee.

TACKING.[1]

TAIL, Estate in. *See* Lease, vol. v. p. 339; *post*, Waste.

I. Origin and Definition.[2]

II. General Incidents: General or Special,[3] Male or Female.[4]

sonal representatives of the deceased cannot be a party to the proceeding, although the whole beneficial interest belonged to him. *Anderson v. Martindale*, 1 East. 497. The survivors, when suing in their own right, may join any cause of action accruing to themselves. Thus, a surviving partner may recover, or be made liable in the action on a count properly framed (*see* Form, B. & L. 134), or debt due to or from the late firm, and a debt due to or from himself individually. When all the parties to a joint-contract be dead, the right of suit is vested in the executors or administrators of the last survivor. So if one of several executors die, the survivors alone are entitled to sue, or liable to be sued. Lush, Pr. 48. These rules apply to joint-contracts; if the contracts be several, or joint and several, the plaintiff may sue all or each separately at the same time.

In actions arising out of torts, on the death of one of several interested in the subject-matter of the suit, the survivors must sue, and the representatives of the deceased party cannot join. See *Smith v. London and N. W. Rail. Co.* 2 E. & B. 69. On the death of a joint *tort feasor*, the executors or administrators of the deceased may be sued, and the others in a separate, but not the same action. *See* 1 Saund. 207, n.

[1] The uniting securities given at different times, so as to prevent any intermediate purchaser from claiming a title to redeem or otherwise discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title. The term is most frequently applied to mortgages, and is descriptive of the method by which a third mortgagee may obtain a priority over a second by buying in the first mortgage and uniting it to its own. *See* Coote on Mortgages, 391; Story's *Equity*, 2; Spence's *Chan.* 722; 2 Drury, 78; 1 White's *Equity Cases*, 406, 410. The doctrine is not recognised in America.

[2] To perpetuate estates in the families of owners, the nobility obtained the stat. *De Donis* (West. 2, 13 Edw. 1), which in effect enacted that the intention of the donor should be observed, so that the donee should not have the power by alienation of barring the right of his issue, if any, or of the donor, if there should be no issue, or if such issue should fail. Under this act it was held that the donee took a particular estate, which was denominated fee-tail, and that the donor had an ultimate fee-simple left in him, expectant upon the determination of such particular estate. 2 Bl. Com. 112; Co. Litt. 327. Hence an estate tail is an estate descendible exclusively to the *heirs of the body*, or lineal descendants of the person to whom it is given, in things within the statute. Smith's R. & P. P. 147.

[3] Estates tail are either general or special. Tail general is, where only one person's body is specified from which the issue must be derived; as, where the gift is simply to A. and the heirs of his body. Tail special is, where both the original parents are indicated, as if it be to A. and the heirs of his body to be begotten upon B., or to B. and the heirs of her body to be begotten by A.; or to A. and B. and the heirs of their bodies; in which last case, the parties are joint-tenants of the inheritance. But if the gift had been to two persons, either of the same sex, or by law absolutely incapable of intermarriage, and the heirs of their bodies, then they would have been joint-tenants for life; so that the entirety would go to the survivor of his life, but tenants in common in remainder of the inheritance in tail general.

[4] Again, whether general or special, the estate tail may be made descendible to all the issue in their order, without distinction

III. How Created.[1] IV. How Barred.[2]

TAKING.

I. In Larceny. *See* vol. v. p. 319. II. In Trespass. *See post*, Trespass.

TALES. *See* Jury, vol. v. p. 282.

TALLIES. Use of in Exchequer abolished by 23 Geo. 3, c. 82. Old ones ordered to be destroyed by 4 & 5 Wm. 4, c. 15.

TAM quam. *As well as.* Used where a proceeding is applied to two things or persons, as well as of force as of fact. Bract. f. 138. *See* Qui tam, *ante*, p. 300.

TAXATION of Costs. *See* vol. iii. p. 310.

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of sex, as in the preceding examples; or it may be continued to the heirs male, or, which is not very usual, to the heirs female. In the two latter cases, which are distinguished by the appellation of tail male and tail female, the descent must be traced entirely through males, or entirely through females. Co. Litt. 19; 5 Bac. Abr. 717.

[1] The statute *De Donis* speaks only of three modes of creating an estate tail: viz. by a gift to a man and his wife and to the heirs of their bodies; a gift in frank marriage and a gift to a person and the heirs of his body issuing; yet if lands be given to a person and his heirs, and if the donee die without heirs of his body, that it shall remain to another, this shall be an estate tail by the equity of the statute, though it be out of the words, for the makers of the act did not mean to enumerate all the forms of estates tail, but to put these examples so as all manner of estates tail, general or special, are within the power of the act. Plowd. 53; 2 Inst. 334.

With respect to the kind of property on which the statute *De Donis* was meant to operate, the only word in the statute is *tenementum*, which has been shown to signify everything that may be holden, provided it be of a permanent nature; so that not only lands may be extended, but also every species of corporeal property. 2 Inst. 20; 7 Rep. 33, b; 2 Ves. 170; 1 Bro. Rep. 377.

In a *deed*, to create an estate tail, the word "heirs" is necessary as well as words of procreation (Co. Litt. 20, n. b); but in a devise it is not essential, any words denoting an intention to give the devisee an estate of inheritance descendible exclusively to his or some of his lineal descendants suffice. 1 Pres. Shep. Touch. 105. *See* rule in *Shelley's case*, *ante*, p. 424.

The 7 Wm. 4, & 1 Vic. c. 26, s. 24, directs that, in a will, the words "die without issue," and similar expressions, shall be construed to mean a want or failure of issue in the lifetime, or at the death of the party, and not an indefinite failure of issue; unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a gift of an estate tail to such person or issue, or otherwise.

Tenant in tail, having an estate of inheritance, has a right to all deeds and muniments belonging to the lands, which the Court of Chancery will order to be given up to him. 2 P. Wms. 471. *See post*, Title Deeds, p. 534.

A tenant in tail, having only a particular estate, and not the entire property, is not bound to pay off any charges or incumbrances affecting the estate. But where a tenant in tail does pay off an incumbrance charged on the fee-simple, the presumption is that such payment was made in exoneration of the estate; because he may, if he pleases, acquire the absolute ownership. But the tenant in tail may, by taking an assignment of the incumbrance to a trustee for himself, or by several other acts, charge the estate with the payment of such maintenance. 1 Mo. R. 206. It was formerly held, that a tenant in tail was not even bound to pay the interest of any incumbrance charged on the estate; but it has been since resolved that in some cases he is bound to keep down the interest.

There can be no estate tail in personalty. The words "heirs and heirs of his body," are quite inapplicable to personal estate. Fearne, *Con. Rem.* 461. A gift of personalty to A. simply, without more, vests in him the absolute interest. *Byng v. Lord Stafford*, 5 Beav. 558.

[2] The act for the abolition of fines and recoveries (3 & 4 Wm. 4, c. 74) has instituted in their stead a simple deed executed by the tenant in tail, and to be enrolled within six calendar months after the execution. (Sects. 41, 74.) By such a deed a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate simple; thus at once defeating the claims of his issue, and all persons having any estates in remainder or reversion.

TAXES.[1] *See* Succession Duty, *ante*, p. 507.

I. Different Kinds of, and Time of Payment of, p. 514.
(A) *Assessed*, p. 514.
(B) *On Land.* *See* vol. v. p. 295.
(C) *On Property.* *See* id. p. 289, *and Insurance*, id. p. 103.
II. Officers connected with, p. 514.
III. Contracts, *see* vol. v. p. 304, and Covenants to Pay, id. p. 475.
IV. Levying Arrears, p. 515.
V. Jurisdiction as to Questions on, p. 515.

I. Different Kinds of, and Time of Payment of.

(A) *Assessed.*[2]

II. Officers connected with.[3]

[1] In a general sense, any contributions imposed by government upon individuals for the use and service of the state; in a more limited application, a rate or sum imposed by government upon individuals, lands, houses, personal chattels, and possessions, as distinguished from custom duties and excise. "Taxes" generally import parliamentary (in these the Crown has an inheritance: *Brewster v. Kitchen*, 1 Ld. Raym. 320); rates and assessments, parochial and local charges.

[2] A reference to the following statutes may be useful: 9 & 10 Vic. c. 56, provides the forms of proceeding for the recovery. The 13 & 14 Vic. c. 96; 14 & 15 Vic. c. 33; 16 & 17 Vic. c. 90; and 17 & 18 Vic. c. 1, authorise compositions for these taxes. 14 & 15 Vic. c. 36, is the Inhabited House-Duty Act. 16 & 17 Vic. c. 90, imposed new duties in respect of servants, carriages, dogs, &c. 17 & 18 Vic. c. 85, regulates the appointment, sureties, and duties of collectors.

Lodging-houses in watering-places let during the season, and wholly unoccupied for the rest of the year, are chargeable (*Sollett and Glass's case*, 8 Price, 123, n. *Wright's case*, id. 125, n); as, where they are only let for six months. *Skinner's case*, id. 124, n. And where defendant used part of a smaller house adjoining to his own dwelling-house, and having an internal communication, as an office for conducting his business as an attorney:—*Held*, that was not within the exemption of 57 Geo. 3, c. 25, from the window-tax. *Rex v. Dryden*, 8 Price, 103. So, the lower room of a dwelling-house, used as an accountant-room, having no internal communication (id. 105); so, the window of a shop, having no internal communication (id. 106); and the upper part of a dwelling-house, let for the purpose of a warehouse, and having no communication with the part of the dwelling-house occupied, but having a distinct external door, is not within the exemption. (Id. 105.)

Where the party assessed had not given the notice to the assessor required by the 43 Geo. 3, c. 161:—*Held*, that the commissioners had no authority in their discretion to discharge the assessment, the surveyor having only the means of demanding a case for the opinion of the judges, upon a determination on an appeal. *Semble*, houses left unoccupied during part of the year are liable to the duties for the whole year, where the furniture is not taken away. *In re Cloyton*, 8 Price, 117.

By the 11 & 12 Vic. c. 90, no person is entitled to be registered as a voter unless, on or before the 20th July, he shall have paid all assessed taxes which have become payable by him previous to the 5th January preceding. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes are payable, and are to be paid quarterly, on the 20th July, the 20th September, the 20th December, and the 20th March. By the 48 Geo. 3, c. 141, s. 1, the collectors are directed to collect the assessed taxes in equal moieties within twenty-one days after the 10th October and 5th April; but with a proviso that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous acts. A quarter's house-tax due from a householder on the 20th December was not demanded till the 11th April following, and he did not pay it before the 20th July:—*Held*, that the quarter's assessed taxes which, by the 43 Geo. 3, c. 161, s. 23, become payable on the 20th December, are taxes which, in the language of the 11 & 12 Vic. c. 90, have become payable before the succeeding 5th January, although no demand for payment has been previously made. *Ford v. Smedley*, 2 Lutw. Reg. Cas. 203; 12 C. B. 622; 16 Jur. 1159; 22 L. J. C. P. 35.

An assessment under the Assessed Tax Acts (43 Geo. 3, c. 99, and id. c. 161), is final and conclusive, unless appealed against in the manner prescribed by the 43 Geo. 3, c. 99, s. 24. *Allen v. Sharp*, 2 Ex. 352; 17 L. J. Ex. 209.

[3] By 25 Vic. c. 22, s. 45, commisioners for taxes are authorised to appoint more than two collectors of income and assessed taxes for each parish.

A *mandamus* lies to compel commissioners to re-assess. *In re Wootton*, 6 Price 105.

The commissioners executing the several acts relating to the assessed taxes for dis-

IV. Levying Arrears.[1]
V. Jurisdiction as to Questions on.[2]

TEINDS. In Scotch law, tithes.

TELEGRAPHS.[3] *See* also Electric Telegraph, vol. iv. p. 224.

tricts, are not entitled under the 43 Geo. 3, c. 161 (empowering them to discharge assessments at their discretion), to exonerate persons charged for taxes under the 10th section, on the ground of their not having been occupied during the whole year, unless notice in writing has been given to the assessor of such houses not having been occupied. *In re Cloyton*, 8 Price, 117. And if the commissioners should insert any such allowance in their schedule of discharge (as in that case the opinion of the judges cannot be taken, because that can only be done in a case of appeal), the court will order them to amend the schedule by striking it out. (Id.) So the commissioners are ordered to state and sign a case for the appellants, for the opinion of a judge, where a question arose respecting certain cases of duty made by a surveyor on the appellants. *In re Yarmouth*, 9 Price, 149. See *Rex v. Davies*, 1 Ld. Kenyon, 329.

A joint-collector is liable for any deficiency of his coadjutor in the collection for the year. *In re Moorly*, 5 Price, 5.

The insertion of the collector's name, as such, in the warrant of the commissioners, is not a sufficient nomination. *Rex v. Radley*, Forrest, 150.

If there be in a parish two districts and two collectors, and one collector misapply, the whole parish is responsible. *See* 3 Anst. 920. *Ex-parte Henllan*, 7 Price, 594.

The collector's bond is valid, though only one surety. *Peppin v. Cooper*, 2 B. & A. 431. And such bond covers the expense of process, &c. against him. *R. v. Deane*, 2 Anst. 369. And on the collector's bankruptcy the Crown may seize all his property by warrant under the 49 Geo. 3, and also under an extent. *R. v. Jones*, 8 Price, 108.

The office of collector is an annual office, and the bond is satisfied by a due performance of the duty for one year; for, being taken under the act, the liability can only be co-extensive with the duty imposed by the act. *Peppin v. Cooper*, *supra*. So, the bond may be put in suit against the surety, although it may happen that another person may have been jointly appointed collector, without first sealing the bonds, &c. against the person. (Id.)

Collectors, in an action for an excessive charge, are not entitled to a month's notice. *Umphelby v. M'Lean*, 1 B. & A. 42. But a collector of taxes exacting duty, in respect of which there had been no charge at all in the assessment upon the person from whom the payment was exacted, is not liable to the penalties under the 43 Geo. 3, c. 99. *Lister* (*qui tam*) *v. Priestley*, Weightw. 405.

[1] Separate and distinct arrears may be included in the same warrant. *Patchet v. Bancroft*, 7 T. R. 367.

A preliminary assessment is necessary to levy for years passed, where the power is to assess yearly. *Newton v. Young*, 1 N. R. 187.

It was doubted whether a re-assessment could be made for the duties on carriages, servants, and horses. *Rex v. Wimbleton*, 2 Anst. 855.

In levying arrears, the goods of the person charged can only be distrained. *Shaftesbury v. Russell*, 1 B. & C. 666.

[2] The limitation to appeal is confined to the time prescribed by the commissioners under 25 Geo. 3. *Rex v. Walker*, 6 T. R. 436.

The Court of Exchequer will not, upon motion, enter upon any question of rateability to the assessed taxes. *Rex v. Navy* (*Commissioners of*), 3 Anst. 850.

[3] These are now principally regulated by the Telegraph Act, 1863 (26 & 27 Vic. c. 112.

An action lies against a corporation for a libel transmitted by telegraph, allowed to be known by the public from want of proper care (*Whitfield v. South-Eastern Railway Co.* 1 E., B. & E. 115; 27 L. J. Q. B. 229; 4 Jur. 688); and against a telegraph company for not correctly or duly transmitting messages intrusted to them.

A telegraph company had power, by their act, to place under any public road their wires and pipes, and to break up the pavement or soil of such roads, making compensation for all damage, provided that nothing in the provision should extend or apply to any railway, except that the company might carry their wires and pipes directly, but not otherwise, across any railway, so as not to damage, or be likely to damage, the railway or any of the works connected therewith. A railway, pursuant to the provisions of the act incorporating the company, crossed a public road on the level:—*Held*, that the telegraph company had no right to place their wires and pipes under that part of the public road where it was crossed by the railway on the level, as that part was not a public road, but a railway within the Telegraph Company's Act. *South-Eastern Railway Co. v. European and American Electric Telegraph Co.* 10 Ex. 363; 2 C. L. R. 467; 23 L. J. Ex. 113.

A telegraph company, without any parliamentary powers, laid down their wires in tubes under a public highway. An information and bill were filed complaining of those acts as a nuisance to the public, and as an invasion of the rights of the owner of the adjacent land in the soil of the road. The

TEMPEST. Liability of Tenant for Injuries to Premises from, *see* vol. iii. p. 479 ; of Carrier for Loss or Damage by, id. p. 33.

TENANCY. *See* Landlord and Tenant, vol. v. p. 296.

TENANT after possibility of Issue Extinct.[1]

at Will. *See* vol. v. p. 301.

by Copy of Court Roll. *See* vol. iii. p. 225.

by Curtesy. *See* id. p. 531.

by Dower. *See* vol. iv. p. 130.

by Elegit. *See* id. p. 224.

by Sufferance. *See* vol. v. p. 301.

for Life. *See* id. p. 388.

for Years. *See* id. p. 338.

from Year to Year. *See* id. p. 299.

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court refused to grant an injunction until the legal right had been established. *Attorney-General v. United Kingdom Electric Telegraph Co.* 30 Beav. 287; 8 Jur. N. S. 583; 31 L. J. Ch. 329; 10 W. R. 167.

On an indictment for a nuisance in obstructing a highway by erecting telegraph-posts upon it, the judge directed the jury, first, that in the case of an ordinary highway, although of a varying and an unequal width, running between fences one on each side, the right of passage or way, *primâ facie*, and unless there is evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages; secondly, that a permanent obstruction erected on a highway, placed there without lawful excuse, which renders the way less commodious to the public, is an unlawful act, and a nuisance at common law, and that if the jury believed that a company placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty, and that the circumstance that the posts were not placed upon the hard or metalled part of the highway, or upon a foot-path artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict:—*Held*, that these directions were right. *Reg. v. United Kingdom Electric Telegraph Co.* 9 Cox, C. C. 174; 31 L. J. M. C. 166; 10 W. R. 538; 6 L. T. (N. S.) 378, Q. B.

[1] Is defined by Littleton to be where tenements are given to a man and to his wife in especial tail. If one of them die without issue, the survivor is tenant in tail after possibility of issue extinct; as, if they have issue, and the one die, albeit that during the life of the issue the survivor shall not be said tenant in tail after possibility of issue extinct, yet, if the issue die without issue, so as there be not any issue alive which may inherit by force of the entail, then the surviving party is tenant in tail after possibility of issue extinct. Nothing but a moral impossibility of having issue can give rise to this estate. Thus, if a person gives lands to a man and his wife, and to the heirs of their two bodies, and they live to a hundred years without having issue, yet they are tenants in tail, for the law sees no impossibility of their having issue. 1 Inst. 28, a.

The Court of Chancery, by analogy to the rule adopted in the case of tenant for life without impeachment of waste, will restrain persons seised of estates tail, after possibility of issue extinct, from pulling down houses, cutting down trees planted for shelter or ornament, or any other kind of malicious waste. 2 Ch. Ca. 32; 2 Show. 68; 2 Freem. 53. The privilege which this tenant enjoys arises from the privity of estate, and because the inheritance was once in him; therefore, if he grants over his estate to another, his grantee will be bare tenant for life. 2 Inst. 28, a; 3 Leon. 241.

TENANT in Fee. *See* vol. iv. p. 440.

TENANT Fixtures. *See* id. 475.

TENANTS in Common.

I. Definition.[1]

II. General Incidents.[2]

III. Rights and Liabilities as regards each other and Third Persons.[3]

IV. As to being subject to Curtesy or Dower. *See* Dower, vol. iii. p. 531.

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[1] The holding of an estate in lands by several persons by several distinct titles, but by unity of possession. 2 Bl. Com. 191; 4 Kent's Com. 367.

[2] The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common, to the residue. So, one tenant in common may have but a life or other limited interest in his share; another may be seised in fee of his; and the owners of another undivided share may be joint tenants as between themselves; whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is, therefore, the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

When the rights of parties are distinct, that is, for instance, when they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property. Of the two, a tenancy in common is no doubt preferable, inasmuch as a certain possession of a given share is preferable to a similar chance of getting or losing the whole, according as the tenant may or may not survive his companions. But the enjoyment of land in severalty is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant, or tenant in common, to compel his companions to effect a partition between themselves, according to the value of their shares. *Ante*, p. 63.

Tenancy in common may exist in a personal chattel, as of a ship, by several persons at the same time, with distinct but undivided interests.

[3] One tenant in common might have had (before its abolition) a writ of waste against another who had committed waste in the lands. Statute of Westminster, 2, c. 22; 2 Inst. 403; Co. Litt. 200, b. So, he or his executor, &c., may have an action of account against the others as bailiffs, for receiving more than their portion of the profits of the estate. 4 & 5 Anne, c. 16; Co. Litt. 172, a; 186, a; 200, b; 3 Leon. 228; F. N. B. 118; vol. i. p. 109. So, one tenant in common may maintain ejectment or other action against the others, if they eject him or withhold the possession from him (Co. Litt. 199, b); but it must be an actual disseisin, such as turning him out, hindering him to enter, &c.; a bare perception of the profits is not sufficient. 1 Salk. 392; 7 Mod. 39; 1 East, 568; 3 Burr. 1895.

In trespass against B., C., and D., for turning A. out of his house, and keeping the house and goods from him, it was holden to be no plea to say that A. had nothing in the said house and goods but jointly and undividedly with D. 2 N. R. 188. But for a new entry on the premises without an ouster no action of trespass will lie. Litt. 323; Th. Dig. 11, c. 30, 6; 1 Salk. 4; Skin. 6. And also where there are two tenants in common of a personal chattel, such as a horse, and one of them seizes it for his own use solely, the other has no remedy by action. Litt. 323; Co. Litt. 200, a; 1 T. R. 651. Therefore, if one of two partners become bankrupt, his assignees cannot maintain trover against the solvent partner or his executor for any of the partnership goods (1 East, 363); nor against any other person to whom the solvent partner may have given or delivered them (id. 368); because in these cases the solvent partner, his executor, and the persons to whom he delivered the goods respectively were, as to these goods, tenants in common with the assignees of the bankrupt. But if a tenant in common destroy the goods, &c., as if there be two tenants in common of a park or dove-house, and one of them destroy all the deer, or take all the old doves and destroy the flight, the other may undoubtedly maintain trespass against him. Co. Litt. 200, a, b. And where one tenant in common of a ship took it away and sent it to the West Indies, where it was lost in a storm, this was holden to be evidence of a destruction, and the other tenant in common recovered against him in an action for his moiety. Bull. N. P. 34, 35.

Semble, acts by one tenant in common, which entirely destroy or put an end to the enjoyment of the property in common, may amount to an ouster by such tenant in common of his co-tenant in common. *Beauman v. Kinsella*, 8 Ir. Com. Law Rep. 291, Q. B.

V. Partition of Estates in Common.[1] *See ante*, p. 65.

TENANTS, Joint. *See* vol. v. p. 256.

TENDER of Amends: By Constable, *see* vol. iii. p. 191; by Justices, *see* vol. v. p. 293; by Parties entitled to Notice of Action, *see* id. p. 548; of Amends in Distress Damage Feasant, *see* vol. iv. p. 87.

TENDER of Conveyance. *See post*, Vendor and Purchaser.

TENDER of Debt to Extinguish Lien. *See* vol. v. p. 387.

TENDER of Money.[2]

[1] Thirty-six years' uninterrupted possession by one tenant in common is sufficient ground for the jury to presume an actual ouster of the co-tenant. *Doe v. Prosser*, Cowp. 217, *Semble*, overruling *Farinclain v. Shockleton*. 5 Burr. 2604. But in *Peaceable v. Read*, 1 East, 568, it was determined, that where a tenant in common levied a fine of the whole estate, and took the rent and profits afterwards, without consent, for nearly five years, this is no evidence wherein a jury should be directed by the judge of the court to find an ouster of the co-tenant at the time of the fine levied.

One tenant in common cannot maintain an action against his co-tenant in possession of the whole property, under a demise of his companion's moiety for cutting trees of a proper age and growth. *Martyn v. Knowllys*, 8 T. R. 145.

Where one tenant in common sues in action against his co-tenant, and the declaration takes no notice of his limited interest, but alleges an expulsion or total destruction, the defendant may pay money into court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, or traverse the plaintiff's property. *Creswell v. Hedges*, 8 Jur. N. S. 767; 31 L. J. Ex. 497; 10 W. R. 777; 7 L. T. (N. S.) 70.

If a tree spreads its roots into another's soil, they are tenants in common of the tree, and he may have an action against the other for the damage. *Waterman v. Soper*, 1 Ld. Raym. 737.

Tenants in common could not join in a real action, for they had several titles (Litt. 311); nor in a writ of waste upon a lease for life; nor for forging of false deeds, for that concerns the inheritance. 2 Cro. 231. So, if they make a joint lease in tail or for life, rendering rent, which is not entire, but may be divided, they shall make several avowries for several titles (Litt. 314; 5 T. R. 249); or if a distress for rent, not entire, be rescued, they shall not join in rescous. Litt. 314. But in an action for a thing entire and incapable of division, tenants in common must join (Co. Litt. 197); or in *quare impedit* (Co. Litt. 197, b; Th. D. l. 2, c. 3, s. 3); or in waste upon a lease for years. 2 Mod. 61. So, in all personal actions for a matter that concerns the tenements in common (1 Sid. 49; 4 Co. Litt. 198; 1 Salk. 4); or in an action on the case for a nuisance, &c. (2 Cro. 231); or in detinue of charters (Co. Litt. 197, b); or in a *warrantia chartæ* (id.); or in action on the case for ploughing their lands, whereby their cattle are hurt. R. Jon. 142; Com. Dig. Abatement, E. 10. Tenants in common, however, may join or sever in debt or covenant for rent (Carth. 289); they may join, because the contract is entire, or they may sever, because the rent is distributable. So one tenant in common may sue for the double value of his moiety of the rent, under stat. 4 Geo. 2, c. 28 (2 W. Black. 1077); or both may join in an action for the double value of the whole rent. But in all other cases where that which is sued for is not distributable, as in covenant for not repairing, where the damages are not distributable, because uncertain, tenants in common must join in the action. 1 Sid. 157; 1 Lev. 109; T. Raym. 80; and *see* Bro. Joinder in Action, 104; 28 Edw. 3, c. 90; 18 Hen. 6, c. 7; Keilw. 14; Moor, 40; Bendl. 89; Godb. 90, 283.

If one tenant in common be sued alone in a personal action without his co-tenant, for a matter touching the lands holden in common, he may plead in abatement that he held in common with such a person not named. 7 H. 58, 6; Bro. Action sur le Case, 32; Joint Tenancie, 12; Clift. Ent. 7, Pl. 161, d. But if a husband and wife and A. be tenants in common, and the husband die, and the wife bring dower against the heir before partition, it is no plea that the heir is tenant in common with A. and the defendant. R. 3 Lev. 84. Also, in replevin, tenants in common must avow severally for *rent* (1 Salk. 390; 1 Jon. 253), but *jointly for damage feasant*. R. 1 Jon. 253; Com. Dig. Abatement, F. 6.

[2] An offer of a sum of money in satisfaction of a debt or claim, by producing and showing the amount to the creditor or party claiming, expressing an unconditional willingness to pay it. 1 Saund. 33, n. 2. It is a performance of the contract on the part of defendant, so far as he can perform it, and is not prevented by the plaintiff. It should never be pleaded when there is the least doubt of establishing the formal requisites. *Lord Tenterden*, in 3 C. & P. 342, said such a plea was very seldom successful, and he regretted to see it pleaded. Where there

(A) *In what Actions it may be made*, p. 519.
(B) *At what Time it should be made*, p. 519.
(C) *Effect of making*, p. 519.
(D) *To Whom it should be made*, p. 520.
(E) *On whose Behalf to be made*, p. 520.
(F) *What Amount should be tendered*, p. 520.
(G) *In what Money it should be made in general*, p. 521.
(H) *Of Producing the Money, and when its Production may be dispensed with*, p. 521.
(I) *Of its being Unconditional*, p. 521.
(J) *Of a subsequent Demand and Refusal of the Sum tendered*, p. 522.
(K) „ *the Form of the Plea*, p. 522.
(L) *At what Time the Plea is to be pleaded*, p. 523.
(M) *Of the Payment of Money into Court*, p. 523.
(N) *Of the Replication to, and subsequent Pleadings*, p. 523.
(O) *Of the Evidence*, p. 523.
(P) „ *Costs*, p. 523.
(Q) *As to Tender of Performance of a Contract*, p. 524.

(A) *In what Actions it may be made.*[1]

(B) *At what Time it should be made.*[2]

(C) *Effect of making.*[3]

is any doubt, the prudent course is to pay the money into court, or take out a summons to stay proceedings.

[1] A tender cannot in general be pleaded, except when the action is brought for the recovery of a certain pecuniary demand, or the making of a tender is expressly authorised by act of parliament.

In *assumpsit*, where the promise laid is to pay money, or in debt on simple contract, or covenant for payment of rent, a tender is a good plea (*Johnson v. Clay*, 7 Taunt. 486); or for non-payment of any sum certain, or even to a *quantum meruit*, although the demand is unascertained. *Johnson v. Lancaster*, 1 Stra. 576. But it cannot be pleaded in an action for unliquidated damages, such as an action of *assumpsit* by landlord against tenant for not repairing (*Searle v. Barrett*, 4 Nev. & M. 200), or the like. In debt on a money bond, a tender of the principal and interest after the day of payment (*Underhill v. Matthews*, Bull. N. P. 171), or in an action on a bill of exchange against the acceptor, a tender of the amount of the bill and interest after the day of payment (*Hume v. Peploe*, 8 East, 168. *Poole v. Tumbridge*, 2 Mee. & W. 223. *Dixon v. Clark*, 5 C. B. 365. *Dobie v. Larkin*, 10 Ex. 776) is unavailing; but the drawer or indorser of a bill may tender the amount within a reasonable time after notice of dishonour and before action. *Walker v. Barnes*, 5 Taunt. 240. *Soward v. Palmer*, 8 Taunt. 277. See *Siggers v. Lewis*, 1 C., M. & R. 370. Where a bill or note is payable on demand, a tender of the amount of the note, with interest, may be made at any time before action. *Norton v. Ellam*, 2 Mee. & W. 463. See *Smith v. Manners*, 28 L. J. C. P. 220.

[2] A tender, to be available, must always be made before action brought; but it is no objection to a tender that a creditor had previously put the matter into his attorney's hands. 1 Marsh. 55; S. C. 5 Taunt. 307.

If a thing is to be done at or before a certain day, the tender must be at a convenient time of the day. *Hammond v. Ouden*, 12 Mod. 421. *Duke of Rutland v. Hodgson*, Stra. 777.

Where the obligee of a bond receives the whole principal after it is payable, he cannot recover in an action on the bond; as *solvit post diem* is a good plea. *Dixon v. Parkes*, 1 Esp. 110.

A defendant who offers payment after action commenced, and before declaration, is not entitled to a stay of proceedings on payment of the demand and costs of the writ, unless he can show an actual tender, and that the declaration was prepared and delivered for the sake of enhancing the costs. *Gibbon v. Copeman*, 5 Taunt. 840; 1 Marsh. 392. *Partington v. Williams*, 2 N. R. 398.

[3] A tender and refusal is equivalent to payment. *Isaac v. Ledgingham*, 1 Vent. 167. But as it admits the contract and facts stated in the declaration, care should be exercised not to plead it where such an admission would be prejudicial. *Cox v. Brain*, 3 Taunt. 95.

A promise to pay the debt of a third person need not be proved to be in writing when the defendant pleads a tender, and pays money into court on such promise. *Middleton v. Brewer*, Peake, 15. And it was once held that, after a plea of tender, the plaintiff could not be nonsuited. *Per Heath, J.*, in *Harding v. Spicer*, 1 Camp. 327); but now a different rule obtains. 3 Bing. 290.

If the declaration be upon the common counts only, or where the plea is pleaded to the common counts only, the plaintiff will have to prove his whole case, in order to prove the excess. Where there was a count on a special contract, and also the common counts, and a tender was pleaded to the common counts only, but the money was paid in upon a rule in the common form generally, and not confined to the counts to which the tender was pleaded, the court held that the payment could not be referred exclusively to the counts to which the tender was pleaded, but applied to the whole decla-

(D) *To Whom it should be made.*[1]

(E) *On whose Behalf to be made.*[2]

(F) *What Amount should be tendered.*[3]

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ration, and therefore admitted the special contract. *Bulwer v. Horne*, 4 B. & Adol. 132.

If a party is under an engagement to release on payment of money, he is bound to release on tender and refusal, as if actually paid. *Simon v. Gavil*, Salk. 75; 2 Ld. Raym. 961.

Where a man is to pay money upon an act being performed, and there is a tender of performing the act, and a refusal, it is equivalent to its having been done. *Lancashire v. Kellingworth*, Com. 116. If there be a tender of the money after the day, and refusal upon and after debasement of the coin, the debtor shall bear the loss. 1 Dy. 82, Pl. 70.

Where the maker of a promissory-note paid money into the hands of an agent to secure it, and the agent tendered the money to the holder of the note, on condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands:—*Held*, that the maker was still responsible on the note, but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 3 Camp. 296.

[1] A tender to a person authorised by the creditor to receive money for him is sufficient. *Goodland v. Blewith*, 1 Camp. 477. *Watson v. Hetherington*, 1 C. & Kir. 36. And where a clerk, who was in the ordinary habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of the attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307. A tender to the attorney on the record is a good tender to the client. *Crozer v. Pilling*, 4 B. & C. 26. When the money was brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was held to be evidence to submit to the jury, from which they might infer that a tender was made. *Anon.* 1 Esp. 349. *Bingham v. Allport*, 1 Nev. & M. 398. *Kirton v. Braithwaite*, 1 Mee. & W. 310. A tender to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683. But a tender of a debt due to a bankrupt's estate to a collector employed by the solicitor under the adjudication is, as it seems, bad. *Blow v. Russell*, 1 C. & P. 365.

The obligor of a bond may plead a tender to one whom the obligee has appointed to receive the money and refusal of it, but not where he is bound to pay the money to a third party. Mo. 37.

Two provisoes in two indentures of conveyance of two several manors to A. and B., that if the feoffor pay or tender 20*s.* to A. and B., or to the heir of A., they shall be void. A. dies; tender to B. is ill, but to the heir of A. good; yet it must be of two twenty shillings. 3 Dy. 372, pl. 9.

Where the defendant, on going to the office of the plaintiff's attorney to tender the debt, was referred to a person in the office, who objected to receive it as insufficient:—*Held*, that it was good, without proof that the person to whom it was made was authorised on the part of the plaintiff to receive it. *Wilmot v. Smith*, 1 M. & M. (N. P.) 238; 3 C. & P. 453.

A tender made to the attorney or his clerk, after a letter sent by the attorney to demand payment, the authority not being disclaimed at the time:—*Held*, good. 3 C. & P. (N. P.) 453. See *Kirton v. Braithwaite, supra.*

If A. be indebted to several persons in different sums of money, and when they are all assembled together tender there one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being done, this is a good tender. *Black v. Smith*, Peake, 88.

[2] A tender must be taken to be made on behalf of the person who owes the money. When a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea, stating that a certain portion of the sum was tendered for the debt of one. *Strong v. Harvey*, 3 Bing. 304.

[3] If a man tenders more than he is bound to pay, it is good; for the other ought to accept so much as is due to him. *Wade's case*, 5 Rep. 115, c. *Astley v. Reynolds*, 2 Stra. 916. *Dean v. James*, 4 B. & Ad. 546. See *Hardingham v. Allen*, 5 C. B. 793; 17 L. J. C. P. 198. But it seems that such a tender is only valid where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5*l.* note, from which the creditor is desired to take 3*l.* 10*s.*, is *not* good. *Bettersbee v. Davies*, 3 Camp. 70. *Robinson v. Cook*, 6 Taunt. 336. *Watkins v. Robb*, 2 Esp. 710. *Brady v. Jones*, 2 D. & R. 305. But where a greater sum is tendered than the sum due, and the creditor refuses to receive it on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is, it seems, good. *Black v. Smith, supra. Saunders v. Graham*, Gow. 121. *Cadman v. Lubbock*, 5 D. & R. 289. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 T. R. 683. *Black v. Smith, supra.* Proof of a smaller sum will not sustain a plea of a greater, although the smaller sum only was due. *Tyler v. Bland*, 9 Mee. & W.

(G) *In what Money Tender should be made.*[1]

(H) *Of Producing the Money, and when its Production may be dispensed with.*[2]

(I) *Of its being Unconditional.*[3]

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338. *Dixon v. Clarke*, 5 C. B. 365. *Cotton v. Godwin*, 7 Mee. & W. 147. *See* 11 id. 386; 3 Q. B. 915. *Brown v. Saul*, 4 Esp. 267. *Wright v. Read*, 5 T. R. 554. *Lockyer v. Jones*, Peake, 180, n.

The debtor is not entitled to apply a set-off in reduction of the amount due, so as to make a tender of the residue sufficient. *Searles v. Sadgrove*, 25 L. J. Q. B. 15; 5 E. & B. 639. But in an action for money received, pleas, except as to 7*l.*, never indebted, except as to the 7*l.* set-off. And as to 7*l.* a tender and payment into court. Replication to the last plea, that, at the time of tender, a larger sum was due as one entire sum on one entire contract. The judge, at the trial, having ruled that the tender was good, and that if the payment into court, and set-off, made up the amount, the verdict should be for the defendant, and a verdict having been found accordingly, the court granted a rule absolute for a new trial. *Phillpotts v. Clifton*, 10 W. R. 135.

A tender of the debt demanded, without paying the costs claimed for a letter before action, suffices. *Kirton v. Braithwaite*, 1 Mee. & W. 310. *Capel v. Stain*, 2 id. 850.

[1] The tender may be made in Bank of England notes, if the sum amount to or exceed five pounds (3 & 4 Wm. 4, c. 98, s. 6); or it may be made in the current gold coin, or in the current silver coin, as to sums not exceeding 40*s.* 56 Geo. 3, c. 68, s. 12. The notes of a private banker, however, are not strictly a legal tender (*Grigby v. Oakes*, 2 B. & P. 526. *Mills v. Safford*, Peake, 180, n. *Polglass v. Oliver*, 2 C. & J. 15); but if the party do not object to it on that ground it will be sufficient.

To make a legal tender, there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor (*Thomas v. Evans*, 10 East, 101). As where the creditor insists on more money being due than the amount tendered. *Black v. Smith*, Peake, 88. *Cole v. Blake*, id. 179.

[2] The manner of the tender and of the payment should be directed by him who makes them, and not by him who accepts. Pennel, 5 Co. 117, a. A tender of money in bags is valid without showing or counting it, if the proper sum was deposited in them. *Wade's case*, 5 Co. 114, a.

Where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said, "You must go to my attorney:"—*Held*, that this was not sufficient to support a plea of tender to an action brought for 6*l.* 17*s.* 6*d.* *Brady v. Jones*, 2 D. & R. 305. *Holland v. Phillips*, 6 Esp. 46. See *Bevan v. Rees*, 5 Mee. & W. 306. *See* 14 Sim. 179; 13 L. J. Ch. 458.

Where a person offered a sum of money by way of tender, and stated the precise sum he so offered, which he held in his hand, it is a sufficient tender, although it was twisted up in bank-notes, and not shown to the party; but if the amount of the sum had not been mentioned, it seems that it would not have been a good tender. *Alexander v. Brown*, 1 C. & P. 288.

If at an interview between plaintiff and defendant, when defendant was willing to pay 10*l.*, a third person offer to go up stairs to fetch that sum, but is prevented by the plaintiff's saying he cannot take it, such offer is a good tender; and, although the defendant did not, at the time, take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. *Harding v. Davis*, 2 C. & P. 77.

To render a tender available, the offer to pay must be unqualified. *Brady v. Jones*, *supra*.

Where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him he need not give himself the trouble of offering it, for that he would not take it, the tender was held to be good. *Douglas v. Patrick*, 3 T. R. 684. The agent of the defendant met the plaintiff in the street, and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*, the plaintiff said he would not take it. The witness then said he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff, that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it: this tender was held to be good. *Read v. Goldring*, 2 M. & S. 86.

[3] Hence a tender, accompanied with a protest against the party's liability, appears to be insufficient. *Simmons v. Wilmott*, 3 Esp. 94; but see *Manning v. Law*, 2 C. & Kir. 13. Or an offer by the debtor to pay the money, if the creditor will give him a receipt in full (*Griffith v. Hodges*, 1 C. & P. 419. *Ford v. Noll*, 12 L. J. C. P. 2), or a receipt in full of his demand (*Cheminant v. Thornton*, 2 C. & P. 50. *Strong v. Harvey*, 3 Bing. 304), or if the creditor would take it in full of his demand (*Mitchell v. King*, 6 C. & P. 237. *Evans v. Judkins*, 4 Camp.

(J) *Of a subsequent Demand and Refusal of the Sum tendered.*[1]

(K) „ *the Form of the Plea.*[2]

156. *Peacock v. Dickerson*, 2 C. & P. 51, n.), or as all that is due (*Sutton v. Hawkins*, 8 id. 259), or in payment of the half-year's rent due at Lady-day last (*Marquis of Hastings v. Thorley*, id. 573), or wherever, by accepting the money, the creditor would be bound by the condition upon which it is offered to be paid: in such cases the tender is deemed insufficient. But where a person on behalf of the defendant produced the money, and said to the plaintiff, "I am come with the amount of your bill," and the plaintiff answered, "I shall not take that, it is not my bill:" it was holden that this was not a conditional tender, being nothing more than was implied in every tender, and the acceptance of the money would not have prevented the plaintiff from suing for any further sum claimed by him. *Henwood v. Oliver*, 1 Q. B. 409. *Bowen v. Owen*, 11 Q. B. 130; 17 L. J. Q. B. 5. So, where the witness, producing the money, "I am come by the direction of Mr. Parker to pay you 4*l.* in full discharge of your account," *Wightman, J.*, held it not to be conditional, as it was not intimated to the plaintiff that the money would not be paid to him unless he took it in full discharge. *Bull v. Parker*, 12 L. J. Q. B. 93.

Where a person offered to pay his creditor a certain sum, if he would give him a stamped receipt, this was deemed a conditional tender, and bad (*Laing v. Meader*, 1 C. & P. 257; and see *Ryder v. Lord Townsend*, 7 D. & R. 119); but this has since been doubted. *Richardson v. Jackson*, 8 Mee. & W. 298); and, at all events, if the creditor refused the sum tendered, not on account of the receipt, but because it was less than he demanded, he cannot object to the tender on this ground. (Id.) And if there be any doubt whether the tender was conditional or not, the question should be left to the jury. *Eckstein et al. v. Reynolds*, 7 Ad. & E. 80; and see *Henwood v. Oliver*, 10 L. J. Q. B. 158. *Jennings et al. v. Major*, 8 C. & P. 61.

A tender of a certain sum, as being "all that is due," is bad; and a demand of a certain sum, made up of two sums, claimed on two distinct grounds, is not "a demand" of either. *Field v. Newport, &c. Railway Co.*, 3 H. & N. 409; 27 L. J. Ex. 396. Therefore, where a railway company, entitled to distrain for tolls, demanded a sum in gross, made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due:—*Held*, that the company was not entitled to distrain, but was not precluded by the tender from recovering the toll. (Id.)

[2] To a plea of tender, the plaintiff may reply a subsequent demand and refusal of the sum tendered. Issue being joined on the fact of this demand, it will be incumbent on the plaintiff to prove that he demanded the precise sum before tendered; proof of a demand of a larger sum than that which was originally offered will not support the issue. *Spybey v. Hide*, 1 Camp. 181. *Rivers v. Griffiths*, 5 B. & A. 630. *Coore v. Callaway*, 1 Esp. 115. The demand ought to be made by some person authorised to give the debtor a discharge. Hence, in a case where the demand had been made by the clerk to the plaintiff's attorney, who had never seen the defendant before going of this errand, *Lord Ellenborough* held the demand insufficient; admitting, however, that a demand by the attorney himself might have done. *Coles v. Bell*, 1 Camp. 478.

A subsequent demand upon one of two joint debtors suffices. *Peirse v. Bowles*, 1 Stark. 323. A letter written by the plaintiff's attorney, and received by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for, at the time of the demand, the defendant should have an opportunity of paying the sum demanded. *Edwards v. Yates*, 1 R. & M. 360. *Haywood v. Hague*, 4 Esp. 93. But a letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned that the demand should be settled, is a sufficient evidence to go to the jury, of a demand on the issue of a subsequent demand and refusal. *Haywood v. Hague*, *supra*. The rejoinder may deny this subsequent demand. The plaintiff will then have to prove it; and he must prove a demand of the same sum exactly, which is stated in the plea, the slightest variance will be fatal. *Spybey v. Hide*, *supra*.

It is no replication to say that before the tender the plaintiff had instructed his attorney to sue out a writ, and that the attorney had applied for the writ before the tender, and which was sued out after it. *Briggs v. Calverley*, 8 T. R. 629; and see *Stratton v. Sevignac*, 3 B. & P. 330. *See* the form of a rejoinder to the above replication, that the plaintiff had no cause of action previously to his suing out the writ. *Wood v. Newton*, 1 Wils. 142.

[2] A tender cannot be given in evidence under the general issue, but must, in all cases, be pleaded. Where the money is due, and payable immediately, by the agreement; the party pleading a tender must show that he was always ready from the time when the cause of action accrued. Hence, to an action of *indebitatus assumpsit*, where defendant pleaded that before the action, viz. on such a day, he tendered a certain sum of money, and that he was always afterwards ready, and then was ready, on demurrer the plea was holden bad. *By the Court.*—It is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action. Willes, 637. So

(L) *At what Time the Plea of Tender must be pleaded.*[1]
(M) *Of the Payment of Money into Court.*[2]
(N) „ *Replication to, and subsequent Pleadings.*[3]
(O) „ *Evidence.*[4]
(P) „ *Costs.*[5]

where, to an action by the indorsee of a bill of exchange, the defendant pleaded that after the expiration of the time appointed for the payment of the bill, and before action brought, he, the defendant, tendered the whole money then due upon the bill, with interest, in respect of the damages sustained by the non-performance of the promise; and that he always, from the time of making the tender, had been, and still was, ready to pay, &c. On demurrer, the plea was holden bad. In debt on bond conditioned to pay 500*l.* to the administrator of the obligee within two months after his death; a plea that he was ready to pay it, but that no administrator was appointed, without saying, *encore prist*, is bad. *Lee v. Garrett*, 2 Show. 144. If *touts temps prist* be pleaded by an administrator, he must aver that his intestate was at all times, from the time of making the promise to the time of his death, ready to pay; and that he has, at all times since the death of the testator, been ready to pay. Say. 18. *Giles v. Hart*, 3 Salk. 343; 1 Ld. Raym. 254; Carth. 413. So, in pleading a tender of a sum of money according to a defeasance which is in a different instrument from the original deed, it is not necessary either to plead that the party has always been, and still is, ready to pay, or to bring the money into court. *Trevett v. Aggas*, Willes, 111; 2 Saund. 48. *Aliter* if the defeasance be in the same deed. Willes, 110.

A plea of tender pleaded to the common counts is good in the usual form, alleging the defendant to have always been ready and willing to pay, and before the commencement of the action to have tendered the money. *Smith v. Manners*, 5 C. B. (N. S.) 632; 5 Jur. N. S. 549: 28 L. J. C. P. 220.

A replication, alleging the sum pleaded to, and brought into court, not being sufficient to satisfy the plaintiff's claim in respect thereof, is bad. (Id.)

A tender can be pleaded to an avowry only in excuse of damages. *Horne v. Lewin*, 1 Ld. Raym. 644. *Osborne v. Beversham*, 1 Vent. 322. The defendant cannot plead *non assumpsit* or *non est factum* (5 T. R. 97) to the whole declaration, and a tender as to part for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it. But the plea may be pleaded to a particular count with other pleas. *Dean v. James*, 4 B. & Adol. 546. *Robinson v. Ward*, 8 Q. B. 920; 15 L. J. Q. B. 271.

[1] Formerly nice points were raised as to the time of pleading, that it could not be done after imparlance, &c., but now it must be pleaded within the time allowed for other pleas in bar.

[2] It is paid in at the master's office, and the clerk there gives a receipt for it in the margin of the plea. If it be not paid in, and the plea be merely as to part, the plaintiff may sign judgment as to the sum said to be tendered, but not as to the whole declaration. *Chapman v. Hicks*, 2 C. & M. 633.

If the defendant bring money into court upon a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought; or he may reply a subsequent demand and refusal.

An admission of the tender is not necessary to enable the plaintiff to take the money out of court (1 Saund. 33. *Contrà*, 2 Ld. Raym. 774); but it cannot be taken out by the defendant, though he has a verdict (*Cox v. Robinson*, Stra. 1027); nor can plaintiff proceed for damages where money was paid generally on the whole declaration in *assumpsit*, after taking the money tendered out of court. *Burton v. Souter*, 2 Ld. Raym. 774. On a tender to one of two counts, plaintiff may proceed on the other, though he take the money out of court. 1 Saund. 33.

[3] The plaintiff, in his replication, may traverse the tender, or allege a prior or a subsequent demand (*ante*, p. 522), or may admit the tender and join issue on other pleas. It is not necessary to reply a subsequent demand and refusal, as the making of it shows defendant was not always ready to pay. *Johnson v. Clay*, 7 Taunt. 486. *Poole v. Tumbridge*, 2 Mee. & W. 223, 226.

To a plea of tender the plaintiff replied a demand and refusal. Rejoinder before suing out the writ, the defendant tendered, &c., traversing that at any time after the tender, and before suing out the writ, the plaintiff requested him to pay, &c., the rejoinder is bad. Willes, 602.

[4] The nature of the evidence required to sustain or defeat a plea of tender may be readily understood from what has been stated under the three first divisions of this title, to which the reader is referred.

[5] If the costs are not paid on bringing money into court on a plea of tender, the plaintiff must proceed in the action, and cannot have an attachment. *Hand v. Dinely*, 2 Stra. 1220.

The sum taken out of court is deemed to be recovered in the action, so that if it alone, or with other sums recovered in the action, exceed 20*l.*, the plaintiff is entitled to his costs. *Cooch v. Maltby*, 23 L. J. Q. B. 305. But *see* 7 Mee. & W. 214; 23 L. J. Q. B. 267.

(Q) *As to Tender of Performance of Contract, &c.*[1]

TENDER of Rent before Impounding, &c. *See* vol. iv. p. 116.

TENEMENT.[2]

TENENDUM.[3]

TENOR.[4]

TENTHS.[5]

TENURE.[6]

TERM.[7] *See* Lease.

or Month's Notice.[8]

TERMINUS.[9]

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[1] It is a good defence to an action for the non-performance of a contract to say that the defendant offered, and was always ready to perform it; as, where a party agreed to execute a deed in favour of another, it suffices if he tender a draft of such deed, and it is not necessary to proceed to execute a conveyance if the other party refuse to complete the bargain; and where concurrent acts by two parties are to be performed, a readiness and offer by one person to perform his part entitles him to proceed against the other for refusing to perform his part, without making a formal tender, as in the case of a sale of goods, to be paid for on delivery, when the purchaser is ready to pay, and the vendor refuses to deliver. *Rawson v. Johnson*, 1 East, 201. *See post*, Vendor and Purchaser.

A tender of goods should be in such a way that the party to whom they are delivered may have a reasonable opportunity of seeing them. 10 Mee. & W. 757; 12 L. J. Ex. 93; id. 318.

[2] Anything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial and ideal kind. 2 Bl. Com. 17.

"Tenement" is a word more comprehensive than "land," as it includes rents, commons, and other rights and interests issuing out of or concerning realty. 1 Steph. Com. 158, 159. It must relate to land. Burr. S. C. 318.

[3] In ancient conveyancing, "to hold; literally, to be held.

[4] Always imports a true copy. 3 Salk. 225. "Tenor" always signifies the very words. Hall, c. 1; 12 Mod, 218. To do a thing according to the tenor of a writing, is to do it according to the true intent and meaning thereof.—*Cowell.*

[5] The tenth part of the annual profit of every living, formerly paid to the Pope; but by 26 Hen. 3 transferred to the Crown, and afterwards made a part of the fund called Queen Anne's Bounty. 1 Bl. Com. 284.

[6] The mode of holding a feudal estate. All the land in the kingdom is held mediately or immediately of the sovereign. Co. Litt. 93, n.; Wright on Tenure, 136, 137; 2 Bl. Com. 59; 1 Steph. Com. 173. There can be no tenure of purely incorporeal hereditaments. Co. Litt. 47, a; 2 Bl. Com. 42. As to copyholds, *see* 1 Scriv. Cop. 357.

[7] A limitation of time. Co. Litt. 45, b. A limitation of an estate. The period of time for which an estate is granted, as for life or years. The duration of an estate. An estate for years is called a "term."

[8] In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereon, shall not be deemed a proceeding within this rule; but a notice of trial, though countermanded, shall be deemed a proceeding within it. Reg. Gen. H. T. 1853 (Pr.) 12. See *Doe d. Vernon v. Roe*, 7 Ad. & E. 14. This notice, however, is not necessary with respect to any proceeding after verdict (*May v. Wooding*, 3 M. & S. 500. *Newton v. Boodle*, 4 D. & L. 664), if the verdict be acquiesced in, and no new trial granted (*Tipton v. Meeke*, 8 Moore, 579. *Deacon v. Fuller*, 1 C. & M. 349); nor is it necessary to enable the defendant to go to trial by proviso (*Theobald v. Crickmore*, 2 B. & A. 594), or to move to set aside proceedings (*Lumley v. Thompson*, 3 Mee. & W. 632); nor is it necessary for the plaintiff to give a term's notice, where his not having proceeded arose from the defendant's having prevented or delayed him (*Bosworth v. Phillips*, 2 W. Black. 784. *Hayley v. Riley*, 1 Dougl. 71. *Watkins v. Haydon*, 2 W. Black. 762), or where the proceedings have been suspended at the defendant's request (*Bland v. Darley*, 3 T. R. 530. *Evans v. Davies*, 3 Dowl. 786); or the delay has been caused by an injunction or application for security for costs. See *Boswell v. Phillips*, 2 Q. B. 784.

[9] A limiting point either of time or space, and either at the beginning or end of a period. The termini of a voyage, or road, or

TERMS of Court.[1]

TERRE Tenant. The tenant, holder, or occupier of land. 2 Bl. Com. 91, 328.

TERRIER.[2] *See* Ancient Documents, vol. i. p. 348; Boundaries, vol. ii. p. 533; Evidence, vol. iv. p. 337.

TERRITORIAL Rights, Incidents. *See* Easements, vol. iv. p. 149; Lights, vol. v. p. 389; Nuisance, *ante*, p. 1; *post*, Watercourse; Ways.

TEST Act.[3]

TESTAMENT. *See post*, Will.

TESTAMENTARY Cause. *See* Probate, *ante*, p. 253.

TESTATOR. One who makes or has made a will; one who dies leaving a will.

TESTE of Writs.[4]

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way, are the two points at which it begins or ends. 1 East, 377. The *terminus à quo* is the point where it begins; the *terminus ad quem* is the point where it ends. 3 Kent's Com. 185.

[1] The stated periods of the year during which the courts sit for the despatch of business. 3 Bl. Com. 375.

Hilary term begins on the 11th, and ends on the 31st of January: Easter term begins on the 15th of April, and ends on the 8th of May: Trinity term begins on the 22nd of May, and ends on the 12th of June: and Michaelmas term begins on the 2nd, and ends on the 25th of November; provided that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day, shall fall within Easter term, there shall be no sittings *in banc.* on any of such intervening days, but the term shall in such a case be prolonged, and continue for such number of days of business as shall be equal to the number of intervening days before mentioned, exclusive of Easter-day; and the commencement of the ensuing Trinity term shall in such case be postponed, and its continuance prolonged for an equal number of days of business. 11 Geo. 4 and 1 Wm. 4, c. 70, s. 6. These intervening days, however, shall be deemed a part of the term, although there shall be no sittings *in banc.* upon them (1 Wm. 4, c. 3, s. 3); but they shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of inquiry. Reg. Gen. R. 2 Wm. 4. If the day on which the term is thus to end should happen to fall on Sunday, the Monday next following shall be deemed the last day of the term. 1 Wm. 4, c. 3, s. 3.

Until recently all the proceedings in an action, except the trial, were supposed to take place during term; pleadings were entitled of a term, and not of the day of delivery or filing; writs were tested and returnable in term; there could be no judgment except of a term; and when signed, it related to the first day of that term. Judgments are now signed on the day of the month on which the entry is made, and to which they alone relate. It is still, however, necessary to recollect the ancient system, for where no statute has altered it it still remains. The writ of summons does not specify any day on which it is returnable, but it is deemed returnable as soon as it is executed, and the defendant must appear within eight days afterwards, at his peril. So writs of execution are now made returnable *immediatè*. It is unnecessary, therefore, to give any list here of what were formerly called the return days.

[2] A register or survey of land, either of an individual or corporation. Particularly applied to ecclesiastical lands.

[3] The popular name of the stat. 25 Car. 2, c. 2, by which it was provided that all persons accepting any office should take certain oaths, and receive the sacrament according to the usage of the Church of England. It was repealed by 9 Geo. 4, c. 17, as regards the administration of the sacrament, and a new form of declaration substituted. 3 Steph. Com. 108.

[4] The clause in writs applied to the day on which it is witnessed, that is, issued. It is expressive also of the place and court. Formerly writs must have borne teste and been returnable on some day in term. See *supra*. *Adams v. Sparry*, 1 Wils. 155. *Campbell v. Cumming*, 2 Burr. 1187. But now, by 15 & 16 Vic. c. 76, s. 5, writs of summons "shall bear date the day on which they are issued, and shall be tested in the name of the lord chief justice, or lord chief baron of the court from which the same shall issue, or, in case of a vacancy of such office, then in the name of a senior puisne judge of the said court." If it bear date on a Sunday it is wholly void. *Hanson v. Shackleton*, 4 Dowl. P. C. 48. And by stat. 3 & 4 Wm. 4, c. 67, s. 2, and

THAMES. As to existing Piers, *see* 6 C. B. 388; 28 L. J. C. P. 285; 33 L. T. 271; Watermen, 30 L. J. M. C. 2; 3 L. T. (N. S.) 296; 6 Jur. N. S. 1371; Water-Bailiffs, 31 L. J. M. C. 113; 3 L. T. 847; Tolls, power of Corporation transferred to Conservators, 30 L. J. C. P. 225. The extent of is *ex officio* noticed by the Court. 1 Saund. Pl. & Ev. 920.

THEATRES and Public Entertainments. *See* also Dancing, vol. iii. p. 553.

I. As to the License, and Infringement of.[1]

II. „ Proprietors and Performers.[2]

Reg. Gen. H. T. 1853 (Pr.) r. 72, all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after execution thereof. And this is now always adopted in practice; except in the *ca. sa.* sued out for the purpose of fixing bail. *See ante*, Outlawry, p. 26. The effect of this is, that the writ remains in force until it is executed. *Greenshields v. Harris*, 9 Mee. & W. 771. *Thomas v. Harris*, 1 Dowl. N. S. 793.

[1] The 6 & 7 Vic. c. 68, regulates the licensing of theatres. As to a conviction under the 2d section, see *Leary v. Patrick*, 15 Q. B. 266; 19 L. J. M. C. 211.

The stat. 10 Geo. 2, c. 28, s. 2, prohibited acting plays, &c. for gain, without patent from the king, or license from the Lord Chamberlain. Sect. 5 provides that no person shall be authorised by patent or license to act except within the city and liberties of Westminster, or where the king shall be resident: —*Held*, that the prohibition in sect. 2 is not merely co-extensive with the exempting power as limited by sect. 5, but prevails throughout the kingdom. *Rex v. Neville*, 1 B. & Adol. 489. *See* 3 id. 299. In proceeding for penalties for giving entertainments in an unlicensed place, proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not. *Parsons v. Chapman*, 5 C. & P. 33.

Where the plaintiff is a participant in the concern, he cannot recover money he has paid at the request of the defendant in the conduct of an unlicensed theatre. *De Begnis v. Armistead*, 10 Bing. 107; 3 M. & Scott, 501.

No action can be maintained for the breach of an agreement "to dance at the king's theatre in the Haymarket, or at such other place as the plaintiff should appoint," if it appear that no license for that theatre was granted by the Lord Chamberlain, as required by 10 Geo. 2, c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. *Gallini v. Laborie*, 5 T. R. 242. But if in an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption is sufficient *primâ facie* evidence that the theatre is duly licensed. *Rodwell v. Redge*, 1 C. & P. 220.

A dramatic performance (a dialogue) by two persons, is a stage-play within the 6 & 7 Vic. c. 68. *Thorne v. Colson*, 3 L. T. (N. S.) 697, Q. B. But tumbling was held not to be an entertainment within the 10 Geo. 2. *R. v. Handy*, 6 T. R. 286.

A caravan-theatre, such as is used at fairs, is not a tenement under 2 & 3 Vic. c. 47, s. 46. *Fredericks v. Howie*, 8 Jur. N. S. 750; 31 L. J. M. C. 249; 10 W. R. 224; 6 L. T. (N. S.) 544, Ex. But a booth used as a temporary and portable theatre is a place within 6 & 7 Vic. c. 68, s. 11. *Fredericks v. Payne*, 8 Jur. N. S. 1109; 32 L. J. M. C. 14; 7 L. T. (N. S.) 329. And the manager is liable to a penalty under section 11. (Id.)

A booth theatre, which is taken to pieces and carried from place to place for theatrical performances, is not a "house or other place of public resort for the public performance of stage plays," within the meaning of sect. 2 of the 6 & 7 Vic. c. 68. *Davys v. Douglas*, 4 H. & N. 180; 28 L. J. Ex. 224; 32 L. T. 283.

[2] *Contracts between.*—Where the defendant signed a letter, in which he agreed that his daughter should perform at a theatre during the remainder of a season, and consented that she should enter into articles for three following seasons, an action may be maintained on the first part of the agreement for the refusal of the daughter to perform, but the latter part is a mere consent, and not an agreement. *Morris v. Paton*, 1 C. & P. 189.

The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal "on behalf of the members of an orchestra," to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money payable to himself and the rest, and stated the contract to be with himself and the others. The jury found that he acted on behalf of himself as well as of the rest:—*Held*, that the contract was joint, and that

III. As to the Subscribers[1] and Spectators.[2]

he could not recover. *Lucas v. Beale*, 10 C. B. 739; 20 L. J. C. P. 134.

An actress having been engaged by a manager of a theatre, for three years, at a salary of 5*l.*, 6*l.*, and 7*l.* per week, in those years respectively:—*Held*, that this contract being ambiguous, parol evidence was admissible to show that, under such a contract, it was the theatrical usage to pay a proportion of salary for those nights only during which the theatre was open for performance. *Grant v. Maddox*, 15 Mee. & W. 737; 16 L. J. Ex. 227.

As to what is a refusal to perform, see *Batty v. Melillo*, 10 C. B. 212; 19 L. J. C. P. 362. An action will lie for enticing away and inducing an actress to depart from a proprietor's employment. *Lumley v. Gye*, 2 E. & B. 216; 22 L. J. Q. B. 463.

To prove the loss of profits of a theatre, from the giving up of boxes, the box-keeper is not competent to prove that they were so given up for a particular cause (Id.); the parties should be called. Nor does an action with a *per quod servitium amisit* lie by the manager of a place of public entertainment against a person for beating one of the performers, who is thereby prevented from performing. *Taylor v. Neri*, 1 Esp. 386.

The proprietor of a theatre cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. *Ashley v. Harrison*, Peake, 194; 1 Esp. 48.

A performer who is called on to resume, in consequence of the illness of another, a part in which by previous performances she had acquired celebrity, is entitled to reasonable notice previous to the time of performance; such notice to be proportioned to the reputation at stake. *Graddon v. Price*, 2 C. & P. 610.

[1] An owner of a theatre by deed, in 1839, for valuable consideration, covenanted to confirm to certain debenture-holders the privilege of free admission to a theatre. A. was entitled as a debenture-holder to the benefits of the deed, but subsequently lost his debenture. Afterwards B. became lessee of the theatre, with notice of the deed:—*Held*, that A. was not entitled specifically to enforce against B. the privilege of free admission created by the deed. *Malone v. Harris*. 11 Ir. Ch. Rep. 33.

A lease of the Opera-house contained covenants on the part of the lessee, first, not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year:—*Held*, that this was not a breach of the covenant. *Croft v. Lumley*, 6 H. L. C. 672; 4 Jur. N. S. 903; 27 L. J. Q. B. 321. A second covenant was, not to grant away, assign, dispose of, &c., the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with this *habendum*: "From the 1st of February now next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day:"—*Held*, that this was not a breach of the covenant. (Id.) And a third covenant was, "not to charge or encumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts he granted warrants of attorney, one of which was to secure payment of bills not due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and to be registered; and judgments were signed against him on those warrants of attorney, and upon judges' orders, and registered:—*Held*, that no breach of this covenant had been committed. (Id.) See *Helling v. Lumley*, 28 L. J. Ch. 249; 4 Jur. 868.

A. became tenant of a theatre under a lease, which contained covenants not to convert it to any other uses than those of a theatrical kind, but to use his utmost endeavours to improve it for that use; not to grant or let the boxes for a longer period than for one year or season; and not to encumber the property. A., on account of embarrassments, shut up the theatre. He had previously let the boxes in the month of December for a period of one year, to be dated from the succeeding March, and he gave two *bonâ fide* creditors' warrants of attorney, on which they entered up judgments:—*Held*, that these acts did not constitute breaches of the covenants above mentioned. *Croft v. Lumley*, 27 L. J. Q. B. 321; 4 Jur. N. S. 903, H. L.

[2] *Per Lord Ellenborough, C. J.:* Although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage, yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are, in point of law, guilty of a riot (*Clifford v. Brandon*, 2 Camp. 358), or may be made liable in an action for conspiracy. *See* vol. i. p. 5. *Gregory v. Brunswick* (*Duke*), 1 C. &

THEFT, Liability of Bailee for. *See* vol. ii. p. 114.

THELLUSON Act. *See post*, Wills.

THINGS.[1]

in Action. *See* Chose in Action, vol. iii. p. 38.

THREATENING Letters Accusing of a Crime,[2] and Threats to Induce Execution of Deed, &c.

THREATS. *See* Duress, vol. iv. p. 146.

TIME,[3] **Computation of.** *See* also *ante*, Sunday, p. 508; and *see* names of different proceedings.

I. In General.[4]

Kir. 24: *Tindal. See* S. C. 6 Man. & G. 205; 1 D. & L. 518; 6 Scott, N. R. 809; 8 Jur. 148; 13 L. J. C. P. 34; 3 C. B. 48; 16 L. J. C. P. 35.

In an action for conspiracy to hiss an actor, the defendants cannot, under the general issue, give in evidence libels published by the plaintiff, with a view of showing that the plaintiff was hissed on account of those libels, and not by reason of any conspiracy of the defendants. (Id.)

[1] In a will is construed to mean things *ejusdem generis*. 1 Dow, P. C. 73; Sugd. L. P. 221. It will be limited to personal effects if it is consistent with other words inserted. 1 Jarman on Wills, 693.

[2] The stat. 24 & 25 Vic. c. 96, s. 45, applies to threatening letters to accuse of crimes, with intent to extort; by sect. 46 infamous crimes are defined. The 47th section applies to accusing or threatening to accuse with intent to extort; and sect. 48 to inducing a person by violence or threats to execute deeds, &c. with intent to defraud. By sect. 49, it shall be immaterial as to from whom menaces proceed. As to threatening to publish a libel, *see* vol. v. p. 381.

[3] This is expressive both of a precise point or terminus, and of an interval between two points.

[4] Although there is no arbitrary or invariable rule in computing time from any act or event that the day is to be exclusive or inclusive (*Lester v. Garland*, 15 Ves. 248), yet in general, where time is to be computed *from* or *after* a certain day, that day is to be *excluded* in the calculation, unless it appear that a different computation was intended, for no moment can be said to be *after* a given day until that day has expired; and where time is to be computed from any *act done*, the day on which the act is done is to be *excluded* in the computation, for a day is to be considered as an indivisible point of time; and there can be no distinction between a computation from an *act done*, and a computation from the day on which the act was done. See *United States' Dig.*, Time; but see *Castle v. Burditt*, 3 T. R. 623. *Glassington v. Rawlins*, 3 East, 407, *contrà*. Therefore, where a patent, dated 10th May, contained a proviso that a specification should be enrolled within one calendar month next and immediately after the date thereof. The specification was enrolled on the 10th of June following. It was held that the month did not begin to run till the day after the date of the patent, and that the specification was in time. *Watson v. Pears*, 2 Camp. 294. But see *Russell v. Ledsam*, 14 Mee. & W. 574; 14 Ex. 353. And in construing 2 Wm. & M. stat. 1, c. 5, s. 2, as to selling goods under a distress, the days must be so calculated as the rule is in other cases, inclusive of the *last*, and exclusive of the day of taking. *Robinson v. Waddington*, 13 Q. B. 753; 18 L. J. Q. B. 250. *R. v. Aberdare Canal Co.* 14 Q. B. 854; 19 L. J. Q. B. 251. *M'Gorse v. Lowndes*, 11 Sim. 434.

Where an act directed that seven days' notice at least should be given of an appeal: —*Held*, that the meaning was, that so many clear days should be given; and, therefore, the day on which the notice was given should be excluded from the computation. *Reg. v. Middlesex (Justices)*, 2 New Sess. Cas. 73; 3 D. & L. 109; 9 Jur. 758; 14 L. J. M. C. 139.

In a letter of license from creditors to a debtor, "for and during the term of one year from the date hereof:"—*Held*, that the day of the date should be excluded from the computation of the year. *Ammerman v. Digges*, 12 Ir. Com. Law Rep., App. i.

In computing time, under the 15 & 16 Vic. c. 5, s. 2, avoiding letters patent, in failure in payment of stamp duties:—*Held*, that the day of the date is excluded, and that the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted. *Williams v. Nash*, 5 Jur. N. S. 696; 28 L. J. Ch. 886.

When a court is advertised to sit at a particular time, the mean time at the place must be understood, and not Greenwich time, unless so expressed. *Curtis v. March*, 4 Jur. N. S. 1112; 3 H. & N. 866; 28 L. J. Ex. 36.

A trader having petitioned the Court of Bankruptcy for arrangement under the 12 & 13 Vic. c. 106, s. 211, praying that "his person and property might be protected

II. In Particular.

(A) *Year.*[1] (B) *Month.*[2]

from all process until further order," the commissioner made an order, which, after reciting the petition, proceeded thus: "I hereby grant such protection, and order that the person and property of the trader be protected from process until the 29th July next;" and the court appointed a meeting for twelve o'clock on that day for the creditors to assent to or dissent from the arrangement proposed by the trader:—*Held*, that the word "until" in the order must be understood inclusive of the whole of the 29th July, the day until which the protection was given. *Backhouse v. Mellor; Proudman v. Mellor*, 4 H. & N. 116; 5 Jur. N. S. 175; 28 L. J. Ex. 141.

[1] The period of 365 days, or twelve calendar months. 2 Bl. Com. 140; Co. Litt. 135; Cro. Jac. 166.

By 21 Hen. 3 the increasing day in the leap-year, together with the preceding day, were directed to be accounted for one day. *See* 24 Geo. 2, c. 23.

A person is of age the day before his 21st birthday. *Anon.* 1 Ld. Raym. 480. *Fitzhugh v. Dennington*, 2 id. 1096.

By sect. 58 of the 1 & 2 Vic. c. 106, if a living continues "for the space of one whole year," under sequestration for non-residence, such living shall be deemed void, and the patron may appoint thereto:—*Held*, that this meant one whole year on which the sequestration issued, and not a year commencing on the 1st January, and ending on the 31st December, both inclusive, as defined in sect. 120. *Bartlett v. Kirwood*, 1 E. & B. 771; 18 Jur. 173; 23 L. J. Q. B. 9.

By indenture, dated and executed the 19th of July, 1851, the plaintiff demised to the defendant premises then in his occupation, "to hold from the 25th of December, 1849, for the term of fourteen years thence next ensuing," with a proviso "that it shall be lawful for either party to determine this demise at the expiration of the first seven years thereof by six months' notice:"—*Held*, that the seven years ran from the 25th of December, 1849. *Bird v. Baker*, 4 Jur. N. S. 1148; 28 L. J. Q. B. 7.

B., by lease, dated and made 19th July, 1851, demised to A. premises, *habendum* to A, from 25th December, 1849, for and during and until the full end and term of fourteen years thence next ensuing, determinable as therein mentioned. Proviso that it should be lawful for either B. or A. to determine the demise at the expiration of the first seven years thereof, by six months' notice; and thereupon that demise, and every covenant therein contained, should cease and determine accordingly:—*Held*, that the seven years were to be reckoned from 25th December, 1849, and that the lease might be determined on 25th December, 1856. *Bird v. Baker*, 1 El. & El. 12.

Upon a policy to insure for a year, it does not expire until that day twelvemonths. *Anon.* 1 Ld. Raym. 480. *See*, as to premium payable by quarterly instalments, 27 L. J. Q. B. 227; 28 id. 94.

[2] By 13 & 14 Vic. c. 21, for shortening the language used in acts of parliament, the word "month" is by the interpretation clause (sect. 4) to mean "calendar," unless words be added showing "lunar" month to be intended. And sect. 8 declares act shall take effect on the 18th November, 1847.

In legal matters a month means a lunar month, but in commercial matters a month always means a calendar month. *Hart v. Middleton*, 2 C. & Kir. 9: *Pollock, C. B.* S. P. *Att.-Gen. v. Newbury* 1 Coop. 383.

An auctioneer was employed to sell land, under a written contract that he should be paid one per cent commission; but if the estate were not sold within two months after the day of the auction, only one-half per cent:—*Held*, that this by itself meant two lunar months, unless there was evidence that the parties meant calendar months. *Simpson v. Margetson*, 11 Q. B. 23; 12 Jur. 155; 17 L. J. Q. B. 81.

The judge might construe it to mean calendar months if the context showed this meaning; or if this appeared to him from the surrounding circumstances at the time of making the contract. That if there were evidence that the words were used in a sense peculiar to the trade, business, or place, the jury upon this might find such peculiar meaning (Id.):—*Held*, also, that a jury may in some instances find the meaning of technical words, but that the conduct or correspondence of the parties since the making of the contract was not evidence upon which alone a jury might find that the words denoted calendar months. (Id.)

The word "month" may mean lunar or calendar month, according to the intention of the contracting parties. Therefore where, upon a sale of land on the 24th of January, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of June, making a period of precisely five calendar months from the date of the sale and conditions; the word "months" was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract.

The condition for delivery of the draft of the conveyance within three months was not a condition precedent with respect to its delivery within the precise time. *Lang v. Gale*, 1 M. & S. 111.

A house and land were taken by lease

(C) *Day, and Portion of.*[1]
(D) *Hours.*[2]
(E) *When no Time is mentioned.*[3]
(F) *Reasonableness.*[4]

"for the term of six months from the 1st day of January next" (1830), "and so on, for six months to six months, until one of the parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st day of July, 1830:"—*Held*, that the months here spoken of were shown by the context to be calendar months, and that this was a taking for a year at least. *Reg. v. Chawton*, 1 Q. B. 247; 4 Per. & D. 525.

A., in London, consigned goods to B., at Bristol, to be disposed of for him by B.; and after they were shipped off, wrote to B., inclosing the bill of lading, and requesting leave to draw on B. in about three months: to which B. replied, "that the moment the goods arrived A. might depend on hearing from him, when he might draw upon him; or that B. would send him a banker's draft." The goods arrived, and a bill at two months' sight was presented to B., which he, being a creditor of A., refused to accept:—*Held*, that the three months were to be reckoned from the date of the letter, and not from the arrival of the goods. *Smith v. Brown*, 2 Marsh. 41; 6 Taunt. 340.

[1] Generally, "days" mean consecutive days, except Sunday is the first or last day. *Brown v. Johnson*, 10 Mee. & W. 331; *see* 17 L. J. M. C. 111.

Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. *Wright v. Mills*, 5 Jur. N. S. 771; 28 L. J. Ex. 223. And to avoid injustice the day is divisible (*Pugh v. Robinson*, 1 T. R. 116); but not as against the Crown. *R. v. St. Mary, Warwick*, 1 E. & B. 816; 22 L. J. M. C. 109; *Edwards v. Reg.* 9 Ex. 628; 23 L. J. Ex. 165.

The Practice of the Courts.—In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. Reg. Gen., Q. B., C. P., and Ex., H. T., 16 Vic., r. 174; 1 E. & B., App. xxviii.

The days between Thursday next before, and the Wednesday next after, Easter-day and Christmas-day, and the three following days, shall not be reckoned or included in any rules, notices, or other proceedings, except notices of trial or notices of inquiry. R. 175. (Id.)

In computing the eight days allowed by the 27th sect. of the 15 & 16 Vic. c. 76, to a defendant who is proceeded against by a writ of summons specially indorsed, Sunday must be reckoned as one, whether it falls on the last day or not. *Rowberry v. Morgan*, 9 Ex. 730; 2 C. L. R. 1026; 18 Jur. 452; 23 L. J. Ex. 191.

The above rule of court does not apply to computation of time under that section. (Id.)

Where the eighth day after service of a writ of summons fell on any day between the Thursday next before, and the Wednesday next after, Easter-day, the last day for entering an appearance thereto was the Wednesday next after Easter-day, the rule of court of Easter Term, 2 Wm. 4, being overridden by the 2 Wm. 4, c. 39, s. 11. *Harris v. Robinson* or *Roberts*, 2 C. B. 908; 3 D. & L. 813; 10 Jur. 458; 15 L. J. C. P. 208.

The three days following Christmas-day, though made holidays at the offices by 3 & 4 Wm. 4, c. 42, s. 43, were reckoned in legal proceedings. *Wilkes v. Perks*, 5 Man. & G. 376; 6 Scott, N. R. 42; 7 Jur. 68; 12 L. J. C. P. 145.

Where an award, dated 13th October, 1840, directed money to be paid on the 28th October next, the money is payable on the 28th day of that present month of October. *Brown v. Smith*, 8 Dowl. P. C. 867.

A promise for payment on the — day of February next ensuing, properly imports of next February, but on the 29th February next ensuing:—*Held* to mean 29th February in next leap-year, in order to give effect to the words. *Chapman v. Beccham*, 3 Q. B. 723; 12 L. J. Q. B. 42.

In computing the two days allowed by sect. 40 of the Nuisances Removal Act (18 & 19 Vic. c. 121), to an appellant for entering into recognisance after giving notice of appeal, Sunday is to be reckoned as one, though it falls on the last day. *Ex-parte Simkin*, 6 Jur. N. S. 144; 29 L. J. M. C. 23, Q. B.

[2] If an act is to be done on a day named, and no hour be mentioned, the law gives to the last hour of that day. *Parks v. Crawford*, 10 Mod. 376; *see* 1 E. & B. 816; 22 L. J. M. C. 109.

[3] If no time be named, it is reckoned from the period an event is proved to have taken place. Hob. 140.

[4] In many cases the common law gives a year and a day for a convenient time. *Constable's case*, 5 Co. 106, a. *See post*, Year and Day. In some instances the court will define what is or is not a reasonable time. *Palmer v. Moxon*, 2 M. & S. 43.

The plaintiff's men were driving thirty-six oxen along the road between five and six o'clock of an evening in November; twenty-three escaped into a field of the defendant's, adjoining the road, through gaps in his fence. The men drove on the remaining thirteen to the nearest place of safety for the night, and returned (having been absent about an hour) for the other twenty-three left in the field. The defendant had then

(G) *Statement of Time in Pleading.*[1]

(H) *Computation of in Particular Proceedings.* *See* title according to name of proceeding.

TIME, Essence of Contract. *See post,* Vendor and Purchaser.

Immemorial. *See* Easement, vol. iv. p. 154; 2 & 3 Wm. 4, c. 71.

of Memory.[2]

Policy.[3]

TITHES.[4]

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impounded them, for which the plaintiff brought an action. The judge at the trial directed the jury that, under the circumstances of the case, the plaintiff's men had not removed, or tried to remove, the cattle within a reasonable time, and directed a verdict for the defendant:—*Held* (*Bramwell, B., dissentiente*), to be a misdirection; that it was not a question of law for the opinion of the judge, but a question of fact upon the evidence given, that should be determined by the jury, and consequently there must be a new trial. *Goodwin v. Cheveley* or *Cheveley*, 4 H. & N. 631; 28 L. J. Ex. 298; 33 L. T. 284.

Overseers of a township agreed with the plaintiff and several other persons, who had given notices of appeal against a poor-rate, that all matters in difference between the overseers and the plaintiff, and the other appellants, should be referred; and that the costs of the plaintiff and the other appellants incurred in relation to the appeals, up to the time of the agreement, should be taxed and paid by the overseers. A declaration against the overseers for nonpayment of such costs alleged, that they were taxed in a reasonable time after making of the agreement, of which they had notice, and were requested to pay the amount, but that they had not paid it. They pleaded that the costs were not taxed in a reasonable time after making of the agreement, on which issue was joined, and found for the overseers:—*Held*, that the question whether such reasonable time had elapsed was a question for the decision of the jury, and not of the judge. *Burton v. Griffiths*, 11 Mee. & W. 817.

A covenant in a bill of sale to pay the money "immediately on demand," in writing, with a condition for seizure and sale on default, must be construed reasonably, with reference to the time necessary for the debtor, either to get the money at a banker's or some place of deposit, or to satisfy himself reasonably of the authority of the party making the demand; and where a demand in writing, signed by attorneys who had authority to receive the money, was delivered by a bailiff, who bore no proof that he had such authority, and did not even ask for the money, but seized instanter:—*Held*, that the seizure was wrongful, and that trespass lay. *Toms v. Wilson*, 11 W. R. 117; 7 L. T. (N. S.) 421, Q. B. S. P. *Rogers v. Mutton*, 31 L. J. Ex. 275.

A contract to be performed "directly" means to be performed not "within a reasonable time," but "speedily," or at least "as soon as practicable." *Duncan v. Topham*, 8 C. B. 225; 18 L. J. C. P. 310.

If justices decide time to be reasonable under the circumstances, the court of Queen's Bench will not review their decision. *Ex-parte Williams*, 21 L. J. M. C. 46.

[1] This is only material in actions upon written contracts; and now any variance would be amended at the trial. *See post,* Variance; and Amendment, vol. i. p. 324.

[2] A period commencing from the beginning of the reign of Rich. 1. Whatsoever was before that time is before time of memory; whatever is since is, in a legal sense, said to be within or since time of memory. Hales' *History*, 4. "Time of memory" is defined by Lord Coke to be "when no man alive hath any proof to the contrary, nor hath any conusance to the contrary." Co. Litt. 86, n. b.

[3] One in which the risk is limited to a certain fixed term or period of time specified instead of being limited by local *termini*. 1 Arn. on Ins. 409.

[4] It is thought unnecessary to state more on this subject than give the shortest possible summary. The near completion of an entire commutation is rapidly extinguishing all grounds for litigation or enquiry. *See* Mirehouse on Tithes; Toller, id.; Shelford, id.; Burn's *Eccles. Law;* Cripp's, id.

Tithes are a tenth part of the annual produce of land, the stock upon land, and the labour and industry of the occupiers. 11 Rep. 13, b; 4 Leon. 47.

They are,—Predial; such as arise merely and immediately from the vegetable produce of the land; such as of corn, hay, hemp, flax, grass, fruit, herbs, and wood. 2 Inst. 649. *Norton v. Clarke*, Gwin. 428. *Scarr v. Trin. Coll.* 3 Anstr. 760. *Bally v. Wells*, 3 Wils. R. 30.

Mixed are those which arise not immediately from the profit of the land, but from the produce and increase of animals nourished by the land; as of cattle, sheep, pigs, wool, milk, and eggs. 3 Salk. 347; 1 Roll. Abr. 635; 2 Inst. 649. *Scarr v. Trin. Coll.* Gwin. 1445.

Personal are the profits which arise from

the labour and industry of man in some trade or employment, being the tenth of the clear profits, after deducting all expenses; as of mills, &c. 3 Salk. 347; 1 Roll. Abr. C. 635; 2 Inst. 649.

They are further divided into great and small. It is the nature, or rather the quality, that makes a great or small tithe. *Wharton v. Lisle*, 3 Lev. 365; 4 Mod. 183.

The great tithes, as corn and hay, are generally payable to the rector or parson, the small tithes to the vicar. Thus, the tithes of corn, hay, and wood, are great tithes, because they are in general of much greater value than any other species of tithes. The predial tithes of other less valuable vegetables, such as hops, potatoes, madder, woad, together with mixed and personal tithes, are small tithes. So, acorns and clover-seed are small tithes (*Wharton v. Lisle*, Carter, 640); so are flax (S. C. 12 Mod. 41), potatoes (*Smith v. Wyatt*, 9 id. 336), and wood. *Tildell v. Walter*, 1 id. 50.

Generally speaking, tithes are payable on everything that yields an *annual increase*, but not for that which is of the substance of the earth, as of mines, minerals, and the like; nor for deer and animals whose increase, so as to profit the owner, is but casual. Tithe is payable for the pasturing of cattle, for gardens, orchards, and nursery-grounds, if the produce is sold: but hothouse fruit, it seems, is not titheable; nor timber, except when cut down and used as firewood, and made into charcoal. Fish taken in the sea or open river are not titheable; if taken in a pond or enclosed water, they *are* liable. Pigeons, honey, and beeswax, are titheable; and deer and rabbits, though wild by nature, by special custom; but not chickens, if tithe has been paid for the eggs. The tithe of milk is the milk yielded every tenth day. Barren ground becomes liable, if converted into pasture or meadow land, after seven years from the first attempt to make it productive. Ordinary headlands do not pay tithes, unless grain be grown upon them. Corn-mills are liable for the tenth of their profits, if built since 1315; but the more ancient mills become liable for tithe for any *increased* power. Steph. Black. 4th ed.

The tithes of all *extra-parochial* lands belong to the queen. *Attorney-General v. Lord Eardley*, 8 Price, 39.

Day-labourers and servants in husbandry are not liable to personal tithes.

A vicar is not liable for tithes to his rector, nor a rector to his vicar.

Persons holding the lands of any abbey dissolved by the 31 Hen. 8, c. 13, are as free from tithes as the abbeys themselves formerly were; and thus lands, formerly abbey lands, now claim to be tithe free. But this exemption does not extend to the lesser monasteries, whose landed income did not exceed 200*l.* per annum, and which were dissolved by the 27 Hen. 8, c. 20.

Lands may be exempt from tithe, either by composition, or by custom, or prescription. Composition is when an agreement is made between the owner of the land and the parson or vicar, with consent of the ordinary and patron, that such land shall be discharged in consideration of land, money, or other equivalent given to the parson in lieu thereof; but by the 13 Eliz. c. 10, compositions were not binding on the succeeding incumbent.

A discharge by custom or prescription is either entire or partial, *i.e.* either by a *modus de non decimando* or a *modus decimandi*.

By the 2 & 3 Wm. 4, c. 100 (amended by 5 Wm. 4, c. 83) any exemption from tithe due to any layman is valid on proof thereof for thirty years, unless payment of tithe is shown to have taken place prior to such thirty years, or that such exemption was made by agreement; or if such proof extend to sixty years it is deemed absolute and indefeasible, unless enjoyed by written agreement. In case of tithe due to an ecclesiastical corporation sole, the exemption must have continued during two successive incumbencies, and for not less than three years after the institution of a third; and if this be less than sixty years, then it must be continued up to the sixty years, and such three additional years, unless enjoyed by a written agreement.

Spiritual persons and corporations may claim exemption by (1) composition real; (2) the pope's bull of exemption; (3) unity of possession, as if the rectory and lands in it both belonged to a religious house; (4) prescription, as having always been in spiritual hands. Steph. Black. vol. iii. p. 84. As to abbey lands, extra-parochial places, *see supra*.

The Ecclesiastical Courts cannot try the right to tithes, unless between the clergy themselves, and can only compel the payment when the right is not disputed; so that if the defendant plead any custom, modus, or composition, or if other matter involving the right of tithing is pleaded, the ecclesiastical right is ousted.

By 2 & 3 Edw. 6, c. 13, if any person carry off the great tithe of corn, hay, and the like, before the tenth part is duly set forth, or agreement made with the proprietor, or if he hinder the proprietor or his deputy from viewing and carrying away his tithe, double the value of the tithe may be recovered from him in the Ecclesiastical Court, and treble the value in the temporal courts. A more summary method exists by the 7 & 8 Wm. 3, c. 6, for the recovery of small tithes under the value of 40*s.*, which enacts that, on refusal to pay twenty days after demand, the clergyman may complain to two justices, who may summon the party, determine the complaint, and give reasonable allowance for the tithe, and costs not exceeding 20*s.* Persons claiming an exemption may give security to pay the costs and try the question. If a *Quaker* refuse to pay or compound, two justices may summon him and ascertain what is due and direct payment, so that the sum ordered does not exceed 50*l.*; and upon refusal, may levy the money. Oblations and compositions of 10*l.* may be

in like manner recovered. 7 & 8 Wm. 3, c. 34; 53 Geo. 3, c. 127; 54 Geo. 3, c. 68.

The tithes of the London clergy are a rent-charge on the houses liable, even if empty, and are leviable on the goods of the succeeding occupier.

The incumbents of the fifty-one churches in the city injured by the great fire have a fixed annual sum, being an equal pound-rate on the parishioners, regulated by the 44 Geo. 3, c. 89. The other London clergy in the city are entitled to 2*s.* 9*d.* in the pound on the improved annual rental, under the decree made pursuant to the 37 Hen. 8, c. 12.

Tithe commutation under the act 6 & 7 Wm. 4, c. 71, and the various acts amending, may be effected through the Tithe Commissioners, either by a voluntary parochial agreement, if with the consent of the patron and Commissioners, or by the compulsory award of the Commissioners, who are in this case to take as the basis of the commutation (but with power to vary it in certain cases) the clear average value for seven years, ending Christmas, 1835, of the tithes of the parish, or of the composition, if any, payable for the same. The value so agreed or compulsorily awarded (as the case may be) will be the total rent-charge in lieu of tithes in that parish, and is afterwards apportioned among the several lands of the parish, according to the average titheable produce. The apportioned rent-charge is payable by two half-yearly payments, fluctuating according to the price of corn, as advertised in the *London Gazette*. The *land* only of the party charged is liable. The remedy where the rent-charge is in arrear for twenty-one days, is only by distress on the land; but if it be in arrear for forty days, and there be no sufficient distress, a writ may be issued, followed by an execution, for taking possession of the lands till the debts and costs be satisfied. But only two years' arrears can be recovered at any one time. The rent-charge is subject to all incumbrances, and to all rates and charges to which the tithes were subject; *i.e.* poor-rate, highway-rate, &c., but not to church-rates (Cripps, 355, 6); and rates and charges are to be assessed in the first instance upon the occupier, who may deduct the amount from his next payment of rent, and the landlord may recover from the owner of the rent-charge. (Sects. 71, 79.) Land to the extent of twenty acres in the same parish may be given to the tithe-owner in exchange for the tithes or the rent-charge. (Sect. 29.) The rent-charge is affected by the same interests, liabilities, and rights of exemption, as the tithes commuted (sect. 71), and may be sold, exchanged, or applied accordingly. As to extinguishment of, *see* 9 Jur. N. S. 277. As to hop-grounds, *see* 32 L. J. Q. B. 20.

The acts provide for the settlement of questions as to any composition real, modus, or exemption from tithe. A commutation may be effected voluntarily (under sect. 21 of the act) by agreement between the tithe-owners and at least two-thirds of the land-owners, with the consent of the bishop and patron (sect. 26), and must be confirmed by the Commissioners. (Sect. 27.) As to the apportionment of the rent charge so arranged, *see* sect. 32.

At any time before this confirmation by the Commissioners of an apportionment after a compulsory award, the land and tithe-owners may by agreements, as in the case of tithes, commute Easter offerings, mortuaries, and surplice fees. 23 Vic. c. 62, s. 89.

Recovery of Tithe Rent-charge.—By 6 & 7 Wm. 4, c. 71, s. 81, in case the rent-charge is in arrear and unpaid for twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment, or on any part thereof, for all arrears of the rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years: Provided that not more than two years' arrears shall, at any time, be recoverable by distress.

5 & 6 Vic. c. 54, s. 17, enacts that the service of this notice to distrain upon any person occupying or residing on the land chargeable with the rent, or in case no person shall be found thereon, then affixing the same in some conspicuous place on the land, shall be deemed good service of such notice.

By 6 & 7 Wm. 4, c. 71, s. 82, in case the rent charge is in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there is no distress on the premises liable to the payment, it shall be lawful for any judge of his majesty's courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable with the rent are situated, requiring the sheriff to summon a jury to assess the arrears remaining unpaid, and to return the inquisition thereupon on a day named; a copy of the writ and notice of the time and place of executing it is to be given to the owner of the land, or left at his last known place of abode, or with his known agent, ten days previous to its execution, and thereupon the owner of the rent-charge may sue out a writ of *habere facias possessionem*, commanding the sheriff to give possession to the owner of the rent-charge of the lands chargeable therewith, until the arrears found to be due, and the costs, together with the expenses of cultivating and keeping possession, shall be satisfied: Provided that not more than two years' arrears over and above the time of such possession shall be recoverable.

By 5 & 6 Vic. c. 54, s. 17, the service of the copy of the writ to assess these arrears, or the notice of executing it, upon any person occupying or residing on the land, or

TITLE.[1] *See* 25 & 26 Vic. c. 53, "An Act to Facilitate the Proving of Title to and Conveyance of Real Estate;" and (id. c. 67), the Act for Obtaining a Declaration of Title.

TITLE, Covenant for. *See* Abstract of Title, vol. i. p. 63; Covenant for Title, vol. iii. p. 482.

TITLE-Deeds.[2] *See* Abstract of Title, vol. i. p. 63; Deposit of Mortgage Deeds, vol. v. p. 497. As to Registering, *see* 25 & 26 Vic. c. 53.

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in case no person shall be found thereupon, then affixing the same in some conspicuous place on the land, shall be deemed good service.

By sect. 18, defendants in replevin, brought on any distress for the rent-charge, may avow or make cognisance generally, which is in analogy to the provisions contained in 11 Geo. 2, c. 19, s. 22. And by sect. 19, any irregularity or unlawful act by the party distraining, or his agent, in the conduct, sale, or disposition of the distress, is not to render the distress unlawful, nor party a trespasser *ab initio*, but party aggrieved may recover for special damage, provided ten days' written notice of action has been given.

By 6 & 7 Wm. 4, c. 71, s. 67, it is enacted and declared, that nothing contained in the act shall be taken to render any person whomsoever personally liable to the payment of the rent-charge.

7 & 8 Vic. c. 85, s. 22, provides for recovering the tithe-rent chargeable on lands taken by railway companies, in a similar mode against these companies, as is in the case of other lands, by sect. 81 of 6 & 7 Wm. 4, c. 71.

The right to recover arrears of rent-charge by action seems taken away. *See* id. sect. 67.

Landlord and Tenant. — By 6 & 7 Wm. 4, c. 71, s. 80, every tenant or occupier who occupies any lands by any lease or agreement made subsequently to the commutation of the tithes, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the landlord.

By 14 & 15 Vic. c. 25, s. 4, if an occupying tenant of land quits leaving unpaid any tithe rent-charge for or charged upon such land, which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner has given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord or the succeeding tenant or occupier to pay the tithe rent-charge, and any expenses incident thereto, and to recover the amount which he may so pay over against the first-named tenant or occupier, or his legal representatives, in such manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making the payment.

[1] *To personal property.*—May be acquired by bill of sale (vol. ii. p. 494), bequest (vol. v. p. 356), gift (vol. iv. p. 604), or by lien (vol. v. p. 382). *See* also *post*, Vendor and Purchaser.

To land.—It may be by descent or purchase. The latter, in its evident technical sense, is the acquisition of an estate in any other manner than by descent. Hence, the donee of a gift is a purchaser, or a devisee under a will, in the technical sense of the word; or where a party takes originally under a limitation not derivatively by descent from his ancestors: but in this sense it does not include an acquisition by escheat. As to modes of acquirement, *see* Adverse Possession, vol. i. p. 208; Alienation, id. p. 284; Alluvion, id. p. 308; Bankruptcy, vol. ii. p. 239; Curtesy, vol. iii. p. 351; Descent, vol. iv. p. 46; Dower, id. p. 130; Escheat, id. p. 267; Forfeiture, id. 499; Marriage, vol. v. p. 59; id. 459; Occupant, *ante*, p. 21. *See post*, Will.

[2] The title-deeds to an estate follow the legal interest, and belong to the legal owner for the time being (*Allwood v. Heywood*, 32 L. J. Ex. 153), yet, as being movable, may be the subject-matter of an action of trover or detinue. *See* 3 B. & Adol. 174; 4 Bing. 106. Tenant in tail, having an estate of inheritance, has a right to all deeds and muniments belonging to the lands, which a court of equity will order to be delivered up to him. 2 P. Wms. 471. See *Lord Buckhurst's case*, 1 Rep. 2 a.

Every person having a freehold interest has a right to the custody of the title-deeds, yet Lord Hardwick has said it was the common practice of the Court for Chancery to direct the title-deeds to be taken from the tenant for life and deposited in court, for the security of the persons entitled to the inheritance. In a cause where the title-deeds of an estate had been sent to a master in Chancery, for the purpose of showing the title to a part directed to be sold, and the tenant for life, after the sale, had obtained an order that they should be delivered to him, the persons entitled to the inheritance moved the Court of Chancery to discharge that order. *Lord Henley* refused the motion, observing, it was his opinion that the tenant for life should have the deeds, except when brought into court under an order for safe custody. See *Ford v. Peering*, 1 Ves. jun. 72. So, a trustee is entitled to the muniments of title, and, in fact, it is his duty to keep them in his possession. 2 Esp. 46. Where there is any difficulty or danger as regards the title-deeds of a trust estate, or the securities of a trust fund, the

TITLE of Declarations, Pleas, &c. *See ante*, p. 143.[1]

TITLES of Honour.[2] *See* Peer, *ante*, p. 122; and Precedence, Table of, *ante*, p. 210.

court may provide for every such emergency by ordering the deeds or the securities to be deposited in court. (Id.)

[1] *See* also *Hodson v. Runell*, 4 Mee. & W. 373; 4 Dowl. P. C. 290; 5 id. 259; 8 id. 320.

[2] The Crown alone can create and confer dignities and honours. The queen is not only the fountain, but the parent of these titular distinctions. Nor can an ordinance of the House of Lords confer peerages. Wm. Jones, 104; 1 Ld. Raym. 16. The titles of nobility at present in use are dukes, marquises, earls, viscounts, and barons. These titles were introduced by sovereigns at different periods (*see* 3 Cruise, Dig. 176–184; 1 Bl. Com. 396, &c.); and consequently the degrees of nobility are not of equal antiquity. The most exalted in point of rank are not the most ancient. Thus, the titles of earl and baron were the only titles of nobility used before the reign of Edward 3. (1 Ld. Raym. 12.) The dignity of a duke was first conferred by him on his son, the Black Prince, whom he created Duke of Cornwall. (Hume, *Hist. Eng.*) The title of marquis was afterwards introduced by Rich. 2 (2 Inst. 5), and Hen. 6 introduced that of viscount. Various offices and duties were formerly attached to most of these titles (*see* 3 Cruise, Dig. 172, 173; 1 Ld. Raym. 12, 13); and there can be no doubt that they were originally territorial. Thus, the bishops still sit in the House of Lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands. Stanf. 1, 7, c. 1. But subsequently, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of being territorial, became personal. At the present time, therefore, peers may be created by the queen though no office or property be annexed to them. It is indeed immaterial whether the place from whence a peer takes his title really exists. (Id. Ld. Raym. 13.) The creation of peers is effected either, 1st. by writ, or 2d. by patent (usually by the latter mode), for those who claim by prescription must suppose either a writ or patent granted to their ancestors, though by length of time it is lost. (1 Bl. Com. 400.) As to a dignity by prescription, *see* 1 Bulst. 196. The creation by writ, which is more ancient than the creation by patent (Co Litt. 16, b), is a summons to attend the House of Peers by the style and title of that barony which the queen is pleased to confer (1 Bl. Com. 400); but the writ does not take effect, and the party is not ennobled, until he has taken his seat in parliament by virtue of her majesty's summons. (12 Co. Rep. 78; Co. Litt. 16, b; 3 Cruise, Dig. 194; 1 Bl. Com. 400.) The sitting in parliament must be proved by the records of parliament. (Co. Litt. 16, b; 1 Ld. Raym. 14; 3 Cruise, Dig. 195.) The queen may, in the writ of summons, restrict the mode in which the dignity is to descend. It seems clear, that if no restraint be made, the dignity created by the sitting in pursuance of the summons descends to the lineal heirs male and female of the person first summoned. Lords' Journ. 12 vol. 629; 15 vol. 442, 458, 552; 17 vol. 81, 91; 3 Cruise, Dig. 202, sect. 64; Collins' Append. No. 7.

The creation by patent under the great seal is a royal grant to a subject of any dignity and degree of peerage. (3 Com. Dig. 215; 1 Bl. Com. 400.) The patent must contain apt words to direct the inheritance in the dignity conferred, else it will enure to the grantee for life only, and his descendants will have no claim to it. Co. Litt. 16, b; 1 Bl. Com. 401; 3 Cruise, Dig. 318; *see* 1 Ld. Raym. 16. *See* discussion in House of Lords as to Lord Wensleydale.

Where a person who has a dignity marries, his wife becomes entitled to the same during her life, unless she afterwards marry a commoner, for as she acquired, so she loses her dignity by marriage. But where a woman who has a dignity in her own right marries a commoner, she still retains her rank. (1 Inst. 16, b; Dyer, 49.) Nobility gained by marriage is to be tried by jury (6 Co. 53, a; Ld. Raym. 14). A wife communicates no rank or title to her husband. Harg. Co. Litt. 326, b.) The queen may legally grant to a Scotch peer a patent of peerage of Great Britain, with all the privileges incident thereto. By the common law her majesty may give any nobleman precedence and place in public assemblies, even before others who enjoyed a more ancient dignity of the same or a higher degree of nobility (4 Inst. 361, 363; Recital; 31 Hen. 8, c. 10); but this latter prerogative is restrained (1 Ld. Raym. 16) by the statute 31 Hen. 8, c. 10, and Wm. & M. sess. 1, c. 21, which settle the place and precedence of all the nobility and great officers of state. As to precedence in general, *see* 4 Inst. 361; Cruise, Dig.; 4 Inst. 323; Co. Litt. 16, n. 4; 1 Bl. Com. 405; Table of Precedence, *ante*, p. 210.

Her majesty may by her prerogative grant rank and precedence to a foreign prince, who intermarries into the royal family, before the greatest officers of state and peers of the realm. A subject cannot refuse to accept from her majesty mere dignity or honour. So nobility, when once acquired, cannot be lost or transferred by any other power but that of parliament, except by death or attainder. (7 Rep. 33; 1 Bl. Com. 402.) Hence it appears to be now settled, that a peer cannot be degraded on account of poverty or other reasons, even by the queen (Id.; 12 Mod. 56; 12 Co. Rep.

TO (Lat. *Ad, usque ad*), in expressing a boundary, is a term of exclusion, unless by necessary implication manifestly used in a different sense.

TO Wit. A term used to call attention to something particular at, or contradictory to, a detailed statement of what has been before mentioned generally; literally, "to know." 2 Burr. 533.

TOLL. *See* also Markets and Fairs, vol. v. p. 441; as to being rateable, *see* Poor, *ante*, p. 182; *post*, Turnpike Roads.

I. Definition.[1]

II. Different Kinds of.

(A) *Toll Traverse.*[2]

107; *see* Ld. Raym. 16); and though formerly held otherwise, it is now settled that a dignity or title of honour can neither be effectually aliened by the person in possession of it, though the queen's consent is obtained (Lords' Journ. vol. iv. p. 150; 3 Cruise, Dig. 250, ss. 114–118), or be surrendered to her majesty. Lords' Journ. vol. iv. 150; vol. xiii. 253; Show. Cas. in Parl. 1; *Lord Purbeck's case*, Coll. 10, 3; 3 Cruise, Dig. 232.

If a person possessed of a barony by writ, which is, consequently, descendible to his heirs general, be created an earl, to him and the heirs male of his body, the earldom does not restrict the barony, and they are separate and distinct from each other. Collins, 195; 1 Inst. 15, b, n. 3; Lords' Journ. vol. iv. p. 149. The barony will descend to the heir general, although the earldom become extinct. Collins, 286; 3 Cruise, Dig. 237, s. 131.

Where a dignity or title of honour is descendible to heirs general, and the person possessed of it dies, leaving only daughters, or sisters, or co-heirs, it falls into abeyance, or, rather, becomes vested in the Crown during the continuance of the co-heirship, for a dignity is entire and not divisible, and no one co-heir can in particular sustain a claim to it, and, of course, they cannot claim it together. Lords' Journ. vol. iii. p. 535; Collins, 175; 3 Cruise, Dig. 245, 248, s. 149; id. 266–7: *per C. J. Eyre.* But the dignity in abeyance is not in the power and disposal of the queen absolutely, and her majesty cannot by law extinguish or dispose of it to a mere stranger; and therefore, on the termination of the abeyance, where there remains only one heir, such sole heir becomes entitled to the dignity or title, not as a favour, but as a matter of legal right. 3 Cruise, Dig. 354, 5. *See* Skin. Rep. 432, 437; Dugd. Bar. vol. ii. p. 363; Collins, 412, 322; Lords' Journ. vol. xv. p. 634, 643, 671; id. vol. xxi. 266, 339. It is, however, in the power of the Crown to terminate the abeyance or suspension of the dignity by nominating any one of the co-heirs to it. Such nomination operates not as a new creation, but as a revival of the ancient dignity, for the nominee becomes entitled to precedence according to the date of the dignity. 3 Cruise, Dig. 349; Lords' Journal, vol. xxx. 403, 561, 572; id. vol. ii. 347: *per C.J. Eyre.* 3 Cruise, Dig. 267, 8. The abeyance terminates as a matter of course whenever there remains, by the death of some of the co-heirs, but one heir (3 Cruise, 254); but the attainder of one of two co-heirs does not determine the abeyance. *Stapleton's case, Printed Cases*, Dom. Proc. 1794, 5, cited 3 Cruise, Dig. 261, s. 172, 1st ed.

Dignities are not within the Statute of Limitation, and may, consequently, be claimed at any distance of time, and there are instances of claims being recognised after the dignities had been dormant for some centuries. Skin. R. 437; Collins, 323; 11 Rep. 1; 4 Inst. 335; 2 Bro. Par. Cas. 167; 3 Cruise, Dig. 274.

If a peer be disturbed in his dignity, the regular course, says Lord Holt (1 Ld. Raym. 16), is to petition the queen, and the queen indorses it, and sends it into Chancery, or the House of Peers, for the Lords have no judge of peerage unless it be given to them by the queen. 11 Co. 1. *Delamere's case*, W. Jon. 96. Such persons as are not noble are, by intendment of law, among the commons (Co. Litt. 16, b); but even these latter are by law divided into several degrees. *See ante*, p. 210, Table of Precedence. The queen possesses also the power of creating esquires, and therefore if the queen, by her commission constituting a subject to a magistrate's office, term him an esquire, he *ipso facto* becomes such. To the Crown belongs also the prerogative of raising practitioners in the court of justice to a superior eminence, by constituting them serjeants, &c., or by granting letters patent of precedence to such barristers as her majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and precedence as are assigned in their respective patents. 3 Bl. Com. 27. *See* Barrister, vol. ii. p. 373.

[1] Signifies in a general sense, a sum of money paid by the buyer for exporting or importing goods or merchandise. 2 Inst. 58. This description is not sufficiently comprehensive, as the term includes custom or port duty. Hale, *De Jure Mar.* p. 216. So, a duty imposed on travellers and goods passing along public roads, bridges, &c.

Tolls of a lighthouse are real estate. *Attorney-General v. Jones*, 1 Man. & G. 574, 590. *See*, generally, Gunning on Tolls.

[2] Toll traverse is a toll payable for going over another man's soil. *James v. Johnson*,

(B) *Toll Thorough.*[1]

III. Of Market Tolls, and Navigable Rivers, Railways, &c.[2]

2 Mod. 143. It may be claimed as appurtenant to a manor. Id. 1 Mod. 231. The consideration for it is implied (*Colton v. Smith*, Cowp. 48. *Pelham v. Pickersgill*, 1 T. R. 660), and need not be stated in a declaration thereon. (Id.)

[1] Toll thorough is for a passage through a highway, public navigable river, or a public ferry or bridge, and must be founded on a good consideration (*James v. Johnston, supra*), and which must be shown. *Rex v. Corporation of Boston*, W. Jon. 162. *Warren v. Prideaux*, 1 Mod. 105; Willes, 111. Hence a prescription for toll thorough the streets of a town, in consideration of repairing divers streets there, was held void, because it did not say plaintiff repaired all the streets there. *Truman v. Walgham*, 2 Wils. 296. This species of toll cannot be demanded, unless it has been used to be taken time out of mind (Fitz. Toll, pl. 3); and the reservations of the Toll must be contemporaneous with dedications of the way to the public. *Pelham v. Pickersgill, supra.* See *The Mayor, &c. of Nottingham v. Lambert*, Willes, 111; *see post*, Turnpike Roads.

The repair must be of the particular streets along which the toll is claimed to constitute a good consideration for a toll thorough (*Brett v. Beales*, 10 B. & C. 508; M. & M. 416); therefore, a plea of prescription in trespass for a toll thorough the streets of Gainsborough, in consideration of repairing certain streets there, held bad, because it did not say he repaired all the streets there, and for all that appeared the plaintiff might be passing through a street which he did not repair. *Truman v. Walgham*, cited *supra.*

The corporation of T. having proved a prescriptive right to tolls:—*Held*, that it was not destroyed by a charter of Elizabeth, granting and confirming, among other things, all the ancient rights of a corporation, but exempting the inhabitants from toll in all places except London; and that this exemption applied to the tolls of all other places except London, but not to the tolls of T. *Mayor of Truro v. Reynolds*, 8 Bing. 275.

The plaintiff claimed a right under custom to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove, and landing fish therein. It was proved that the plaintiff and his ancestors had, from time immemorial, furnished and maintained a capstan and rope for the use of fishermen; and that, in stormy weather, boats could not be drawn up from the sea with safety to the crews without them; that the spot on which the capstan stood belonged to the plaintiff, but the rest of the cove over which the boats were drawn was the property of a third person:—*Held*, that the keeping of the capstan and rope was a good consideration for the exaction of the toll from all boats landing in the cove, whether the capstan and rope were used or not. *Earl of Falmouth v. George*, 2 M. & P. 457; 5 Bing. 286.

Toll thorough may be severed from the soil whence it arises. *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402.

[2] A prescription to take toll for passing on an ancient navigable river through the plaintiff's manor is bad in law (*The Mayor, &c. of Nottingham v. Lambert*, Willes, 111); nor can a prescription to market tolls on sales by sample be supported. *Hill v. Smith*, 4 Taunt. 520. But an usage that toll has been taken for forty years on sales by sample, is sufficient to support a general right to toll. *Hill v. Smith*, 10 East, 476. But a claim to toll on all wheat brought into and sold at a market does not apply to a bulk sold in the market by sample. *Tewkesbury Corporation v. Diston*, 6 East, 438, a; 1 Smith, 508.

Toll is not incident of common right to a fair or market, but must be by prescription or grant; reasonable toll lies in grant, not excessive toll; toll of common right is due for live cattle; and for other things, stallage and piccage are only due to the owner of the soil. Mo. 474. *Holloway v. Smith*, Stra. 1171. *Anon.* 7 Mod. 12.

No toll is due by law but for goods sold, unless by special custom. *Leight v. Pym*, Lutw. 559.

A capital burgess cannot be disfranchised for preventing the corporation from receiving a toll pretended to be due to it by prescription. *Rex v. Vicars*, 11 Mod. 214.

A toll in Penzance market, belonging to the Crown in right of the Duchy of Cornwall, is not discharged by a grant from the Crown, exempting the inhabitants of Penzance from all and all manner of toll, pontage, stallage, &c., all which King John had granted to them to be discharged from, for King John never had the toll belonging to the Crown in right of the duchy; but if the grant had been general, without referring to the tolls which the kings of England formerly had in this market, it would have been a good grant of exemption. *Hill v. Priour*, 2 Show. 34.

A prescription for toll for setting goods on land within plaintiff's manor is good without other consideration (*Crispe v. Belwood*, 3 Lev. 424); but a prescription generally for toll of all goods brought within the limits of a certain manor is bad, for every prescription to charge the subject with a duty must import a benefit, and show the reason why it is claimed. *Warrington v. Moseley*, 4 Mod. 319; Comb. 297, S. C. But *see* Willes, 115; Gunning on Tolls, 5.

An act of parliament for making navigable the river Ouse, provided that for every ton of stone, &c. carried and conveyed upon the said river, should be paid the sum of 4*d.*;

IV. Computation of and Exemption from.[1] As to the exemption from, *see post*, Turnpike.

V. Grant of.[2]

and for every ton of butter, or other goods, wares, merchandises, and commodities, the sum of 9*d.*:—*Held*, that stones cut into a certain size and shape, for the purpose of being used as railway sleepers, did not thereby become liable to the higher toll. *Fisher v. Lee*, 10 L. J. Rep. (N. S.) Q. B. 1; 12 Ad. & E. 622; 4 Per. & D. 447.

An act of parliament enacted, that 1*s.* per chaldron should be paid on all coals landed within certain limits, and that when the surplus rates therefrom should amount to 3000*l.*, that sum should be invested in the funds, and the rates be reduced. The rates were accordingly, in 1834, reduced to 4*d.*, and after the passing of the 5 & 6 Wm. 4, c. 63, were raised to 9*d.* per ton. This sum was less in proportion than the sum of 1*s.* per chaldron, but the proportion had not been regulated by the justices in sessions, under the 14th section of that act:—*Held*, first, that the commissioners, although they had once lowered the rates, might again raise them; secondly, that they were not bound to have the proportion of rate, depending upon the difference between the chaldron and the ton, ascertained by the justices at sessions, under 5 & 6 Wm. 4, c. 63, s. 14. *Goody v. Penny*, 11 L. J. Ex. 289; 9 Mee. & W. 687.

The oyster-meters of London have, by custom, the exclusive right of unloading and delivering oysters in every place throughout the port, and to be paid a reasonable compensation. *Layburn v. Crisp.* 8 C. & P. 397.

Action on a deed made between five commissioners of an inland navigation, under the authority of several acts of parliament, and the defendant, whereby the commissioners, in consideration of rent, demised the tolls of the navigation to the defendant for a year, from the 1st of January, 1850, at the rent of 3470*l.*, together with other payments, and the defendant covenanted with them, and also with the whole body of commissioners, in a separate covenant, for the payment of the rent. The declaration alleged an entry by virtue of the demise, and the occupying and receiving of the tolls during the entire year. *Breach*, non-payment of the rent. *Plea*, that the commissioners never executed the lease, and that the entry and occupation were at the will of the commissioners only, and not under the demise. *Replication*, that the defendant had entered, and had received and enjoyed the tolls, by the permission of the commissioners, under the terms of the deed:—*Held*, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated; namely, a permanent estate during the demise and under its terms, and, therefore, that he was not liable to be sued upon his covenant in the lease. *Swatman v. Ambler*, 8 Ex. 72; 22 L. J. Ex. 81.

Where the language of an act of parliament, obtained by a public company for imposing a rate or toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public. *Stockton and Darlington Railway Co. v. Barrett* (in error), 3 Man. & G. 956; 3 Scott, N. R. 803; 2 Rail. Cas. 467; 11 Clark & Fin. 590.

Where by an act for paving, lighting, and cleansing a town, tolls were imposed on all stage-coaches, and other such public carriages carrying passengers for hire, and coming to or going from or out of the town and the precincts, and also on all wains, waggons, carts, or other such carriages carrying goods for hire, and coming to or going from or out of the town and the precincts:—*Held*, that railway carriages carrying passengers for hire, and coming into the town by a railway, and railway trucks carrying goods for hire, and coming into the town by a railway, were not liable to the tolls. *Newmarket Railway Co. v. Foster*, 2 C. L. R. 1617.

A trading company empowered by statute to take tolls for certain matters, is not bound, unless there is an enactment to that effect, to exact one uniform toll from all persons alike, but may charge a smaller toll to a particular class than to another. *Hungerford Market Co. v. City Steamboat Co.* 7 Jur. N. S. 67; 30 L. J. Q. B. 25; 3 L. T. (N. S.) 732.

[1] The computation of an additional toll is according to the progressive proportions named in the statute for the regulation thereof. *Chamberlain v. Songhurst*, Cowp. 365.

Under charters granting to a dean and chapter "that they and all their men shall be quit of toll, passage, cheminage, &c. in city and borough, fair and market, in the passage of bridges, and all parts of the sea, in all places throughout England," their laytenant of lands included in the charters is exempt from market-toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandise. *Middleton (Lord) v. Lambert*, 1 Ad. & E. 401; 3 Nev. & M. 841. *Quære*, whether in the latter case the exemption could have been claimed by ecclesiastical persons? (Id.) *Quære*, also, whether the exemption from toll claimable at common law by ecclesiastical persons and tenants in ancient demesne, extended to goods bought and sold, or carried for the mere purpose of trade? (Id.)

[2] A grant of toll payable for every horse drawing the cart containing specific goods, applies to whatever description of carriage it may be conveyed in. *The Corporation of Carlisle v. Wilson*, 1 Smith, 297; 5 East, 2.

If a person, claiming a toll for passing over a highway, can show an immemorial

VI. Action for.[1] VII. Distress for.[2]
VIII. Annual Returns.[3]

TOLL Collectors. *See* Extortion by, vol. iv. p. 426; Notice of Action, vol. v. p. 552.

TOMBSTONE. *See* vol. iii. pp. 15, 16.

TONTINE.[4]

TOOLS.[5] As to distraining, *see* vol. iv. p. 101.

TORT. Used to denote a wrongful act, for which an action will lie, as distinguishable from a contract. *See* vol. i. p. 139. Tort Feasor, a wrong-doer; a trespasser. As to contribution between, *see* vol. iii. p. 213.

TORTIOUS Conversion. *See post*, Trover.

TORTS under colour of Legal Process. *See post*, Trespass.

TOTAL Loss. *See* Insurance, vol. v. p. 207.

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usage, and that the soil and toll were, before the time of legal memory, in the same hands, though several since, it will be presumed that the soil was originally granted to the public in consideration of the toll. *Pelham (Lord) v. Pickersgill*, 1 T. R. 660.

[1] In an action for disturbance of toll, the plaintiff need not set out his title, but may declare merely on his possession. 2 Saund. 113, b, 114. *See* declaration for, B. & L. (Pr.) 153.

A general *indebitatus assumpsit* or debt lies for tolls. *Steinson v. Heath*, 3 Lev. 400, n. *Anon.* 7 Mod. 12.

An averment in a declaration by the owner of a market claiming toll in specie, that he is entitled to toll for goods sold within the market, means exclusively toll for goods brought into the market. *Moseley v. Pierson*, 4 T. R. 104.

A mere claim of a right to take certain tolls, without showing clearly that it is a *bonâ fide* claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. *Rex v. Hampshire (Justices)*, 3 Dowl. P. C. 47.

Ejectment lies by a mortgagee for a proportion of the toll and toll-house. *Doe d. Bankes v. Booth*, 2 B. & P. 219.

Turnpike-tolls are not within the Statute of Limitations (3 & 4 Wm. 4, c. 27), and consequently more than six years of interest may be recovered on a mortgage of turnpike-tolls, notwithstanding the 42d sect of that act. *Mellish v. Brook*, 3 Beav. 22.

If the lessee of tolls under a corporation vary, by temporary agreement, the amount of toll claimed of individuals, it shall not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Lancum v. Lovell*, 6 C. & P. 463: *Tindal.*

In an action for tolls or port dues, the jury should be directed to presume from immemorial usage the legal existence of the right. *Jenkins v. Harvey*, 1 C., M. & R. 877; S. C. 2 id. 393.

[2] Tolls on goods fraudulently sold out of a market cannot be distrained for. *Blakey v. Dinsdale*, Cowp. 661.

A tender of a certain sum as being "all that is due" is bad, and a demand of a certain sum, made up of two sums claimed on two distinct grounds, is not "a demand" of either; and, therefore, where a railway company entitled to distrain for tolls, demanded a sum in gross made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due:—*Held*, that the company was not entitled to distrain, but was not precluded by the tender from recovering the toll. *Field v. Newport, &c. Railway Co.* 27 L. J. Ex. 396. As to canal tolls on partial completion of works, *see* 32 L. J. Q. B. 295.

[3] By 23 & 24 Vic. c. 51, the amount of tolls and dues levied under the authority of parliament, in respect of markets, bridges, or harbours, must be annually returned to a secretary of state, but not of any tolls or dues taken by any railway, canal, or joint-stock company, as profits of their undertaking, or of any tolls or dues taken by prescription or otherwise as private property.

[4] A loan raised on life annuities, with benefit of survivorships. (Brande.) Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions have been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project; it was held, that each subscriber might, in this action, recover the whole money advanced by him, without deduction of any part towards the payment of expenses incurred. *Nockells v. Crosby*, 3 B. & C. 814; 5 D. & R. 751. *Doubleday v. Musket*, 7 Bing. 118. See *Loyd v. Sanchlands*, Gow. 13.

[5] Where these have been wrongfully detained or converted, and the owner has lost his customary wages, or lost employment, he may recover damages beyond the value of the tools. *Bodley v. Reynolds*, 8 Q. B. 779.

TOTIES Quoties. *See* 6 M. & S. 81; 7 Man. & G. 39.

TOUCH, License to, in Policy. *See* vol. v. p. 194.

TOUT temps prist. *Always ready.* The essential words in a plea of tender. *See ante*, p. 523, n.

TOWING-Paths.[1] *See* also Banks of Rivers, vol. ii. p. 371; Rivers and Canals, *ante*, pp. 9, 348.

TOWN.[2] *See* Town-Council, vol. iii. p. 276; Town Improvement Clauses Act, 10 & 11 Vic. c. 16; Town Police Clauses Act, id. c. 89.

TRADE.[3] As to what is, *see* vol. ii. p. 170. Nuisance in Exercising, Actions for, *ante*, p. 10; Indictment for, p. 16; Contracts in restriction of, *see* Covenant not to carry on particular Trade, vol. iii. p. 485; or in a particular Place or Limits, id.; so as to Bonds, vol. ii. p. 517; Words spoken concerning, *ante*, p. 452; Illegal Trades, *see* particular titles, as Fire-Works, &c.; as to Representation of Value of, *see post*, Warranty; as to Rating Stock in Trade, *ante*, p. 181; Married Women Trading, vol. v. p. 82.

TRADE Marks.[4] *See* also Deceit, vol. iii. p. 569.

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[1] There is no general common-law right of towing along the banks of a navigable river (*Ball v. Herbert*, 3 T. R. 253); but such a right may be acquired by grant, custom, or prescription (Add. *Torts*, 32). As to property in the soil of towing-paths, *see* id. 153-4 and 28 L. J. Q. B. 120; 4 H. & N. 427.

[2] A generic term, comprehending under it the several species of cities, boroughs, and common towns. 1 Bl. Com. 115. Lord Coke (1 Co. Litt. 1156) says the having, or having had, a church and celebration of divine service, is necessary to constitute a town.

[3] The 7 & 8 Vic. c. 24, repealed a variety of ancient acts, which restrained the exercise of trade; and as to restrictions on foreign ships employed in coasting trade, *see* 17 & 18 Vic. c. 5.

As to offensive or noxious trades.—The 11 & 12 Vic. c. 63, s. 64, provides that when the Public Health Act is applied to any district or place, the business of a blood-boiler, fellmonger, slaughterer of cattle, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade, or manufacture, shall not be newly established without the consent of the Local Board of Health, unless the general board shall otherwise direct.

By 16 & 17 id. c. 128, s. 1, if any person carries on any trade or business within the metropolis, which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbourhood or inhabitants, without using the best means for preventing or counteracting such annoyance, he is liable, on summary conviction, to pecuniary penalties. The same act requires furnaces used for the purpose of trade and manufacture, with certain excepted cases, to be so built as to consume the smoke arising therefrom. Form of declarations for price of goodwill of a trade, B. & L. Pr. 154, 155. Counts on contracts not to carry on in certain places, id. 155, 166.

Where a trade is regulated by committees of the masters and workmen respectively, which committees make rules from time to time, and by one of such rules, in case of disputes between a master and his men, an arbitration committee, presided over by a barrister, is to decide, and a particular dispute has been so decided, such decision is not to be considered as imported into all future engagements between masters and men, nor is it binding on persons not parties to that particular reference. (Affirming judgment of the Exchequer, 3 H. & N. 7; 4 Jur. N. S. 286.) *Hill v. Levey*, 3 H. & N. 702; 4 Jur. N. S. 589; 27 L. J. Ex. 259.

[4] A manufacturer or a merchant, for whom goods are manufactured, may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufactures, acquire a property therein as a trade mark, for the invasion of which an action for damages will lie, and in the exclusive use of which he may have protection from a court of equity. Besides the case referred to in vol. iii. p. 569, it may be useful to notice *Lawson v. Bank of London*, 25 L. J. C. P. 188; 18 C. B. 84, which was an action held to lie for assuming the name and title of a banking business previously used by the plaintiff. As to penalties for using the name or marks of a patentee of a patented article without his consent (5 & 6 Wm. 4, c. 83, s. 7, and 25 & 26 Vic. *infra*), see *Myers v. Baker*, 28 L. J. Ex. 90. A change in the name of a firm will not enable a purchaser to reject articles with an altered trade mark. 32 L. J. C. P. 154; see *Hall v. Borrow*, 11 W. R. 525; and *see* id. 931, 973.

In an action for assuming trade marks or name of another, for the purpose of selling goods as his, a claim may be made for an injunction to restrain such use under C. L. P. Act, 1854 (*Farina v. Silverlock*, 26 L. J. C. P. 11. *Collins v. Reeves*, 28 id. 56); or a court of equity will grant a perpetual injunction, and direct an account of the profits for the last six years, although the de-

TRAINING to Arms. *See* 60 Geo. 3, and 1 Geo. 4, c. 1.

TRANSFER of Share, Action for not. *See* vol. v. p. 251.

TRANSITORY and Local Actions. *See post*, Venue; and particular Titles according to form of Action.

TRANSLATIONS.[1] *See* Libel, vol. v. p. 362; Slander, *ante*, p. 450.

TRAVELLER,[2] **Who is.** *See* vol. i. p. 281; Sunday, *ante*, p. 508; Obligation of Innkeeper to receive, *see* vol. v. p. 159; Liability of Innkeeper at Common Law, id. p. 160; *see* also *Day v. Bathes*, 32 L. J. Ex. 171; 8 L. T. (N. S.) 205.

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fendant was not aware that such trade mark was the property of the plaintiff. *Cartier v. Carlile*, 8 Jur. N. S. 183.

The 25 & 26 Vic. c. 88, amends the law relating to the fraudulent marking of merchandise. 2. Makes forging a trade mark or falsely applying a trade mark with intent to defraud, a misdemeanor. 3. Applying a forged trade mark to any vessel, case, wrapper, &c., in or with which any article is sold or intended to be sold, a misdemeanor. 4. Selling titles with forged or false trade marks after the 31st Dec. 1863, penalty equal to value of article sold, and a sum not exceeding 5*l.*, nor less than 10*s.* 5. Additions to and alterations of trade marks, made with intent to defraud, to be deemed forgeries. 6. Any person who, after the 31st Dec. 1863, shall have sold an article having a false trade mark, to be bound to give information where he procured it. Power to justices to summon parties refusing to give information; penalty for refusal, 5*l.* 7. Making any false indication of quantity, &c. upon an article with intent to defraud; penalty, a sum equal to the value of the article, and the further sum not exceeding 5*l.*, and not less than 10*s.* Selling or exposing for sale after the 31st Dec. 1863, articles with false statement of quantities, &c.; penalty, not more than 5*l.* nor less than 5*s.* 9. Proviso that it shall not be an offence to apply names or works known to be used for indicating particular classes of manufactures. 10. Description of trade marks and forged trade marks in indictments, &c. 11. Conviction not to affect any right or civil remedy. 12. Intent to defraud, &c., any particular person need not be alleged in an indictment, &c. or proved. 13. Persons who aid in the commission of a misdemeanor to be also guilty. 14. Punishment for misdemeanor under this act. 15. Recovery of penalties. 16. Summary proceedings before justices to be within the 11 & 12 Vic. c. 43. 17. In actions, penalties to be accounted for in like manner as other monies, payable to the crown, and plaintiffs are to recover full costs of suit. 18. Limitation of actions, &c. 19. After the 31st of Dec. 1863, vendor of an article with a trade mark to be deemed to contract that the mark is general. 20. After the 31st of Dec. 1863, vendor of an article, with description upon it of its quantity, to be deemed to contract that the description was true. 21. In suits at law and in equity against persons for using forged trade marks, court may order article to be destroyed, and may award injunction, &c. 22. Persons aggrieved by forgeries may recover damages against the guilty parties. 23. Defendants obtaining a verdict to have full indemnity for costs. 24. A plaintiff suing for a penalty may be compelled to give security for costs. 25. Act not to affect the corporation of Cutlers of the liberty of Hallamshire, nor to repeal the 57 Geo. 3, c. 7, 26, short title, the Merchandise Marks Act, 1862; *see* 9 Jur. N. S. 479; id. 322.

[1] A copyright may be had in a translation (2 Mer. 421), even though it be the gift from another. *Wyatt v. Barnard*, 3 Ves. & B. 77.

[2] By 26 & 27 Vic. c. 41, no innkeeper, after the 13th July, 1862, shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other hired animal, or any gear appertaining thereto, or any carriage to a greater amount than the sum of 30*l.*, except in the following cases; (that is to say), 1. Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ. 2. Where such goods or property shall have been deposited expressly for safe custody with such innkeeper: Provided always, that in the case of such deposit, it shall be lawful for such innkeeper, if he think fit, to require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. If any innkeeper shall refuse to receive for safe custody as before-mentioned any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this act in respect of such goods or property. Every innkeeper shall cause at least one copy of the said section of this act, printed in a plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this act in respect of such goods or property only as shall be brought to his

TRAVERSE.

(A) *In Criminal Proceedings.*[1] (B) *In Pleadings.*[2]

TREASON.[3]

TREASURE-Trove.[4]

TREASURER or Secretary of a partnership or company authorised by statute to sue in the name of such person. *See* Form B. & L. Pr. 15.

TREBLE and Double Costs.[5]

Damages. *See* vol. iii. p. 552.

TREES, Timber, and Underwood. *See* also Fences, vol. iv. p. 452; Highways, vol. v. p. 47, n.; *post*, Waste.

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inn while such copy shall be so exhibited. The word "inn" shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word "innkeeper" shall mean the keeper of any such place.

[1] Formerly in misdemeanors, a defendant had a right to traverse; that is, to put off his trial until the next following assizes: but now, by 14 & 15 Vic. c. 100, s. 26, no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: Provided always, that if the court, upon the application of the person so indicted, or otherwise, shall be of the opinion that he ought to be allowed a further time, either to prepare for defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly: in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session, without entering into any fresh recognisance for that purpose.

[2] Of traverses there are several kinds: the most ordinary description is that which is called a common traverse. It involves a tender of issue. The denial is by way of express contradiction in terms of the allegation traversed. They are generally expressed in the negative; but this is not invariably the case with a common traverse, for if opposed to a precedent negative allegation it will, of course, be in the affirmative. Steph. in Pl. 143, 6th ed.

[3] Is an offence practically directed against the person of the sovereign, and consists (1), in compassing or imagining the death of the king or queen, or their eldest son or heir; (2), in violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; (3), in levying war against the king in his realm; (4), in adhering to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere; and (5), slaying the chancellor, treasurer, or the king's justices of the one bench, or the other justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. 4 Steph. Com. 185–193; 4 Bl. Com. 76–84. This definition of treason, or, rather, this enumeration of acts of treason, was settled by the stat. 25 Edw. 3, c. 2. And as to modification of punishment, *see* 54 Geo. 3, c. 141, s. 1; 7 & 8 Wm. 3, c. 3; 5 & 6 Vic. c. 51, s. 1; 11 id. c. 12; and as to attempts to fire at or do other injury to her majesty, *see* 5 & 6 id. c. 51, s. 2. Form of Indictment, Arch. *New Cro. Law*, 569.

[4] Literally, treasure found, money or coin, gold, silver, plate, or bullion found hidden in the earth or other private place, the owner thereof being unknown. 1 Bl. Com. 295; Finch's Law, b. ii. c. 17); in which case the treasure belongs to the Crown or its grantee. It is the duty of every person who finds any treasure to make it known to the coroners of the county. The punishment for secreting it is fine and imprisonment. 3 Inst. 133; *see* Stra. 505.

[5] By the stat. 5 & 6 Vic. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local and personal act, or in any act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered, and no more; and (sect. 2) that so much of any enactment in any public act not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual between party and party may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf. No double costs in error are to be allowed to either party. Reg. Gen. T. T.; 16 Vic. c. 28; 1 E. & B. App. 82. As to double and treble costs, *see* Gray on Costs, 181–186. Marshall, id. 254.

I. Definition,[1] and General Rights in.

II. Rights to as to particular Parties.

(A) *Landlord and Tenant.*[2]

[1] Timber trees are those which serve for building or reparation of houses, such as oak, ash, and elm, of the age of twenty years and upwards. 1 Cruise, T. 3, c. 2, s. 5; 2 Bl. Com. 281; Co. Litt. 53, a. *Aubrey v. Fisher*, 10 East, 446. By the custom of some countries certain trees, not usually considered as timber, are deemed to be such, being those used for building. 1 Cruise, T. 3, c. 2, s. 6; 2 Bl. Com. 201; Co. Litt. 53, a. Pollards fall within the description of timber-like trees. *Rabbitt v. Raikes*, Woodf. L. & T. 224. Trees and underwood, although growing, are, after they have been agreed to be sold and sold, considered as *quasi* personal property (*Smith v. Surman*, 9 B. & C. 561); but generally speaking, when growing they are part of the realty. If trees be excepted in a lease, the land on which they grow, or at least that immediately adjoining the stem and roots, is impliedly also excepted, and consequently, if the tenant cut down the trees the landlord may maintain trespass for breaking his close, as well as for cutting down his trees. *Rolls v. Rock*, 2 Selw. N. S. 1287; but *see* 1 B. & Adol. 625. But where by a lease of a tenement described as containing nineteen acres, save and except all timber, trees, wood (not woods, in the plural), underwood, &c., it was held that six acres of the soil, which at the time of the lease were covered with growing wood, were not excepted, but passed to the lessee. 1 B. & Adol. 622. When trees are excepted, it frequently becomes a question what trees were intended; an exception of trees in a lease does not include apple-trees. 4 Taunt. 316; and *see* 5 B. & C. 842; 8 D. & R. 657; and id. 651.

The value of standing trees cannot be recovered under a count for goods sold (*Knowles v. Michel*, 13 East, 249. See *Smith v. Surman*, *supra*); but trees purchased and carried away may. *Bragg v. Cole*, 6 B. Moore, 114. See *Parker v. Staniland*, 11 East, 362. *See* Fixtures, vol. iv. p. 474.

In reference to boundaries the general rule is, that the ownership of the tree follows the ownership of the hedge, and the tree will be held to belong to the party on whose land the trunk stands, without reference to the direction of the roots. By the French law, trees which are found in a common hedge are common, like the hedge; each of the two proprietors has the right to require that they should be felled. He whose property is overshadowed by the branches of his neighbour's trees may compel the latter to cut off such branches. If it be the roots which encroach on his estate, he has a right to cut them therein himself. Cod. Civ. art. 672, 673. See *Holder v. Coats*, M. & M. 112. *Waterman v. Soper*, 1 Ld. Raym. 737. *Masters v. Pollie*, 2 Roll. Rep. 141. *See post*, Trespass, p. 545.

[2] The general property in trees, or that which is likely to become timber, is in the landlord; and the general property in bushes or trees not timber is in the tenant; and the landlord cannot maintain trespass against a stranger for cutting bushes and thorns growing in a hedge, although cut improperly, if it were afterwards assented to by the tenant. *Berriman v. Peacock*, 2 M. & Scott, 524; 9 Bing. 384.

Under a liberty in a lease for the lessee to cut down and dispose of all timber and coppice, where there was also a proviso to give notice in writing to the lessor of the lessee's intention, that the former might have the option of purchasing, a lessee gave a *bonâ fide* notice, and the lessor disclaimed any intention of purchasing:—*Held*, that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience, even though the lessor had in the meantime parted with his interest to another. *Goodtitle d. Luxmore v. Saville*, 16 East, 87.

A covenant in a lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing from a part of the orchard which was too crowded (*Doe d. Jones v. Crouch*, 2 Camp. 449): but a covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; and so it is by taking away the trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead. *Doe d. Wetherell v. Bird*, 6 C. & P. 195. See *Snell v. Snell*, 4 B. & C. 741.

A tenant for years is not guilty of waste in cutting down willow-trees for sale, which sprung up again from the stools, unless they serve to protect the house, or to support the bank of a stream. *Phillips v. Smith*, 14 Mee. & W. 589; 15 L. J. Ex. 201.

The following stipulation in a lease not under seal, "All the hedges, trees, thornbushes, fences with the lop and top, are reserved to the landlord," is evidence for the landlord under a plea of leave and license in an action against him by his tenant for entering the close, and drawing the trees, when cut down, over the close. *Hewitt v. Isham*, 7 Ex. 77; 21 L. J. Ex. 35.

A farmer who raises young fruit-trees on the demised lands, for filling up the lessor's orchards, is not entitled to sell them. *Wyndham v. Way*, 4 Taunt. 316.

If a lessor during the term cut down trees growing upon the demised premises, which are fit only for firewood, and the lessee takes

(B) *Tenants for Life; Tenants after possibility of Issue Extinct.*[1]

(C) *Tenants in Tail.*[2] (D) *Tenants in Common.*[3]

(E) *Mortgagor and Mortgagee.*[4]

(F) *Ecclesiastical Persons and Property.*[5]

(G) *Copyholds.*[6]

(H) *Malicious Injuries to.* *See* vol. v. p. 16; Stealing, id.; Malicious Trespass, vol. v. p. 413; and *post*, Trespass, p. 545.

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them away, trespass will lie against the lessee, at the suit of either the lessor or his vendee. *Chapman v. Patch*, 8 D. & R. 651; S. C. nom. *Channon v. Patch*, 5 B. & C. 897.

A lessor, during the term, cut down some oak pollards growing upon the demised premises, which were unfit for timber:—*Held*, that as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them. (Id.)

If trees be excepted out of a demise, waste is not committed by cutting them down; and, therefore, ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright d. Peters v. Vivian*, 8 East, 190.

By an exception of "all trees, woods, coppice-wood, grounds, of what kind or growth soever," apple-trees are not excepted. *Wyndham v. Way*, 4 Taunt. 315.

[1] A tenant for life without impeachment of waste cannot maintain trover for timber severed during a *prior estate;* but it vests immediately in the owner of the inheritance (1 Ves. 484); but a tenant for life without impeachment of waste has the property in the trees severed. 15 id. 425. Such a tenant has a right to cut timber generally in a husbandlike manner, independently of the effect upon the beauty of the place, except equitable waste. *Burgess v. Lamb*, 16 Ves. jun. 179, 185.

Timber left standing for ornament or shelter is not to be cut, though decayed or injurious to adjoining trees, unless the removal is essential to the intended purposes of ornament or shelter. *Lushington v. Boldero*, 6 Madd. 149. *Attorney-General v. Duke of Marlborough*, 3 id. 499; 5 id. 280.

Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, or timber merely ornamental: it does not apply to an extensive wood. *Burgess v. Lamb*, 16 Ves. jun. 174.

Trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. *Pyne v. Dor*, 1 T. R. 55.

A bill will lie to restrain a tenant for life from cutting down underwood of an insufficient growth. *Brydges v. Stephens*, 6 Madd. 279.

Where, in a writ of waste founded on the Statute of Gloucester, 6 Edw. 1, c. 5, it appeared that the defendant, who was tenant for life, had cut down trees on the estate at three different times, but not within six years before the writ was sued out, and it was admitted that several of such trees had been felled for the benefit of the estate; and the judge directed the jury to find a verdict for the plaintiff, if they thought the felling injurious to the inheritance, but if done *bonâ fide* with a view to benefit such estate, then for the defendant; and they having found a verdict for him, the Court of Common Pleas granted a new trial. *Redfern v. Smith*, 8 Moore, 443; 1 Bing. 382; 2 Bing. 262. And see *Pindar v. Wadsworth*, 2 East, 155. And they having afterwards found a verdict for the plaintiff:—*Held*, that they ought to have found the place wasted, and as they had omitted to do so it was impossible to enter a verdict on the *postea*. (Id.)

[2] In the case of an infant tenant in tail in possession, the court will authorise the cutting of all timber which is fit to be felled; but where there is a tenant for life impeachable of waste, with remainder over, the court will authorise the cutting of timber where the interest of the succession requires it. *Hussey v. Hussey*, 5 Madd. 44.

[3] One tenant in common cannot maintain an action on the case in the nature of waste against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of a proper age and growth for being cut. *Martin v. Knowllys*, 8 T. R. 145.

[4] A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting timber, if the land without it is a scanty security. *Humphreys v. Harrison*, 1 J. & W. 581. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent. (Id.)

[5] As regards trees in churchyards, the parishioners have no right to cut them down against the will of the rector or vicar, although they may intend to apply them to the repairs of the church. *See* Lond. 267; 1 Ld. Raym. 212. The rector may cut down for the repairs of the chancel. 2 Atk. 217; 1 B. & P. 115, n.; 2 Bell, 552.

[6] The lord of a manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant as entitles him to enter and cut. *Whitechurch v. Holworthy*, 19 Ves. jun. 213; 4 M. & S. 344; *see* 12 C. B.

TRESPASS. Where remedy, case, or trespass, *see* Action, vol. i. p. 143.

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(9) *Leave and License*, p. 556.

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VI. Actions relating to Personal Property. *See* also Accident, vol. i. p. 82; Distress, Damage Feasant, vol. iv. p. 84; Distress for Rent, id. p. 113–115; Negligence in Driving, vol. v. p. 523; Negligence in Navigation, id. 524; Seizing under colour of Legal Process, *post*.

(A) *Of the Nature of the Chattel, and Plaintiff's Property or Possession*, p. 557.

(N. C.) 16. Generally, if there is no custom for the tenants of a manor to cut timber, it belongs to the lord. (Id.) It seems there may be as to timber on copyhold premises, what may exist unquestionably as to mines, a custom that the lord cannot take without consent of the copyholder, and *vice versâ*. (Id.) A copyholder may by custom have such an interest in the timber that he may himself cut. So he may have a special interest to prevent the lord's cutting; but such a custom ought to be proved by extremely strong evidence. (Id.) The lord of a manor has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there be no custom in the manor. (Id.)

Where a copyhold estate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the estate. *Mardiner v. Elliot*, 2 T. R. 746.

[1] Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down. *Perry v. Fitzhowe*, 8 Q. B. 757; 10 Jur. 799; 15 L. J. Q. B. 239. But he is not justified in pulling it down if there are persons in it at the time. (Id.)

If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder, and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. *Burling v. Read*, 11 Q. B. 904; 14 Jur. 395; 19 L. J. Q. B. 291. *Davis v. Williams*, 16 Q. B. 546; 20 L. J. Q. B. 330.

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I. Definition of.[1]

[1] Trespass is an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another. It is also said (3 Steph. N. P. 2629) that trespass, in the most extensive sense, means any injury arising to another's person or property from the misfeasance or act of another; and the still more extensive definition is given by Blackstone (3 Com. 208), as any transgression or offence against the law of nature, of society, or of the country, whether it relates to a man's person or his property.

The act being voluntary or involuntary is not material; as, if a squib be thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib otherwise than in pure self-defence, are responsible for the injury it occasions. *Scott v. Shepherd*, 3 Wils. 403; 2 W. Black. 822.

If I ride my horse, and J. S. whips the horse so that it runs away with me, and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I, by spurring, was the cause of such accident, then am I guilty. In the same manner, if A. takes the hand of B., and with it strikes C., A. is the trespasser, and not B. *Gibbins v. Pepper*, 1 Ld. Raym. 38; Bac. Abr. Trespass, D. 2. Nor, as regards the form of action, is the legality or illegality of the original act a criterion. *Reynold v. Clarke*, 1 Stra. 635. *See* Accident, vol. i. p. 82. We have seen (id. p. 137) that actions now consist of personal and mixed —real being in form, and almost in effect, abolished (id.); and are again divided into actions *ex contractu* and *ex delicto*: this is shown by 15 & 16 Vic. c. 76, sched. B, referring only to contracts and torts.

Previous to 1852, many very refined distinctions existed, as described in an earlier vol. (vol. i. p. 137), as to whether an action of trespass or an action upon the case was the appropriate remedy for particular wrongs. It is there stated that, as special demurrers are abolished, and no form of action need be mentioned in the writ, and as counts in different forms may now be joined, it is not material strictly to decide whether a wrong be a mere consequence of a tortious act, or one of direct aggression or violence; still, in practice, with a view to costs, damages, and forms of pleading, the technical peculiarities of each particular remedy is not to be disregarded.

In the present article, references will be principally confined to acts of trespass of a direct and immediate character, and so treated under the old form. *See* the well-known cases of *Scott v. Shepherd*, 2 W. Black. 822. *Leame v. Bray*, 3 East, 593; and cases cited vol. i. p. 143.

The injury must be to something of substance, and tangible, as the body, personal chattels, and real property corporeal; if it be not tangible, such as health, reputation, real property incorporeal, case is the only form of remedy; but trespass may lie for injuries to the relative rights of persons accompanied by force, as for criminal conversation, seduction, &c.

II. Summary of what Constitutes, and when Action lies in General.[1]

III. By Whom to be Brought.[2]

A party may in some instances waive a trespass and sue as upon a contract; as if money be obtained under duress, the plaintiff may sue as for money had and received (*Edneads v. Newman*, 1 B. & C. 418); and even where there has been an express agreement, the person injured may sustain an action of *assumpsit*, though the breach amount to a trespass. 2 Wils. 321; 3 id. 354; 1 Camp. 360. So, in some instances, where the injury be immediate and forcible, the plaintiff may waive trespass and sue for the consequential damage. *Petts v. Gaime*, 1 Salk. 10. *See* 1 B. & C. 146; 4 B. & Adol. 413; 10 Bing. 18; 6 Q. B. 123; 1 C. B. 961; 5 Dowl. P. C. 95.

[1] It is not only in instances of actual violence that trespass will lie; it lies in all cases of injury, direct and immediate, and not merely consequential, where the law implies force, from the circumstance of the act being committed without the consent of the party wronged: as, for instance, if a man enter into the house of another, the door being open (Plowd. 71; 2 Roll. Abr. 555, pl. 1), or enter his fields, &c., the gates being open, or take possession of or carry away his goods, although without force, or assault him, although he do not hit him; in all these cases, if the act be done without the consent of the party injured, it is a trespass, and unless the act can be excused or justified, an action of trespass will lie for any damage occasioned by it. And with respect to land, the action will lie, not only for a trespass to the surface soil, but for digging or taking away any of the earth or minerals beneath it; and, therefore, if the owner of a mine, in working it, go beyond the extent of his own property, he is liable to an action of trespass for it (see *Martin v. Porter*, 5 Mee. & W. 351); or if the land be covered with water, an unlawful entry upon the water, or wrongfully fishing in it, will be the subject of an action of trespass. Co. Litt. 122; Cro. Car. 554; 2 Salk. 637. *See* 32 L. J. Q. B. 139; 8 L. T. (N. S.) 416. So the owner of the soil on the sea-shore may maintain trespass (*Blundell v. Catterall*, 5 B. & A. 268); or the owner of the soil of a market. *Mayor of Northampton v. Ward*, 2 Stra. 1239; 1 Wils. 107. Hence it will lie for placing tables, stools, &c. in a market-place without his license (*Mayor of Norwich v. Swan*, 2 W. Black. 1116); or if a man preach in another's chapel without his consent. *Turton v. Reignolds*, 12 Mod. 433. And where an erection is made upon the land of another, without his consent, and afterwards continued there without his permission, the continuance is deemed a fresh trespass, and the party injured may maintain an action of trespass for it from time to time, even although he brought an action for the original erection, and recovered damages. *Holmes v. Wilson*, 10 Ad. & E. 503. But the trespass must consist of an act committed; an omission or mere nonfeasance can never be deemed a trespass (*Six Carpenters' case*, 8 Co. 146); but, if actionable, is the subject of an action on the case. *Turner v. Hawkins*, 1 B. & P. 472. See *Williams v. Ladner*, 8 T. R. 72. The owner of cattle is responsible in trespass if they stray on to plaintiff's land, unless he be liable and omit to repair the fence. (See *Stennet v. Hogg*, 1 Saund. 220. *Rex v. Steward*, 2 Mee. &. W. 424–426. *Carruthers v. Hollis*, 8 Ad. & E. 113); but this liability does not apply to dogs, they not being usually confined: *Willes, J.*, 32 L. J. C. P. 92.

The injury done must arise immediately from the act committed; if it be consequential only, case, and not trespass, is the proper remedy.

There are instances where a man, having authority by law to do an act which would otherwise be a trespass, abuses that authority, and thereby loses the benefit of the justification he would have derived from it; in such a case he is deemed a trespasser *ab initio*. *See* 7 Bac. Abr. Trespass, B. *See post*, Div. X., Trespass under colour of Legal Authority, p. 561.

As to trespass to real property, it must appear that the property is situate within England or Wales; for trespass will not lie for an injury to land abroad or in the colonies (*Doulson v. Matthews*, 4 T. R. 503); but for trespass to personal property, or to the person, it will. Co. Litt. 282; Cro. Car. 444.

[2] To maintain trespass for an injury to property, real or personal, the plaintiff must either have been in possession at the time of the trespass, or (in the case of personal property) be the owner, and have the right to the immediate possession of it. Possession, of itself, gives the party a right to maintain trespass against all except the real owner, both in the case of land (*Catteris v. Cowper*, 4 Taunt. 547. *Harper v. Charlesworth*, 4 B. & C. 574), and of personal chattels. So possession of personal property as a bailee will be sufficient; and if goods be wrongfully taken from a bailee by a stranger, the action may be brought either by the bailee (F. N. B. 89, 92; Co. Litt. 89; Bro. Trespass, pl. 67, 83, 92), although he be a gratuitous bailee (*Rooth v. Wilson*, 1 B. & A. 59; or by the bailor (2 Roll. Abr. 569, pl. 5), if he have the right to the immediate possession (*Ward v. Macauley*, 4 T. R. 489. *Hall v. Pickard*, 3 Camp. 187); but not by both. 2 Roll. Abr. 569, p. 4.

If the goods of a church be taken, the churchwardens may sue for the taking (F. N. B. 92; 1 Vent. 89; 2 Saund. 47); but if a trespass be committed to the church itself the action must be brought by the rector. See *Jones v. Ellis*, 2 Y. & J. 265. So, if the owner of a pew be disturbed in the use of

IV. Against Whom to be Brought.[1]

it, he cannot bring trespass, because the church is in possession of the rector; his remedy is by action on the case. *Dawtrie v. Dee*, Palm. 46. *Clifford v. Wicks et al.* 1 B. & A. 498. *See* Pew, *ante*, p. 128. In other cases of land, however, where there are landlord and tenant, the tenant who has the actual occupation of the land is the only person who can maintain an action of trespass for an injury to it; the landlord cannot maintain any action for it, unless the injury be of a nature to affect the inheritance or reversion, and then his remedy is by action on the case, not an action of trespass. *See post*, p. 549.

A trespasser may have a right of action for an injury sustained while in the act of trespassing. *Barnes v. Ward*, 14 Jur. 334; 19 L. J. C. P. 195.

[1] The same rule prevails in civil actions for trespass as on an indictment for misdemeanor; all persons who order or incite others to commit the trespass, or procure it to be committed, and all persons present aiding and abetting in the commission of it, are principals, as fully as the person by whose hand it is actually committed. *See* Bro. Trespass, pl. 113; 1 Lev. 124. *Britton v. Cole*, Salk. 409. Therefore, it has been holden that trespass would lie against a defendant for having procured, by fear and influence, a sovereign, independent, and absolute prince, abroad, to imprison the plaintiff. *Rafael v. Verelst*, 2 W. Black. 983, 1055. So the captain of a merchant ship was holden liable in trespass for procuring a mutinous seaman to be flogged and imprisoned in a foreign port by the local authorities, where it appeared that he took an active part in the proceedings, and did not merely leave the local authorities to act as they thought fit. *Aitken v. Bedwell*, M. & M. 68. So, if A. state positively to the commander of a press-gang that B. is liable to the impress service, when in fact he is not so, and B., in consequence of this information, be impressed, B. may maintain trespass against A. *Flewster v. Royle*, 1 Camp. 187.

If A., having no right to apprehend B., direct a police-officer to take him, and he do so, B. may sue A. in trespass for the false imprisonment; but if A. merely make a statement to the officer, and leave it to the officer to act or not, as he may think fit, and the officer thereupon take and imprison B., his remedy then against A. is by action on the case, not trespass. *Hopkins v. Crowe*, 7 Car. & P. 373.

If a warrant to apprehend a party, or to distrain upon his goods, be obtained from a magistrate upon complaint, in a case where he has no jurisdiction, and it be executed, the magistrate is liable to an action of trespass at the suit of the party injured. *Weaver v. Price et al.* 3 B. & Adol. 409. *Fernley v. Worthington*, 10 L. J. C. P. 81. And where a justice of the peace maliciously granted a warrant against a person for a supposed felony, without any previous information being laid, it was holden that trespass, not case, was the proper remedy against him. *Morgan v. Hughes*, 2 T. R. 225. So, where an attorney entered up judgment on a warrant of attorney, which he knew had been satisfied, and sued out a *ca. sa.*, under which the party was arrested and imprisoned; it was holden that he was liable for it in trespass, as for a false imprisonment. *Rogers v. Popkin*, 2 Stark. 404. So, if an attorney, instructed to bring an action against J. S., do so, and obtain a judgment against him, but by mistake cause the goods of another person of the same name to be seized and sold under the *fi. fa.* sued out by him upon the judgment; trespass, not case, is the proper remedy for the party injured. *Davis v. Jenkins*, 11 Mee. & W. 745. But, in general, case, and not trespass, is the remedy for falsely, maliciously, and without probable cause, procuring a warrant of a magistrate against another, by reason whereof he is imprisoned, &c. *Elsee v. Smith*, in error, 1 D. & R. 97; vol. v. p. 420.

Where goods are intrusted to a bailee for a particular purpose, and he destroy the thing bailed, an action of trespass lies against him. Bro. Trespass, pl. 295; Co. Litt. 57; 5 Co. 14; Cro. Eliz. 784. So, against a servant, entrusted with his master's goods, if he destroy or injure them by malfeasance (Bro. Trespass, pl. 295. *Glosse v. Hayman*, 1 Leon. 87); but if from negligence merely, he is not liable in trespass, the remedy being by action on the case. 5 Co. 14; 1 Ld. Raym. 188.

If the servant, by his negligence or unskilfulness, do a forcible injury to the property or person of a third party, trespass will lie against the servant of course, or against the master, if he were with him at the time (*Chandler v. Broughton*, 1 C. & M. 29); or if the injurious act were the necessary or natural consequence of any order given by the master to the servant (*Gregory v. Piper*, 9 B. & C. 591); but in other instances the action, if brought against the master, must be case (*Morley v. Gaisford*, 2 H. Black. 442); and if the act be done wilfully by the servant, no action whatever will lie against the master. *M'Manus v. Crickett*, 1 East, 106; *see* vol. v. p. 465.

If, under a *fieri facias* against J. S., the goods of J. N. be taken (Bro. Trespass, pl. 564; 2 Roll. Abr. 552, pl. 3, 9; Carth. 381. *Ackworth v. Kempe*, Dougl. 40. *Saunderson v. Baker*, 3 Wils. 309), or his house be entered, no goods of J. S. being there (*Fallon v. Anderson*, Peake, 110); or if under a *ca. sa.* against J. S., the sheriff's officer take J. N., J. N. may maintain an action of trespass against the sheriff (1 C. & M. 262; 9 Bing. 471); but it will not lie against him by reason of any objection to the proceeding arising merely from a defect in the judgment (*Phillips v. Biron*, Stra. 509; 1 Ld. Raym. 73. *Ives v. Lucas*, 1 Car. & P. 7), unless he have notice of a writ of error

V. Actions relating to Real Property.

(A) *Of the Plaintiff's Possession or Right to the Property, and Parties to Sue.*[1]

pending. *Belshaw v. Marshall*, 1 Nev. & M. 689. And this action will lie, not only against individuals, but against corporations also. *Maund v. the Monmouthshire and Staffordshire Canal Co.* 2 Dowl. N. S. 113.

If the action be against several, and evidence be attempted to be given of defendant's trespasses, they must all appear to have been committed by the same defendants; the plaintiff cannot give evidence of one trespass by two, and of another by three of the defendants, but the judge, upon application of the defendant's counsel, will make the party elect for which of the trespasses he will proceed. *Tait v. Harris*, 6 C. & P. 73.

In trespass against several, there cannot be a verdict for any of them until the case for the plaintiff is finally closed by the complete examination of all his witnesses, nor for so long as the cross-examination of any of them is reserved. *Souch v. Champion*, 1 F. & F. 495.

If a person does not assist in a trespass, either in word or deed, he is not liable for it. *Timothy v. Simpson*, 6 C. & P. 499.

The rule that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time. *Tharpe v. Stallwood*, 5 Man. & G. 760; 6 Scott, N. R. 715.

[1] Possession, actual or constructive, is indispensable to the maintenance of this action (*Topham v. Dent*, 6 Bing. 516. *Graham v. Peat*, 1 East, 246); and though the title may come in question, it is not essential to the action (*Heath v. Milward*, 2 Bing. N. C. 28. *Holmes v. Newlands*, 11 Ad. & E. 44); or he be shown to have the general property, in respect of which possession immediately follows, otherwise he cannot maintain an action of trespass, a mere right to enter not being sufficient. *Peter v. Kendall*, 6 B. & C. 703. *Dyson v. Collick*, 5 B. & A. 600. *Duke of Newcastle v. Clark*, 2 Moore, 666; 8 Taunt. 602.

Proof of *actual* possession, whether legal or not, is sufficient against a wrongdoer, or a person who cannot make out a title, *primâ facie* giving him the right to possession *Graham v. Peat*, 1 East, 244. *Harker v. Birkbeck*, 3 Burr. 1563; 2 Stra. 1238. *Browne v. Dawson*, 12 Ad. & E. 629. *Chambers v. Donaldson*, 11 East, 65. See *Hull v. Davis*, 2 C. & P. 33. *Revett v. Brown*, 5 Bing. 9. Therefore, a tenant for years (2 Roll. Abr. 551. *Geary v. Barecroft*, Sid. 347), a lessee at will (id.), and a tenant at sufferance (id. 13 Rep. 69. *Graham v. Peat*, 1 East, 245, n.; Com. Dig. Trespass, B. 1; 1 Saund. 322, n. 5), may support this action against a stranger, or even against his landlord, unless a right of entry be reserved (*Anon.* 11 Mod. 209; Com. Dig. Biens, H.; 11 Rep. 48): or unless the landlord have a right to re-enter by law; as, where the tenancy has expired, and the tenant becomes a trespasser. *Turner v. Meymott*, 7 Moo. 574; 1 Bing. 158; S. P. *Taunton v. Costar*, 7 T. R. 431.

A servant, having the key and care of a house, may sometimes sue. 2 C. & P. 33.

Where trees are excepted in a lease, the land on which they grow is necessarily excepted also; consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking and entering his close and cutting down the trees. *Rolls v. Rock*, 2 Selw. N. P. 1287. *See ante*, Trees, p. 542.

Where the owner of property gave certain commissioners leave to build a dam upon his ground, it was held the commissioners might maintain trespass against a stranger for breaking it down (*Dyson v. Collick*, 5 B. & A. 600; 1 D. & R. 225. See *Duke of Newcastle v. Clarke, supra. Hollis v. Goldfinch*, 1 B. & C. 205); and even without such permission, as where the plaintiff placed posts on the land of a person, and the defendant took them away. *Welch v. Nash*, 8 East, 394, recognised in 5 B. & A. 603. A person in possession of property, whether rightfully or wrongfully, may maintain trespass against a wrongdoer. *Harper v. Charlesworth*, 4 B. & C. 574; 6 D. & R. 572. *Graham v. Peat*, 1 East, 246. *Oughton v. Seppings*, 1 B. & Adol. 241. *Chambers v. Donaldson*, 11 East, 65. *Catteris v. Cowper*, 4 Taunt. 547. But one who has obtained possession by a trespass cannot sue the person whom he has dispossessed, and who forcibly retakes possession; and this defence may be set up under a plea denying the property to be in the plaintiff. *Browne v. Dawson*, 12 Ad. & E. 624.

Overseers, under 39 Geo. 3, c. 42, have sufficient possession. *Matson v. Cook*, 4 Bing. N. C. 392.

A party who insists upon remaining on the land of another against his will, and therefore *primâ facie* against right, ought to show all the circumstances which make such possession lawful, and abridge the general rights of property. *Hayling v. Okey* (in error), 8 Ex. 531; 17 Jur. 325; 22 L. J. Ex. 139, Ex. Cham.

A person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not thereby acquire possession, but may be forcibly expelled by him on discovery of the fraud; and if in such a case assaults are committed in consequence, the question for the jury will be, whether there has been an excess of violence. A subsequent attempt by force to re-enter, and so causing an affray: —*Held*, an indictable offence, for which the party might be given in charge. *Collins v. Thomas*, 1 F. & F. 416.

The actual possession of crown lands, under a parol license from the Crown, suf-

fices against a wrongdoer. *Harper v. Charlesworth*, 6 D. & R. 572; 4 B. & C. 574. By his induction, the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it (*Bulwer v. Bulwer*, 2 B. & A. 470); and a party at whose expense a tombstone has been erected, may sue in trespass for removing it. *Spooner v. Brewster*, 3 Bing. 136); and on the determination of a lease at will by the death of the lessee, the lessor may sue in trespass before entry. Co. Litt. 62 b; 1 Lev. 202; and *see* 4 B. & C. 583; 6 D. & R. 572. The outgoing tenant, who is entitled by custom to have and to cut certain growing crops, has such a possession as to maintain or resist trespass. *Griffiths v. Puleston*, 13 Mee. & W. 358. But the occasional possession of the key of a chapel, in order to preach there, is not sufficient. *Revett v. Brown*, 5 Bing. 7. The owner of the soil of a public way (*Mayor of Northampton v. Ward*, 1 Wils. 110), or market (1 Wils. 107), may maintain trespass against any one who makes use of it extending beyond those privileges which the public possess.

Wherever there is an exclusive right trespass may be supported, though the party had not the absolute ownership of the soil, or the whole property therein, and however temporary his interest (3 Burr. 1563, 1824; 5 East, 485–487. *Weldon v. Bridgewater*, Cro. Eliz. 421); as, if a person have an exclusive right to cut turf and peat, or cut thorns (*Harker v. Birkbeck*, 3 Burr. 1560, 1824. *Wilson v. Mackreth*, 3 Burr. 1829), or underwood (*Hoe v. Taylor*, Cro. Eliz. 413), or a crop of grass (*Crosby v. Wadsworth*, 6 East, 602); and it may be supported for a trespass in a portion of a common field, after the allotment of the plaintiff. *Weldon v. Bridgewater*, Cro. Eliz. 421; 5 East, 480, 485–487. The word "close" in a declaration in trespass, includes the subsoil as well as the surface. *Cox v. Mousley*, 17 L. J. C. P. 102; 12 Jur. 185; 10 L. T. 374.

Where a full-grown crop of potatoes was purchased while in the ground, to be taken away immediately, it was held, the purchaser had not such an interest in the profits of the soil as would entitle him to maintain trespass *quare clausum fregit*. *Parker v. Staniland*, 11 East, 362. *Evans v. Roberts*, 5 B. & C. 837. The possessor of herbage, or right of feeding cattle on certain closes, may maintain trespass against any person who infringes that right, or may even distrain cattle doing damage there. *Burt v. Moore*, 5 T. R. 329; 1 Ch. Pl. 194. Showing, actual possession, however slight (*Lewis v. Ponsford*, 8 C. & P. 687), or by a tenant even against his landlord, who enters land under an agreement for a lease, suffices. *Alexander v. Borries*, 4 Bing. N. C. 799.

A copyholder may recover in this action damages against the lord of the manor, for cutting down so many trees as will deprive him of his right of estovers, &c. (Bull. N. P. 85 a); and the lord or owner of the soil may support this action against a commoner, though he may have a right to enter if he commit any trespassable act. Cro. Jac. 195; Bac. Abr. Trespass, C. 3. Possession of the lands, &c., at the time when the injury was committed is enough; having quitted before the commencement of the action constitutes no objection. Bac. Abr. Trespass, C. 3.

The owner of a free warren may maintain trespass for breaking his warren (*Lord Dacre v. Tebb*, 2 Black. 1151. *Lord Carnarvon v. Villebois*, 13 Mee. & W. 313); but not for breaking his close (5 Hen. 7, s. 10, cited *Weldon v. Bridgewater*, Cro. Eliz. 421); or owner of a several fishery may sue in trespass. *Holford v. Bailey*, 8 Q. B. 1000. A party may maintain trespass for taking coals from the mines, though there be no injury done to the surface. *Lewis v. Brainthwaite*, 2 B. & Adol. 437.

Proof that the premises were, at the time of the injury, in the occupation of a servant of the plaintiff, he not paying rent will be evidence of the possession of the plaintiff. *Bertie v. Beaumont*, 16 East, 33, 36. *Curtis's case*, Litt. Rep. 139. Paying rent for having the privilege of shooting over and taking the grass of lands is evidence of actual possession. *Harper v. Charlesworth*, 4 B. & C. 574; 6 D. & R. 572.

Cutting down trees in a way, or clearing it, is evidence to prove right to the soil. *Berry v. Goodman*, 2 Leon. 148. If the plaintiff be proved to be owner of land on both sides of a river, he will be presumed to be the owner of the whole river. Hargr. *Law Tracts*, 5.

Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. *R. v. Landulph*, 1 M. & Rob. 393. As to adjacent fences, *see* Fences, vol. iv. p. 452.

The property in a bank generally follows that of the soil from which it is constructed, but the property in a wall belongs to him who is bound to repair it. See *Duke of Newcastle v. Clarke*, 8 Taunt. 602; 2 Moo. 666. *See* vol. iv. p. 452. *Matts v. Hawkins*, 5 Taunt. 20. *Morley v. M'Dermott*, 8 Ad. & E. 138. *Cubitt v. Porter*, 8 B. & C. 257. As to the right to trees growing on boundaries of premises, see *Waterman v. Soper*, 1 Ld. Raym. 737; Bull. N. P. 85. *Masters v. Pollie*, 2 Roll. 141, 255. The tree belongs to him in whose soil it was first sown. *Holder v. Coates*, M. & M. 112. The property in trees is in the landlord; the property in bushes, even where they have been cut down by a stranger, in the tenant. *Berriman v. Peacock*, 9 Bing. 384. In general, waste next adjoining a public highway is presumed, *primâ facie*, to belong to the owner of the land next adjoining such waste, whether freehold or copyhold, and not to the lord of the manor (*Steel v. Prichett*, 2 Stark. 468. *Doe v. Pearsey*, 7 B. & C. 304. *Doe v. Kemp*, 2 Bing. N. C. 102. *Cooke v. Green*, 11 Price, 738); but such presumption may be rebutted; and if the waste be contiguous to, or communicate

with open common or larger portions of land, the presumption is either rebutted or considerably narrowed. See *Grose v. West*, 7 Taunt 41. *Headlam v. Headley*, Holt, N. P. 463. See *Doe v. Hampson*, 4 C. B. 267. *White v. Hill*, 6 Q. B. 487. See *R. v. Edmonton*, 1 M. & Rob. 32. *R. v. Wright*, 3 B. & Adol. 681. *R. v. Hatfield*, 4 Ad. & E. 156.

A party not in *actual* possession cannot sue; therefore a landlord cannot, during a subsisting lease, support trespass, but the action should be in the name of the tenant, or the landlord must proceed in case as a reversioner (1 Saund. 323, b; 2 id. 252, b. *Bedingfield v. Onslow*, 3 Lev. 209. *Panton v. Isham*, id. 360. *Jesser v. Gifford*, 4 Burr. 2141; Com. Dig. Action, Case, Nuisance. *Attersol v. Stephens*, 1 Taunt. 183. *Jackson v. Pesked*, 1 M. & S. 234. *Shadwell v. Hutchinson*, 2 B. & Adol. 97. *Baxter v. Taylor*, 4 id. 72); and both actions may be brought at the same time (*Jesser v. Gifford, supra. Bedingfield v. Onslow, supra. Panton v. Isham, supra. Attersol v. Stephens, supra*); unless the injury was committed to trees or other property excepted in the lease, or the trees were carried away (Bro. Abr. Trespass, pl. 55; 1 Saund. 322, n. 5. *Gordon v. Harpur*, 7 T. R. 13; 8 East, 190; Bac. Abr. Trespass, C, 3; 4 Taunt. 316; 1 Ch. Pl. 72); or the tenant may sue for the trespass to the land.

A mere right to enter is not sufficient (*Peter v. Kendall*, 6 B. & C. 703. *Dyson v. Collick*, 5 B. & A. 600. *Newcastle* (*Duke of*) *v. Clark*, 2 Moo. 666; 8 Taunt. 602. Thus, a lessee before entry cannot support trespass, nor an heir-at-law, before entry (*Barnett v. Earl Guildford*, 11 Ex. 19; 24 L. J. Ex. 281); nor can an heir who has not entered (1 Ch. Pl. 197); but the right draws to it the possession in some instances. *Herbert v. Thomas*, 1 C., M. & R. 861. *R. v. London* (*Mayor of*), 4 T. R. 26.

When a party has the strict legal title, and possessory right, he may acquire such a constructive possession as to enable him to maintain this action against a wrongdoer. Therefore, where plaintiff, who had the legal title, entered with intent to take possession, it was held he might maintain trespass against a person wrongfully in possession, although he did not declare his design. *Butcher v. Butcher*, 7 B. & C. 399. See *Newton v. Harland*, 1 Man. & G. 644. Entry upon part of the estate in the name of the whole is sufficient for the entirety. *Bulwer v. Bulwer*, 2 B. & A. 470.

A parson, before induction, cannot maintain trespass (Vin. Abr. Entry, G, 4, Trespass, S; Bac. Abr. Leases, M. *Hare v. Bickley*, Pl. Com. 528. *Bulwer v. Bulwer, supra*); nor can a lessee for years (Bac. Abr. Leases, M. *Browning v. Beston*, Pl. Com. 142); nor an assignee, &c. (1 Ld. Raym. 367; 1 B. & B. 245); nor an heir or devisee (*Browning v. Beston, supra. Anon.* 2 Mod. 7; Com. Dig. Trespass, B, 3); nor a purchaser (*Geary v. Bearcroft*, Cart. 66; Com. Dig. Trespass, B, 3; 2 Roll. Abr. 553. *Green v. Walwin*, Noy. 73); nor a surrenderee (Bac. Abr. Surrender, 50); nor a reversioner (Com. Dig. Trespass, B, 3) before entry.

A lessor having lawfully entered at the expiration of the term, may sue in trespass persons claiming under the late tenant, as well as the late tenant himself; but where a tenant remains in possession after the expiration of his term, the landlord is not justified in expelling him by force in order to regain possession. *Hay v. Moorhouse*, 6 Bing. N. C. 62. *Newton v. Harland, supra. Wheeler v. Montefiore*, 1 Gale & D. 493; 2 Q. B. 133.

Where a trespass is done to land let at will, both the lessor and lessee may sue in trespass before entry. Co. Litt. 62. *Harper v. Charlesworth*, 4 B. & C. 583; Com. Dig. Trespass, B, 2. *Geary v. Bearcroft*, Bridgw. 496). It is not sufficient that the plaintiff has the freehold in law. Com. Dig. Trespass, B, 3; nor can a party wrongfully holding possession of land treat the rightful owner who enters upon the land as a trespasser. *Taunton v. Coster, supra. Turner v. Meymott*, 1 Bing. 158. *See* also *Brown v. Dawson*, 4 Per. & D. 355; 12 Ad. & E. 629. *Pilgrim v. Southampton and Dorchester Railway Co.* 18 L. J. C. P. 330. Trespass for the continuance is not maintainable by a person who comes into possession after the commission of the trespass. (Id.) *Brown v. Notley*, 18 L. J. Ex. 39.

An administrator may sue for a trespass done before the grant of administration. (*Thorpe v. Stallwood*, 5 Man. & G. 760); so may guardians, trustees, and husbands, seised *jure uxoris*. Joint tenants and parceners must join. Tenants in common may join; though their estates be several, yet the damages survive to all. Bac. Abr. Joint Tenants, K. *Cutting v. Derby*, 2 Black. 1077. *Harrison v. Barnby*, 5 T. R. 247.

In September, 1846, a partnership was entered into between A. and B., the terms of which were never definitely arranged. The business continued to be carried on in the names of A. and B., in a shop and counting-house, forming part of a house of which A. was lessee, down to the 25th of December, when A. caused B. to be served with a notice to dissolve the partnership.

On the 2d day of January, 1847, B. broke into and entered the shop and counting-house:—*Held*, that he was liable in trespass, his right to the occupation of the premises having ceased with the determination of the partnership. *Benham v. Gray*, 5 C. B. 138; 17 L. J. C. P. 50.

Trespass will not lie against the occupier of land at the suit of a mortgagee, who has never been in actual possession, or been seised of the land, and has not obtained a judgment in ejectment either by default or by verdict, and therefore he cannot in such case waive the tort and maintain an action for use and occupation. *Turner v. Cameron's Coalbrook Steam Coal Co.* 5 Ex. 932; 20 L. J. Ex. 71.

In an action for breaking and entering, and digging in the plaintiff's close, it appeared that the close, at the time of the

(B) *Parties to be Sued.*[1]

trespass, was in the occupation of the plaintiff's lessee. The plaintiff tendered evidence to show that he resumed possession of the close for a time after the trespass was committed, and before action, which was rejected by the judge:—*Held*, inadmissible, and that trespass for the continuance is not maintainable by a person who comes into possession after the commission of the trespass. *Pilgrim v. Southampton and Dorchester Railway Co.* 8 C. B. 25; 18 L. J. C. P. 330. *See ante*, p. 551. *Semble*, that a freeholder is not civilly liable for a forcible entry on his freehold. *Harvey v. Brydges*, 14 Mee. & W. 437; 3 D. & L. 55; 9 Jur. 759; 14 L. J. Ex. 272.

An action is maintainable by one tenant in common against his co-tenant, or the licensee of the latter, for digging up and carrying away the soil of the close of which they are tenants in common. In such action, a plea that the close is not the close of the plaintiff, is not supported by proof that the plaintiff is tenant in common of it with others who authorised the trespasses. *Wilkinson v. Haygarth*, 12 Q. B. 837; 16 L. J. Q. B. 103. One tenant in common may sue in trespass for turning him or his servants off the land, or out of the house, holden in common. *Murray v. Hall*, 7 C. B. 454; 18 L. J. C. P. 161. Even shooting at and killing game on another's land, though without an actual entry, is in law a trespass (*Keble v. Hickringill*, 11 Mod. 74, a; *see* 1 Stark. 56; 2 Burr. 1114); and it is of no importance whether the land be enclosed or not. *Stummers v. Dixon*, 7 East, 207. *Lade v. Sheppard*, 2 Stra. 1004; *see* 1 Burr. 133; 6 East, 154. It lies, although the door were open, if the entry was not for a justifiable purpose, as applying for the payment of a debt, rent, &c. It is sustainable for the continuance of an injury. *Holmes v. Wilson*, 10 Ad. & E. 503.

[1] Actions for injuries to real property may be brought either against the party actually committing the wrong, or against the party by whose order or authority the act was done. A master is liable for any act done by his servant in the course of executing his orders; and therefore, where a master ordered his servant to lay some rubbish near his neighbour's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall, it was held that the master was liable in trespass. *Gregory v. Piper*, 9 B. & C. 591; 4 M. & Rob. 500. But to render the master liable for the wrongful acts of the servant, the servant must, at the time he does the wrong, be acting in the execution of the employer's orders, and within the scope of his employment as a servant. It is said, "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished (Bro. Abr. Trespass, pl. 435); and if my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts. 2 Roll. Abr. 553. If fences are allowed to go to ruin, and cattle escape and trespass upon the adjoining land, the action for the injury must be brought against the party who is by law bound to uphold the fence. The action cannot be supported against the landlord when the land is in the possession of a tenant, for it is, as we have seen, the duty of the actual occupier to repair and maintain fences, and not the duty of the landlord. *Cheetham v. Hampson*, 4 T. R. 318. *See ante*, p. 547.

Where several persons have been jointly concerned in the commission of a trespass, they may in general be sued jointly as principals, or the plaintiff may sue any of them separately at his election. *Lord Kenyon, C. J.: Mitchell v. Tarbutt*, 5 T. R. 651. The nonjoinder cannot be pleaded.

Trespass lies against a tenant in common with the plaintiff for destroying a common wall; but not for pulling it down with intent to rebuild, or for raising its height. *Cubitt v. Porter*, 8 B. & C. 257. So, it lies for him or his licensee for digging peat or turf, and carrying it away for his own use. *Wilkinson v. Haygarth*, 16 L. J. (N. S.) 103, Q. B. Trespass is maintainable by one tenant in common against the other; but the proper remedy by one joint-tenant, or tenant in common, against the other, who commits waste to the land or other property, as by cutting down trees unfit to be cut down, is an action on the case for a misfeasance (*Martin v. Knowllys*, 8 T. R. 145; Com. Dig. Estate, K, 8. *Cubitt v. Porter*, 8 B. & C. 268); but if one tenant in common totally destroy the subject-matter of the tenancy in common, his companions shall have trespass. (Id.) Co. Litt. 200. As to the right of the owner of one half of a party-wall to maintain trespass for its destruction, see *Murley v. M'Dermott*, 3 Nev. & P. 358. Trespass lies against one of two tenants in common for an actual expulsion. *Murray v. Hall*, 18 L. J. 161, C. B. Though trespass does not lie against a tenant in common for taking the whole profits, yet, if he drive out of the land any of the cattle of the other tenant in common, or hinder him from entering or occupying the land, an ejectment may be supported (Co. Litt. 199, b; 3 Wils. 119; 12 Mod. 567), but not trespass. *Cubitt v. Porter*, 8 B. & C. 269.

If a landlord, who has let apartments to the plaintiff, exclude him from the house, and remove his name from the outer door, this is evidence of a trespass committed, by breaking and entering the apartments. *Lane v. Dixon*, 3 C. B. 776. A *feme covert*, or an infant, cannot make themselves trespassers by prior command or subsequent assent. Co. Litt. 180, b, n. 4; 356, b.

(C) *Pleadings in Action.*

(*a*) *Venue and Declaration.*[1]

(*b*) *Pleas, Replications, and Evidence under them.*

(1) *Not Guilty.* *See* vol. v. pp. 562, 563. As to Evidence, *see* vol. iv. p. 289.

The abuse of an authority in fact will not, in general, render the party a trespasser *ab initio*. *Six Carpenters' case*, 8 Rep. 146, b. And where the officer of a court, acting under process, commits a subsequent breach of duty, he does not therefore become a trespasser *ab initio*. *Smith v. Eggington*, 7 Ad. & E. 167.

Where the defendant enters under an authority in law, the plaintiff may show that he has abused such authority, and so become a trespasser *ab initio;* but a mere nonfeasance will not be such an abuse. *Six Carpenters' case*, 8 Rep. 146, a. But since 11 Geo. 2, c. 19, a person distraining without consent, who remains in possession over the five days, is a trespasser only for the period he keeps possession after the five days. *Winterbourne v. Morgan*, 11 East, 395. *Messing v. Kemble*, 2 Camp. 115. *See* Distress, vol. iv. p. 158.

If a lessor enter to view waste, and damage the house, or stay there all night; if a commoner enter to examine his cattle, and cut down a tree; if a man enter a tavern, and continue there all night against the will of the innkeeper, he becomes a trespasser *ab initio*. Com. Dig. Trespass, C, 2. So, an officer who neglects to remove goods seized within a reasonable time, and continues on the premises in possession. *Reed v. Harrison*, 2 Bl. Rep. 1218. *Aitkenhead v. Blades*, 5 Taunt. 198. *See* also *Ladd v. Thomas*, 12 Ad. & E. 117. A tenant tendering his rent after distress, but before impounding, may maintain trespass for a subsequent removal of the distress (*Vertue v. Beasley*, 1 M. & Rob. 21); but not if the tender is after impounding, whether for rent arrear or damage feasant. *Ladd v. Thomas*, *supra*. A landlord who enters and distrains goods which were not distrainable in law, becomes a trespasser *ab initio* as to the privileged goods. *Harvey v. Pocock*, 11 Mee. & W. 740. *See* Distress, vol. iv. p. 78.

[1] The venue is local, and must be laid in the county where the land is situate, unless changed by a judge's order. Formerly the declaration was very prolix, and contained many useless allegations; as "*vi et armis*," "against the peace," &c. These are now to be omitted. 15 & 16 Vic. c. 76, s. 49.

The precedent given in the C. L. P. Act, 1852, is very concise: "That the defendant broke and entered certain land of the plaintiff, called the 'Big Field,' and depastured the same with cattle."

The close or place in which the trespass was committed must be designated in the declaration by name or abuttals, or other description; or the plaintiff may be ordered to amend with costs, or give such particulars as the court or judge may think reasonable. Reg. Gen. 16 Vic. c. 18; 1 E. & B. App. lxxxii. The description should correspond with the state of the premises at the time of the commission of the trespass, and not at the time of the delivering the declaration. *Humfrey v. London and North-Western Railway Co.* 7 Ex. 325; 22 L. J. Ex. 149. It should be reasonably accurate, and the local situation of the close should be specified (*Cocker v. Crompton*, 1 B. & C. 489); and the trespass must be proved to have been committed at the place named. *Simmons v. Lillystone*, 8 Ex. 441; 22 L. J. Ex. 218. When there is a general district of land known by one general name, and there are several occupiers in the same district, each person may call his own part of the district by the common name. *Cooke v. Jackson*, 9 D. & R. 496. It is in general sufficient to show two abuttals of the close. *North v. Ingamells*, 9 Mee. & W. 249. It seems that an insufficient description cannot be objected to after pleading. *Lempriere v. Humphrey*, 3 Ad. & E. 181. *Banks v. Angell*, 7 id. 843. *Lethbridge v. Winter*, 2 Bing. 49. The description must correspond with the state of the close at the time of the trespass. *Humfrey v. London and North-Western Railway Co.* 22 L. J. Ex. 149. Where in a declaration for trespass to land the plaintiff describes the land by name, and the defendant pleads that the land so described in the declaration is his land, and it appears upon the evidence that both the plaintiff and the defendant have a piece of land of the same name, the plaintiff is nevertheless entitled to recover without a new assignment. *Cocker v. Crompton*, 1 B. & C. 489.

Besides the principal trespass, there are also usually matters of aggravation laid, which may or may not be in themselves trespasses; and the jury may give damages for the trespass thus aggravated. See *Bracegirdle v. Orford*, 2 M. & S. 77. *Newman v. Smith*, 2 Salk. 643. The matter of aggravation thus laid ought to be something affecting the plaintiff or his property, and not as affecting a mere stranger. See *Osborne's case*, 10 Co. 130.

The word "close," in a declaration in trespass, includes as well the subsoil as the surface. *Cox v. Glue*, 5 C. B. 533; 12 Jur. 185; 17 L. J. C. P. 162.

A count for entering rooms and taking goods is not allowed to be joined with a count for taking the same goods, as and for a distress for rent falsely pretended to be due. *Hoare v. Lee*, 5 C. B. 754; 5 D. & L. 765; 12 Jur. 356; 17 L. J. C. P. 196.

(2) *Traverse of the Plaintiff's Possession and Property in the Land.*[1]

[1] *See* Reg. Gen. vol. v. p. 562.

This plea merely puts in issue whether the plaintiff, at the time of the trespass, had such a title as would enable him to maintain trespass against a stranger and wrong-doer, or, in other words, whether he was then in possession. Where to trespass for breaking and entering the plaintiff's close the defendant pleaded, first, the general issue, and, secondly, that the close was not the close of the plaintiff, the court held, that mere evidence of possession was sufficient to entitle the plaintiff to a verdict on the second plea. *Heath v. Milward*, 2 Bing. N. C. 98. S. P. *Carnaby v. Welby et al.* 8 L. J. Q. B. 22. *Murley v. M'Dermott*, 8 Ad. & E. 138. *Browne v. Dawson*, 12 id. 624.

In some cases there is often uncertainty with respect to the ownership or possession of those portions of landed property which lie immediately upon the boundary between the lands of one man and those of another. If it be a wall, and it cannot be proved on whose land it was built, the presumption is that the owners of the land on both sides are tenants in common of the wall (*Wiltshire v. Sidford*, 8 B. & C. 259, n. *Cubitt v. Porter*, id. 257); but if it can be proved to have been originally built upon the land of one of them, then of course it is his wall; or if it be proved to have been built equally upon the land of each, each is entitled in severalty to the part which was built upon his land, even although it have been erected at their joint expense. *Matts v. Hawkins*, 5 Taunt. 20. If the boundary be a hedge and ditch, the presumption is that both belong to the owner of the land on the side on which the hedge is, for it is presumed that the person who dug the ditch threw the earth upon his own land, and which formed the mound on which the hedge was planted. *Vowles v. Miller*, 3 id. 138. *See* Fences, vol. iv. p. 452. If the boundary be a road or public highway, if the land on both sides be freehold, the presumption is that the proprietors of such respectively are owners of the soil *usque ad filum viæ* (*Cooke v. Green*, 11 Price, 736. *Headlam v. Headley*, Holt, N. P. C. 463. See *White v. Hill*, 14 L. J. Q. B. 79), and each, of course, is the owner of the patches of land (if any) which are between the hedge on his side and the road; but if the land on each side be copyhold, and the road an immemorial way, then, although the patches of land on either side are presumed to belong to the copyhold tenement on that side (*Doe v. Pearsey*, 7 B. & C. 304. *Steel v. Prickett*, 2 Stark. 463), yet the ownership of the soil of the road is presumed to be in the lord of the manor. All this, however, must be deemed to be merely presumption, which may of course be rebutted by evidence of the actual ownership. *Grose v. West*, 7 Taunt. 39. *Voyce v. Voyce*, Gow, 201.

If a tree grow so near the boundary that its roots extend into the lands of both proprietors, they are not tenants in common of the tree, but the tree belongs to him in whose land it was originally planted. *Holder v. Coates*, M. & M. 112; and *see* 2 Roll. Abr. 141; 1 Ld. Raym. 737. *See* Trees, *ante*, p. 542.

If it appear that the part of the close, &c. in which the trespass was actually committed was not in the possession of the plaintiff at the time of the trespass, although the rest of it was, the defendant, upon this plea, will be entitled to the verdict. See *Bassett v. Mitchell*, 2 B. & Adol. 99. *Smith v. Royston*, 8 Mee. & W. 381. So also it would seem to be sufficient for the defendant to show that he was tenant in common with the plaintiff, or that he was authorised by one who was tenant in common with the plaintiff, if he can also show that the alleged trespass was merely an exercise of the right of a tenant in common. One tenant in common may be guilty of a trespass against another by an actual outster of him from the land. *Murray v. Hall*, 7 C. B. 441. *Wilkinson v. Haygarth*. 12 Q. B. 837. *Stedman v. Smith*, 26 L. J. Q. B. 314; 8 E. & B. 1. Under the same issue the defendant may assert a title or right of possession to the land in himself, or in another, under whose authority he has done the acts complained of (*Jones v. Chapman*, 2 Ex. 603. *Slocombe v. Lyall*, 6 id. 119); but it is not sufficient for the defendant to prove that the plaintiff being in possession is not the true owner, unless he himself is, or unless he can justify his acts by the authority of a third person who is. He cannot assert the bare title of a third person, except for the purpose of proving that he acted under the authority of that title. *Jones v. Chapman*, 2 Ex. 803. *Purnell v. Young*, 3 Mee. & W. 296. The plaintiff may show a better right in a third person in order to rebut a *primâ facie* title asserted by the defendant. *Brest v. Lever*, 7 Mee. & W. 593. A person who obtains possession by turning another out of possession without any title or authority to do so, cannot assert his possession so obtained against the prior possession of the latter. *Revett v. Browne*, 5 Bing. 7. *Browne v. Dawson*, 12 Ad. & E. 629; and *see* Conversion, vol. iii. p. 215.

The defence that the defendant himself is the true owner, though admissible under this issue, is often pleaded as a separate plea, with or without the plea traversing the property, and is called the plea of *liberum tenementum*. The title of the defendant is sometimes pleaded in full, and special pleas of justification by the authority of the real owner may be so pleaded.

To an action for breaking and entering the plaintiff's close, a plea, that the close was not the close of the plaintiff, puts in issue the possession merely, not the right of possession of the plaintiff. If the defendant means to set up superior title in himself or some person under whom he

(3) *That Land was the Freehold of Defendant.*[1]

claims, he should plead in confession and avoidance. *Whittington v. Boxall*, 5 Q. B. 139; 7 Jur. 722; 12 L. J. Q. B. 318. But under a plea to a similar declaration that the close was not, at the time when, &c., the close of the plaintiff, the defendant may show a lawful right to the possession of the close, either in himself or in some other person under whose authority he claims to have acted. So held (in error) in the Exchequer Chamber: *per Wilde, C. J., Coltman, Maule*, and *Williams, JJ.; dissentientibus, Coleridge* and *Wightman, JJ. Jones v. Chapman*, 2 Ex. 803; 18 L. J. Ex. 456; B. & L. Pr. 482.

[1] *Liberum tenementum;* or, "that at the time of the alleged trespass the said land was the land and freehold of the defendant." This plea admits such a possession in the plaintiff as would maintain the action against a wrongdoer, but asserts in answer that the defendant is a freeholder with the right to immediate possession. *Ryan v. Clarke*, 10 L. J. Q. B. 267; 13 Jur. 1000. *Holmes v. Newlands*, 11 Ad. & E. 44; 3 Q. B. 679. *Roberts v. Taylor*, 1 C. B. 125. Where it was pleaded to the whole declaration, and one of the counts was for an assault, it was holden bad. *Roberts v. Taylor*, 16 L. J. C. P. 87. *Harvey v. Bridges*, 1 Ex. 261. So it would be to a charge of pulling down a house while the plaintiff and his family were in it. *Jones v. Jones*, 1 H. & C. 1.

The principal object of this plea was, till recently, to compel the plaintiff to describe more particularly the *locus in quo*, by stating the boundaries and abuttals (*Stevens v. Whistler*, 11 East, 51. See *Verion v. Jenkins*, 3 Ad. & E. 741); but as they must now be stated in the declaration (*see ante*, p. 553), this plea is no longer required for that purpose: nor is it now of use to compel the plaintiff to take issue on some point where the defendant sets out his title at length, as the plaintiff may take issue upon the whole plea. C. L. P. Act, 1852.

Either of the above pleas may be pleaded together. *Morse v. Apperley*, 9 L. J. Ex. 61. *Slocombe v. Lyall*, 6 Ex. 119.

When the plea states that the *locus in quo* is the freehold of a third person, and that the defendant or his servant and by his command, committed the trespass, the plaintiff may either traverse the freehold or the command, or take issue on the whole plea, which is generally the better course where the costs is not a material consideration. *Chambers v. Donaldson*, 11 East, 68. The plaintiff may reply a demise, by the defendant to plaintiff. The defendant may, in his rejoinder, either deny it, and so put the demise in issue (see *Wilkins v. Boutcher et al.* 11 L. J. C. P. 104; 3 Man. & G. 807. See also *Darlington v. Pritchard*, 4 Man. & G. 783); or he may rejoin that he gave the plaintiff a notice to quit, which expired before any of the said several times when, &c., and to this the plaintiff may surrejoin, that before the expiration of the notice to quit, and before any of the said several times when, &c. the defendant had waived his notice.

A replication of an outstanding term in a stranger, without tracing title from him to the plaintiff, is a sufficient answer to a plea of *liberum tenementum* to a declaration *quare clausum fregit. Ryan v. Clarke*, 13 Jur. 1000; 10 L. J. Q. B. 267. So defendant may plead title as a copyholder.

It is a good plea to a declaration which states only in general terms that the defendant, "with a strong hand and against the form of the statute," broke and entered the plaintiff's dwelling-house, as the expressions, "with a strong hand and against the form of the statute," are mere matters of aggravation, and not of substantive charge. *Davison v. Wilson*, 11 Q. B. 902; 17 L. J. Q. B. 196. And if the declaration goes on to charge the defendant with having expelled the plaintiff from the dwelling-house, and seized and removed his goods, the plea covers and justifies the expulsion and removal of the goods, as well as the breaking and entering the house. *Moriton v. Coombes*, 19 L. J. C. P. 336. *Taylor v. Cole*, 1 Smith's *Lead. Cases*, 95, 110.

The *onus* of proving this issue is upon the defendant. By the plea of *liberum tenementum* he admits that the plaintiff is in possession, and that he himself is *primâ facie* a wrongdoer; but he undertakes to show a title in himself, which will do away with the presumption arising from the plaintiff's possession, and he must do so either by showing a title by deed in the ordinary way, or by proving a possessory title for twenty years. *Brest v. Lever*, 7 Mee. & W. 593. But if he prove a title to that part in which the trespass was committed it will be sufficient, although he fail in proving any title to the rest of the close; and this, whether the declaration describe the close by name or by abuttals (*Smith v. Royston*, 8 id. 381); the plea merely means that the *place* in which, &c. was at the time the soil and freehold of the defendant. See *Bassett v. Mitchell et al.* 2 B. & Adol. 99. On the other hand, although the defendant prove a title to a close, answering exactly to the description in the declaration, yet if the plaintiff prove that he was at the time in possession of another and different close, also answering the description in the declaration, whether described by name or abuttals, the latter will be entitled to the verdict. *Cocker v. Crompton*, 1 B. & C. 489. *Cooke v. Jackson*, 9 D. & R. 495. *Tapley v. Wainwright*, 5 B. & Adol. 395. *Lempriere v. Humphrey*, 3 Ad. & E. 181.

Whether under this plea and replication the defendant is bound to prove, not only that the *locus in quo* is his soil and freehold, but also that at the time when, &c. he had a right of entry upon it, or whether the plaintiff, in order to compel him to do so, must not reply the Statute of Limitations,

does not seem to have been decided. *Lowe v. Govett*, 3 B. & Adol. 863. See *Holmes v. Newlands*, 11 Ad. & E. 44. *Newland v. Holmes* (in error), 3 Q. B. 679.

[1] "That defendant did what is complained of by the plaintiff's leave." C. L. P. Act, 1852.

In actions for trespasses to land and realty, the defence of leave and license must be specially pleaded. *Kavanagh v. Gudge*, 7 Man. & G. 316. *Moxon v. Savage*, 2 F. & F. 182. A mere license to enter upon land, whether given by parol or by deed, is revocable. *Wood v. Leadbitter*, 13 Mee. & W. 838, 845. *Adams v. Andrews*, 15 Q. B. 284. *Coleman v. Foster*, 1 H. & N. 37.

A license incident to or connected with a verbal grant is revocable. *Wood v. Leadbitter, supra;* and *see* vol. iv. p. 154. A grant of emblements, growing crops, or other similar chattel interests, may be made by parol; consequently, a parol license incident to such grants may be irrevocable. (Id.) *Wood v. Manley*, 11 Ad. & E. 34. A grant of an interest in land, as a lease for a term, is not properly described as a license. Although it is unnecessary to reply a revocation it is often done, it suffices to take issue upon the plea. *Adams v. Andrews*, 15 Q. B. 284.

The defendant is bound to prove a license co-extensive with all the acts proved by the plaintiff. If the license covers some of those acts, but not others, the plaintiff is not bound to a new assign, but may take issue generally to recover damages for the acts not covered by the license. *Adams v. Andrews*, 15 Q. B. 284, 291.

To a declaration for breaking open a gate and lock, the defendant pleaded as an equitable defence that disputes having arisen between the plaintiff and the defendant and other persons, about a right of way, an agreement in writing was entered into between the plaintiff and the defendant, and the other persons, that, without prejudice on either side to the question of right, a way over the *locus in quo* should remain open for the passage of the defendant and the other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding the question in dispute, and that the trespasses were committed in the use by the defendant of the way, because the gate had been wrongfully, and contrary to the agreement, placed across it: —*Held*, first, that the plea did not amount to a plea of leave and license at common law, as the locking of the gate was a revocation of the license to use the way. *Hyde v. Graham*, 8 Jur. N. S. 1229. *Held*, secondly, that it was not good as an equitable plea, the circumstances disclosed not being such as would in equity entitle the defendant to have the plaintiff restrained by an unconditional injunction from prosecuting the action. (Id.)

[2] All damages which naturally result from the wrongful act of the defendant, and are directly traceable thereto, may be recovered by the plaintiff if he claims them in the declaration; but not the costs incurred in preparing a bill for an injunction. 8 L. T. (N. S.) 200.

"Rights of action of this sort are given," observes *Lord Denman*, "in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution of the value of the property may have occurred." *Rogers v. Spence*, 13 Mee. & W. 581.

Surrounding circumstances of aggravation will materially influence the amount of damages to be recovered for a trespass upon land.

Where a landlord entered upon premises demised to his tenant, without asking the leave of the latter, and sold the timber-trees standing in the hedge-rows, and caused them to be felled, and cut up, and removed, and great damage was done to the growing crops of the tenant, and the latter brought an action against the landlord for damages, and recovered 100*l.* beyond the net value of the whole crops, the court declined to interfere to have the amount of damages reconsidered, although they were of opinion that the jury had taken an exaggerated view of them. *Williams v. Currie*, 1 C. B. 847.

In an action for trespass in taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance from the soil, and the trespasser cannot claim any deduction therefrom in respect of the expense incurred by him in getting the coal (*Martin v. Porter*, 5 Mee. & W. 352), unless there is a real disputed title. This value is the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth. *See post*, 517.

If, in consequence of an unlawful entry of diseased cattle into the plaintiff's close, the plaintiff's cattle have become infected with the disease, this is matter of aggravation of damages, and may be recovered if claimed in a declaration for the trespass. *Anderson v. Buckton*, 1 Stra. 192. But it seems essential that the defendant should know the diseased state of his cattle. *Cooke v. Waring*, 32 L. J. Ex. 262.

If the plaintiff is only a tenant on sufferance, or tenant-at-will, the damages may be merely nominal. In the case of injuries to trees, the damages may be the immediate loss of the shade and fruit of the trees, and recoverable by the occupier or lessee; the damage from the loss of the timber and body of the trees falls to the reversioner. *Bedingfield v. Onslow*, 3 Lev. 209.

VI. Actions relating to Personal Property.

(A) *Of the Nature of the Chattel, and Plaintiff's Property or Possession.*[1]

Where, in an action for a trespass by the defendant with horses, &c., upon the plaintiff's land, it appeared that the defendant was the huntsman of the Berkeley hounds, and that he followed the hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, and destroyed the fences and injured the crops; *Lord Ellenborough* held that the defendant was answerable for the whole of the damage, and directed the jury not to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass, but according to the aggregate amount of mischief done by him and his co-trespassers and the hounds. *Hume v. Oldacre*, 1 Stark. 352.

Pending a negotiation for an assignment of a lease, A. was let into possession of the premises as tenant of some kind. The negotiation going off, B. (the landlord) demanded the key, and wrote to A., telling him that he never intended to let him into possession, and A. refusing to go out, B. entered, and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted: — *Held*, that although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion; his tenancy being at the most a tenancy at will, and that having been properly determined. *Pollen* or *Pollon v. Brewer*, 7 C. B. (N. S.) 371; 6 Jur. N. S. 509.

In an action for breaking and entering a house, and taking and selling goods, the plaintiff is not entitled to recover the costs of setting aside a warrant of attorney, and all subsequent proceedings under which the trespass was committed. *Holloway v. Turner*, 6 Q. B. 928; 9 Jur. 160; 14 L. J. Q. B. 143.

Where the plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses; in order to entitle him to more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the production of the written instrument. *Twyman v. Knowles*, 13 C. B. 222; 17 Jur. 238; 22 L. J. C. P. 143.

In trespass for getting and taking coal from a coal-mine, the proper measure of damages is the value of the coal as soon as it is severed from the freehold, which may be ascertained by deducting from the saleable value of the coal at the pit's mouth the expense of carrying it there from the mine. *Morgan v. Powell*, 3 Q. B. 278; 2 Gale & D. 721; 6 Jur. 1109. *See vide Martin v. Porter*, *ante*, p. 556.

[1] This action lies not merely for taking personal chattels out of the possession of the owner, but also for any forcible injury which may be done to them whilst they are in his possession, or in the possession of any person for him, or in removing them from one place to another (*Bushell v. Miller*, 1 Stra. 129. *See* 29 L. J. Ex. 183); but a single act of removal, without any claim over them, is not a conversion. *Fouldes v. Willoughby*, 8 Mee. & W. 551. *See* 4 T. R. 364. And if a party chase cattle, by setting his dog at them, this is the same as if he chased them himself (*King v. Rose*, Freem. 347; 4 Co. 38; Cro. Car. 254); but if the dog chase them in the absence of the master, the master is not answerable in trespass, unless he knew the dog to be accustomed to chase cattle (*Mason v. Keling*, 12 Mod. 332; Ld. Raym. 608); or for an injury to animals *feræ naturæ*, and not generally saleable, it should be alleged and proved that they have been reclaimed or dead, or at least that plaintiff was actually *possessed* of them (Bac. Abr. Trespass. *Grymes v. Shack*, Cro. Jac. 262. *Pollexfen v. Crispin*, 1 Vent. 122. *Child v. Greenhill*, Cro. Car. 554. See observations of Willes, J., *Cox v. Burbridge*, 32 L. J. C. P. 92; and *ante*, p. 4); but for taking fish, plaintiff should show that the fish were edible and valuable. 5 Rep. 35; 11 Mod. 64; 3 Salk. 9; Bull. N. P. 79. See *Somerset v. Fogwell*, 5 B. & C. 879. If for taking away a hare or rabbit, &c. killed on the plaintiff's land, the plaintiff should prove it is his land (*Sutton v. Moody*, 2 Salk. 556; 1 Ld. Raym. 251. *Churchward v. Studdy*, 14 East, 249) *Blades v. Higgs*, 32 L. J. C. P. 182; 7 L. T. (N. S.) 834; or if not killed on his land, he should prove that it was started therefrom, and that defendant pursued it. *Child v. Greenhill*, *supra*. *Coney's case*, Godb. 123. *Sutton v. Moody*, *supra*.

If a dog be found pursuing a hare, &c., upon the land of another, no person is justified in shooting him. *Vere v. Lord Cawdor*, 11 East, 568. And if J. S. make coney-burrows in the ground, and the coneys bred there go into the adjoining land of J. N., and he kill them, J. S. cannot maintain trespass against J. N. for having done so. *Boulston's case*, 5 Co. 104; Cro. Car. 554.

If J. S., having a deed belonging to J. N. in his possession, tear off the seal, an action for trespass is sustainable. Bro. Tres. pl. 29.

The plaintiff must show that, at the time when the injury was done, he had either the *actual possession* (*Young v. Hichens*, 6 Q. B. 606), or else a *constructive possession* in the thing injured, as also a general or qualified property therein. *Smith v. Milles*, 1 T. R. 480. *Ward v. Macaulay*, 4 id. 490. *Gordon v. Harpur*, 7 id. 9.

Actual Possession by the plaintiff of the chattel at the time of the trespass will in all cases suffice, the wrongdoer not being the *real* owner of the chattel (2 Saund. 47, d; 4 Taunt. 547; 1 Ch. Pl. 198); and this, al-

though such plaintiff had the wrongful possession (4 Taunt. 547. *Graham v. Peat*, 1 East, 244; Cro. Eliz. 819; 2 Marsh. 233); or was the mere finder of the chattel. Com. Dig. Trespass, B. 4. *Nelson v. Cherrill*, 8 Bing. 316.

The goods must have been in possession of the plaintiff at the time of the injury (*Taylor v. Rowan*, 7 C. & P. 74. *Harrell v. Ellis*, 2 C. B. 295); merely locking them up, so as to deprive plaintiff of access to them, is not sufficient. *Hartley v. Moxham*, 1 C. & M. 504; 3 Q. B. 701. See *Lane v. Dixon*, 3 C. B. 776. *Harvey v. Bridges*, 1 Ex. 261, 263: *per Lord Denman C. J.*

The defendant, claiming rent in arrear from the plaintiff, his lodger locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent: — *Held*, that the acts of the defendant did not amount to a taking, and that trespass was not maintainable. *Hartley v. Moxham, or Moxon*, 3 Gale & D. 1; 1 Car. & M. 504; 3 Q. B. 701; 6 Jur. 946; 12 L. J. Q. B. 41.

A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West v. Nibbs*, 4 C. B. 172; 17 L. J. C. P. 150.

A gratuitous bailee may maintain trespass (*Rooth v. Wilson*, 1 B. & A. 59); but he cannot sue if he be a mere servant. *Blass v. Holman*, Ow. 52; 3 Inst. 103; 2 Saund. 47, b, c, d; 3 Bl. Com. 396. A distrainer of goods has neither such an actual nor constructive possession in the chattel seized as will enable him to bring trespass for an injury to them, the goods, till sold, being in the custody of the law. 1 M'Clel. & Y. 118.

A sheriff, having duly seized goods under a *fi. fa.*, and in actual possession, has a sufficient special property in them to enable him to support this action. 2 Saund. 47; 1 Vent. 52; 1 Lev. 282. And see *Swale v. Paynter*, 1 D. & R. 307. *Blades v. Arundale*, 1 M. & S. 711. And where the sheriff seizes goods in the possession of the defendant, which he obtained by fraud, the sheriff cannot maintain an action against the real owner for rescuing them out of his custody. See *Earl of Bristol v. Wilsmore*, 2 D. & R. 755; 1 B. & C. 514. As to his re-seizing goods for poundage, *see* 7 B. & C. 26. *Watson v. Maguire*, 5 C. B. 836.

Having the *absolute or general property* over the chattel, without proof of actual possession, is sufficient, for the general property of personal chattels, *primâ facie*, draws to it possession. *Gordon v. Harpur*, 7 T. R. 9; 2 Saund. 47, a, n. l. *Hebbert v. Thomas*, 1 C., M. & R. 861. *R. v. Mayor of London*, 4 T. R. 26.

The owner of goods, though he has deposited them in the hands of a bailee, may maintain trespass for the taking of them, because he still has the general property. *Gordon v. Harpur*, 7 T. R. 12. *Bertie v. Beaumont*, 16 East, 33. So, an executor for the goods of his testator (*Dunwich v. Sterry*, 1 B. & Adol. 831. *Smith v. Mills*, 4 Edw. 3, c. 7. *Thorpe v. Stallwood*, 5 Man. & G. 760); or an executor *de son tort* and the owner of tithe may support trespass after it has been set out. *Williams v. Ladner*, 8 T. R. 72.

A *cestui que trust* or other person having only an equitable interest cannot, in general, sue in the courts of common law against his trustee, or even a third person (1 Saund. on Uses, &c. 222. *Goodtitle v. Jones*, 7 T. R. 47. See *Allen v. Imlett*, Holt, N. P. 641), unless where the action is against a mere wrongdoer, and for an injury to the actual possession of the *cestui que trust*. *Graham v. Peat*, 1 East, 244; 2 Saund. 47, a.

The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person for carrying it away after it has been cut down. *Ward v. Andrews*, 2 Chit. 636. But the lessee cannot have an action in this form. *Evans v. Evans*, 2 Camp. 491. And a lessor may sustain an action of trespass against his lessee for felling or damaging trees, though not excepted in the lease. 1 Saund. 322, n. 5; 7 T. R. 13. Where goods are delivered out of the possession of the general owner, and intrusted to a person who is to have the *exclusive* right to use them, the general owner cannot maintain trespass for the injury done by a stranger. *Ward v. Macauley*, 4 T. R. 490. *Gordon v. Harper*, 7 id. 11. *Hall v. Pickard*, 3 Camp. 187. *Benjamin v. Bank of England*, id. 417. *Pain v. Whitaker*, 1 R. & M. 99. *Davies v. Connop*, 1 Price, 63. See *Bloxham v. Sanders*, 4 B. & C. 941. Nor can an auctioneer put into possession of fixtures, for the purpose of selling them, the purchaser being bound to detach them from the freehold and remove them, maintain trespass *de bonis asportatis*. *Davis v. Danks*, 18 L. J. Ex. 213; 3 Ex. 435. Nor can the general owner support this action against those persons with whom the actual possession and exclusive right of property resides, for a mere abuse of the goods intrusted to them, though, if there be a destruction of the chattel, they are liable in trespass for the injury. 2 Saund. 47, g.

If the owner of a chattel gratuitously permit another person to use it, he may maintain trespass for an injury done to it while it is so used (*Lotan v. Cross*, 2 Camp. 464. *Hall v. Pickard*, 3 id. 187. *Bertie v. Beaumont, supra*), though it is otherwise where the chattel is let to hire. *Croft v. Alison*, 4 B. & A. 590. *Ward v. Macauley*, 4 T. R. 489. *Taylor v. Rowan*, 1 M. & Rob. 491.

A *special* poperty or interest of a limited or temporary nature in the chattel, at the time of the injury, without proof of the actual possession, will sometimes suffice, as in the case of a bailee, with an authority

(B) *Of the Injury, and Committing of it by Defendant.*[1]

from the absolute or general owner, coupled with an interest (*Fowler v. Down*, 1 B. & P. 45. *Nicholls v. Bastard*, 2 C., M. & R. 659; 2 Saund. 47, b, c, d); as a factor, or consignee of goods, in which he has an interest in respect of his commission. *George v. Clagett*, 7 T. R. 359. *Grove v. Dubois*, 1 id. 113. *Williams v. Millington*, 1 H. Bl. 81; Bull. N. P. 33.

A tenant for years may support trespass for cutting down trees, unless they were excepted in the lease, though he cannot support trespass for carrying them away. See *Evans v. Evans*, 2 Camp. 491. *Blackett v. Lowes*, 2 M. & S. 499. *See ante*, p. 558.

The finder of any article may maintain trespass against any person but the real owner. 2 Saund. 47, d. *Catteris v. Cowper*, 4 Taunt. 547. But if the finder, from the circumstances, must have known who was the owner, and, instead of keeping the chattel for him, mean, from the first, to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner may maintain trespass. *Merry v. Green*, 7 Mee. & W. 632: *per Parke, B.* So, a person in possession under an assignment, fraudulent as against creditors, may support trespass against a person who cannot show that he was justified in what he did as a creditor. *Young v. Wright*, 2 Marsh. 233.

[1] The action is sustainable for an injury or wrongful act done to a personal chattel whilst in the lawful adverse possession of the wrongdoer, as for an abuse, which renders him a trespasser *ab initio*. Bac. Abr. Trespass, B; 2 Roll. Abr. 562. As, where a person who, in the first instance, acted with propriety under an authority or license given by law, afterwards abuses it, in which case the taking, as well as the real tortious act, is illegal. *Six Carpenters' case*, 8 Rep. 146, b, So for cutting nets, lawfully taken damage feasant (*Reynell v. Champernoon*, Cro. Car. 228); or for working a horse distrained. *Bagshawe v. Goward*, Cro. Jac. 147. *Oxley v. Watts*, 1 T. R. 12. *Dye v. Leatherdale*, 3 Wils. 20.

In general, the action cannot be supported against a bailee who has the possession, coupled with an interest, unless he destroy the chattel (7 T. R. 7, 11); nor against a joint-tenant, or tenant in common, for merely taking away, and holding exclusively, the property from his co-tenant (*Holliday v. Camsell*, 1 T. R. 658; 2 Saund. 47, g); because each has an interest in the whole, and a right to dispose thereof (*Graves v. Sawcer*, 1 Lev. 29. *Martyn v. Knowllys*, 8 T. R. 145; Co. Litt. 200, a. *Doe v. Prosser*, Cowp. 217. *Heath v. Hubbard*, 4 East, 121); but if the thing be destroyed, trespass lies. Co. Litt. 200, a; 7 T. R. 11; Co. Litt. 57, a. *See post.* And this action may be supported against a bailee who has only a bare authority; as if a servant take goods of his master out of his shop, and convert them (*Glosse and Hayman's case*, 1 Leon. 87. *Gumbleton v. Grafton*, Cro. Eliz. 781; 1 Leon. 87; 5 Rep. 13, b); and it lies by an outgoing tenant against the incoming tenant, for taking the manure, though the latter had a right to it on paying for it. *Beaty v. Gibbons*, 16 East, 116. One joint-tenant, or tenant in common, may support trespass against his co-tenant, when the chattel is *destroyed*. 2 Saund. 47, b, g; 8 T. R. 146.

Distraining where no rent is due, or taking implements of trade, or beasts of husbandry, where there is sufficient other property (*Gorton v. Falkner*, 4 T. R. 565. *Hitchins v. Chambers*, 1 Burr. 579); or a horse while his rider is upon him (*Storey v. Robinson*, 6 T. R. 138), renders the party liable in trespass (*see* 21 L. J. Ex. 55); or if the outer door being shut, or the distrainor get through the window (11 W. R. 309), or if any person expel the tenant, or continue in possession without leave under a distress for more than five days. *Etherton v. Popplewell*, 1 East, 139. *Winterbourne v. Morgan*, 11 East, 395. *Messing v. Kemble*, 2 Camp. 115. *Ladd v. Thomas*, 12 Ad. & E. 117. See *Pott v. Shew*, 1 B. & A. 208. *Wallace v. King*, 1 H. Black. 13. Trespass lies for any forcible malfeasance after legal entry to distrain (1 Ch. Pl. 191); but no subsequent irregularity shall render a legal distress a trespass *ab initio*. *See* Distress, vol. iv. p. 78.

A landlord who has accepted the rent in arrear, and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West v. Nibbs*, 4 C. B. 172.

All the parties to the trespass need not be joined (6 Taunt. 29, 35, 42); but all persons who direct or assist in committing a trespass are liable as principals, though not benefited by the act (2 Saund. 47, i; Bing. N. P. 41; Com. Dig. Trespass, C, 1); and an agent or servant is equally liable as principals, whether the tortious act be done by the authority of his master or not. (Id.) 12 Mod. 448; 1 Wils. 328.

Trespass will lie against a corporation for seizing and converting goods to their own use. *Maund v. Monmouthshire Canal Co.* 2 Dowl. N. S. 113; Car. & M. 606; 4 Man. & G. 452; 5 Scott, N. R. 457; 3 Rail. Cas. 159; 6 Jur. 932.

A party may be liable in respect of his previous consent or request that the trespass might be done. 1 Camp. 187; 2 Bl. Rep. 1055; Com. Dig. Trespass, C, 1. It may also be supported against a person, not being an infant or *feme covert*, who afterwards assents to a trespass committed for his use or benefit (*Badkin v. Powell*, Cowp. 478); for, in such case, his subsequent assent amounts to a command. But see *Wilson v. Tummon*, 6 Scott, N. C. 894; 22 L. J. C. P. 306. But, without such consent, trespass does not lie; as, if A. com-

(C) *Of the Pleadings.*

(*a*) *Of the Venue*[1] *and Declaration.*[2]

(*b*) *Traverse of Plaintiff's Possession or Property.*[3]

(*d*) *Damages.*[4]

(*e*) *Costs.*[5] *See* vol. iii. p. 287.

IX. Malicious and Petty Trespass Act.[6]

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mand his servant to do a lawful act, as to distrain the goods of B., and he wrongfully take the goods of C., A. is not liable (3 Wils. 312, 317; 1 East, 108), the liability of a sheriff being an exception. And the mere acceptance of goods illegally taken by another, does not always furnish evidence of an assent (2 Roll. 555, l. 50), unless at the time of the receipt he has notice of the illegality (*Freeman v. Rosher*, 13 Q. B. 780; 18 L. J. Q. 340); as, if a pound-keeper receives goods wrongfully distrained. *Badkin v. Powell*, Cowp. 476.

[1] This is a transitory action, unless it be against justices, constables, or other persons entitled by statute to have the venue laid in the county where the trespass was committed.

[2] The form of declaration is now very short: "That the defendant seized and took the plaintiff's goods, or removed, destroyed, damaged, or disposed of them to his own use." *See* various forms referred to in B. & L. Pr. 242. No time or place need be stated beyond the venue in the margin. The trespass that will sustain the action has been already described. The statements of "*vi et armis*," and "against the peace," &c., are not to be inserted.

[3] "That the said goods were not, nor was any of them, the plaintiff's, as alleged." This plea is generally adopted with "not guilty," as the latter plea admits the plaintiff's property in the goods. To negative this, however, the plaintiff must prove a right to the immediate possession of the chattels at the time of the trespass. We have seen the nature and character of the right required in the plaintiff to sustain the action, *ante*, p. 557. Under these issues the defendant may show that he has a better right to the possession, notwithstanding the actual possession of the plaintiff. *Ashby v. Munutt*, 8 Ad. & E. 121. He cannot in such case set up a *jus tertii*, unless he can also show an authority in himself to act under it. But where the plaintiff was not in actual possession in fact at the time of the trespass, and therefore relies on evidence of mere legal title, the defendant may set up a *jus tertii* to rebut the plaintiff's evidence. *Gadsden v. Barrow*, 9 Ex. 514. *Leake v. Loveday*, 4 Man. & G. 972. Under this issue the defendant may set up a lien, as such a defence negatives the right to possession. *Richards v. Symons*, 8 Q. B. 90.

[4] The damages in general are measured by the value of the goods, or the amount of injury done to them; but the mode of valuation differs, for according to the form in trover the plaintiff can only recover their value as chattels (*Clarke v. Holford*, 2 C. & Kir. 540); but in trespass their actual value as fixtures may be given. Special damage resulting from the immediate loss or injury may also be allowed; if not of too remote a nature, as in an action for injury to the plaintiff's horse by a collision, it was held that he might recover the keep of the horse at the farrier's while it was being cured, the farrier's bill, and the difference between the value of the horse before and after the accident; but he could not, it is said, recover the hire of another horse which plaintiff had been obliged to have while his own was laid up. *Hughes v. Quentin*, 8 C. & P. 703. See *Barrow v. Arnaud*, 8 Q. B. 595.

Where a defendant had wrongfully seized the plaintiff's goods, but had not removed them from the house in which the plaintiff resided, and another wrongdoer, against the will of the defendant, seized the goods while thus in the defendant's possession, the plaintiff was held entitled in trespass to recover as damages from the defendant the amount she had been forced to pay to the second wrongdoer, to redeem the goods from him. *Keene v. Dilke*, 4 Ex. 388; 18 L. J. Ex. 440.

A.'s carriage was driven against the wheel of B.'s chaise. The collision threw a person who was in the chaise upon the dashing-board. The dashing-board fell on the back of the horse, and caused him to kick, and thereby the chaise was injured:—*Held*, that B. was entitled to recover against A. damages commensurate with the whole of the injury sustained. *Gilbertson v. Richardson*, 5 C. B. 502; 12 Jur. 292; 17 L. J. C. P. 112.

[5] In an action for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which was afterwards set aside as illegal, the plaintiff cannot claim as part of the damage his costs incurred in vacating the warrant of attorney and judgment. *Holloway v. Turner*, 6 Q. B. 928; 9 Jur. 160; 14 L. J. Q. B. 143. See *Toms v. Wilson*, 7 L. T. (N. S.) 421.

[6] The 24 & 25 Vic. c. 95, repeals the 7 & 8 Geo. 4, c. 30. The principal clauses of the existing statute (24 & 25 Vic. c. 97) are set out vol. v. p. 414, and it will be only necessary to give here the 61st sect., relating to the apprehension of persons committing offences against the act:—"Any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction,

X. Under Colour of Legal Authority or Process. *See* also Judge, vol. v. p. 257; Justice of Peace, id. p. 289.

(A) *Where an Erroneous Judgment has been given.*[1]

may be immediately apprehended without a warrant, by any peace-officer, or by the owner of the property injured or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

A reference to some of the leading cases on the repealed act may be useful in determining the application of the present.

To justify a party in apprehending an offender, he must find the prisoner in the actual commission of the offence, or on a quick pursuit, and he must take him directly to a magistrate; and if he take him elsewhere he loses the protection of the act. *R. v. Curran*, 3 C. & P. 397. *Hanway v. Boultbee*, 4 id. 350. *See* Notice of Action, vol. v. p. 547.

In an action brought by A., who, for a supposed malicious injury to property, had been taken into custody by B., who *bonâ fide* believed that he was acting in execution of the above act, the latter was held to be entitled to notice of action. *Beechy v. Sides*, 9 B. & C. 806; 4 M. & Rob. 634. But the act applies only to the case of parties exercising the particular powers conferred by the statute, and not when they are proceeding on a common-law authority. *Thomas v. Sanders*, 5 B. & Adol. 462. It was no offence unless the party actually committed wilful damage. *R. v. Harper*, 1 D. & R. 223. However, if a number of persons be out for the joint purpose of doing wilful damage, and some do the injury and others carry away the property damaged, all being present together, there can be no doubt that all are equally guilty of the whole. Justices of the peace have no power to award 5*l.* at all events. They are to ascertain what the amount of damage in each case is, and award reasonable compensation to the party injured, according to the amount of the injury proved, but they cannot go beyond 5*l.* (Id.) To bring a case within the act, there must be proof of actual appreciable damage being done; and the mere fact of a man treading down the grass, by walking in a field out of the path, is not sufficient. *Butler v. Twiley*, 2 C. & P. 585. The proviso exempting from the penalty there imposed any person acting under a reasonable supposition of right, does not oblige justices to dismiss a charge made under that section upon the mere statement of the accused party that he so acted; but in default of proof by him they may judge from all the circumstances whether or not the party did so act. *Reg. v. Dodson*, 9 Ad. & E. 784. It is no proof of a *bonâ fide* claim subsisting, that several parties other than the individual charged with having committed similar trespasses, using the same colour of right as that which he professes to rely upon, and that the complainants have obtained injunctions from the Court of Chancery against such parties. (Id.) So held on motion for a criminal information against magistrates who have convicted. (Id.)

In discharging a rule for such information, the court refused to order payment of costs by J. S., who appeared to have instigated the trespasses in question, and had employed an attorney to defend the persons charged with such trespasses (including the party making the present application), J. S. not having sworn an affidavit, or otherwise taken a direct part in obtaining the rule. (Id.)

A party using unreasonable violence to beat off a dog which runs at him is guilty of a wilful trespass under the act. *Hanway v. Boultbee*, 1 M. & Rob. 15.

Where shrubs are cut upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the act, though the title to the spot on which the shrubs grew be in dispute between the parties. *Rex v. Whateley*, 4 M. & Rob. 432.

It is questionable whether a reversioner of premises is to be deemed the owner of the property injured. *Horn v. Thornborough*, 3 Ex. 846; 6 D. & L. 651; 18 L. J. Ex. 349.

A party who trespasses upon land under a fair and reasonable supposition that he has a right to do the thing complained of, is not liable to be apprehended by the owner of the property, although the latter have reason to suppose the party to be within the act. *Parrington* or *Parrington v. Moore*, 2 Ex. 223; 17 L. J. M. C. 118.

In an action for imprisonment, it appeared that the plaintiff had been given in charge of a constable by the defendant, without warrant, for doing malicious injury to a house. The defendant was attorney to the owner of the house, and alleged that he had acted under the 7 & 8 Geo. 4, c. 30, ss. 24, 28, and was entitled to notice of action under sect. 41. The judge asked the jury whether the defendant had acted *bonâ fide*, and on their answering in the affirmative, nonsuited the plaintiff for want of notice:—*Held*, that the jury should have been asked, not only generally, whether the defendant acted *bonâ fide*, but whether he had a reasonable belief that he was the owner's servant, or had his authority. *Kine v. Evershed*, 10 Q. B. 143; 11 Jur. 673; 16 L. J. Q. B. 271. See *Jones v. Howell*, 29 L. J. Ex. 19.

Where a landlord, during the existence of a tenancy, charged his tenant under the 2 & 3 Vic. c. 71, s. 38 (the Police-Court Act), with having three months before wilfully damaged his premises:—*Held*, that the magistrate had no jurisdiction, and that the charge should have been made within one month. *Dowell v. Beningfield*, Car. & M. 9.

[1] It has has been shown (vol. v. p. 257), no action whatever can be supported for any act, however erroneous, if expressly sanctioned by the judgment or direction of

one of the superior courts at Westminster, or even by an inferior magistrate acting within the scope of his jurisdiction. If the court or inferior judge has jurisdiction over the subject-matter, he is not liable as a trespasser, however erroneous the conclusion at which he arrives may be. It seems that no action will lie against a judge for what he does *judicially*, though it were done maliciously. *Case of Barnardiston and Soame*, 7 St. Tr. 442; 6 Stowell, 1094. *Ackerley v. Parkinson*, 3 M. & S. 425; 2 Hawk. c. 13, s. 30. *See* cases cited in *Dicas v. Lord Brougham*, 1 M. & Rob. 309; 6 Car. & P. 249, S. C. In such cases the magistrate might be punished by criminal information or indictment. *See* id. and Burn's *Jus.* 26th ed. Justices. But when an inferior court is guilty of an excess of jurisdiction, trespass may be supported for anything done under such proceeding. See *Doswell v. Impey*, 1 B. & C. 169. A distinction exists between error in the process or other proceeding where there is jurisdiction over the subject-matter, and an irregular proceeding where there is a total want of jurisdiction. *Ackerley v. Parkinson*, 3 M. & S. 425–488. And in case of an error by a ministerial officer, this action may be supported if the injury complained was committed by force and immediate. *Groenvelt v. Burwell*, 1 Ld. Raym. 471. *Britton v. Cole*, 1 Salk. 395. *Morgan v. Hughes*, 2 T. R. 225.

[1] When the court has no jurisdiction over the subject-matter, trespass is the proper form against all the parties. 10 Co. 76, a. *Perkin v. Proctor*, 2 Wils. 384. *Warne v. Varley*, 6 T. R. 443. When civil proceedings in an inferior court having no jurisdiction over the debt are adopted by a party with an expressly malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported. *Goslin v. Wilcock*, 2 Wils. 302. *Elsee v. Smith*, 2 Chit. Rep. 304; but see *Morgan v. Hughes*, 2 T. R. 225. So, where a party maliciously and unduly issues a second *fieri facias*, case may perhaps be brought (*Sederer v. Freeman*, Hob. 205, 206. See *Branscomb v. Bridges*, 1 B. & C. 145); and if a person maliciously procure a magistrate to grant an illegal warrant, he is liable in case for the malice. *Elsee v. Smith*, 2 Chit. Rep. 304. *West v. Smallwood*, 3 Mee. & W. 418. Trespass is also the proper remedy where an inferior court has jurisdiction over the subject-matter, but is bound to adopt certain forms in its proceedings from which it deviates, and whereby the proceedings are rendered *coram non judice*. *Cole's case*, Sir W. Jones 171. *Davison v. Gill*, 1 East, 64. *Smith v. Boucher*, Rep. Temp. Hardw. 71. *Martin v. Marshall*, Hob. 63. *Weaver v. Clifford*, 2 Bulst. 643. *Wingate v. Waite*, 6 Mee. & W. 739. But it does not lie for arresting a person privileged either personally or locally, but case is the only remedy. 10 Co. 76, b; 6 Co. 52, a. *Cameron v. Lightfoot*, 2 Bl. Rep. 1190. *Tarlton v. Fisher*, Dougl. 671. *Barker v. Braham*, 3 Wils. 378. *Whalley v. Pepper*, 7 C. & P. 506. *See* Mal. Pros. vol. v. p. 419.

As to rights and liabilities of justices of the peace, *see* vol. v. p. 289.

[2] In instances where there is jurisdiction, but the proceeding is irregular, trespass against the attorney and plaintiff is, in general, the proper form of action (*Parsons v. Lloyd*, 3 Wils. 341. *Barker v. Braham*, id. 368, 376; 2 Bl. Rep. 866); and where a judgment has been set aside for irregularity, this is the appropriate remedy for any act done under it. *Phillips v. Biron*, 1 Stra. 509. But with regard to a party issuing or causing to be issued irregular process, &c., the person prejudiced is at liberty to support an action on the case against him where there was no cause of action, and the proceeding was malicious as well as irregular. Where a party in the custody of the marshal of the Queen's Bench prison was brought up to the court upon an order of the court, and charged with an attachment for contempt, on which attachment he was afterwards detained in custody: it was holden, that trespass was maintainable against the party who caused the order to be served on the marshal. *Dissentiente, Lord Abinger, C. B. Bryant v. Clutton*, 1 Mee. & W. 408. Where the party originating the proceedings takes part in the arrest, of course he is liable in trespass. See *West v. Smallwood*, 3 id. 418. The liability of a magistrate, if a conviction be void or be quashed, has been already observed upon.

Writs which are irregular only in form and not void, so far protect the party at whose instance they are issued or executed, as to suspend the right of action arising out of them until they are set aside (*Riddell v. Pakeman*, 2 C., M. & R. 30. *Codrington v. Lloyd*, 8 Ad. & E. 449); and therefore it is a frequent condition in setting aside an irregular writ, that no action shall be brought for the trespass. Such restriction can only be imposed by consent. See *Adlam v. Noble*, 9 Dowl. P. C. 322. After a writ has been set aside for irregularity, the attorney in the cause is liable, as well as his client. *Codrington v. Lloyd*, *supra*. And see *Rundle v. Little*, 6 Q. B. 174. If the writ be void on its face, no person can, of course, justify under it (*Parsons v. Lloyd*, 2 W. Black. 845); but a writ is not void because it directs the arrest of a person privileged, or protected from process (see *Whitworth v. Clifton*, 1 M. & Rob. 531), unless, indeed, he be either an ambassador or his domestic servant, though for executing it knowingly and maliciously the officer may be liable to pay damages in respect of the injury committed. *Tarlton*

(D) *Where the Process was Misapplied or Abused.*[1]

v. Fisher, ante. Where the party is described in the writ by his initials, it would seem incumbent on the officer or sheriff to show that such description was authorised by statute.

[1] On misapplication of process, as when the property of A. is seized under an execution against B., trespass is the only remedy. *Sanderson v. Baker*, 2 Bl. Rep. 833. *Wale v. Hill*, 1 Bulst. 149. *Coote v. Lynworth*, Moore, 457. See *Reeves v. Slater*, 7 B. & C. 486.

An arrest of the right person by a wrong name, but one he himself has given, or where he has allowed judgment by default, will not render the party arresting liable. *Price v. Harwood*, 3 Camp. 108. *Walker v. Willoughby*, 6 Taunt. 530. Misnomer can now only be corrected by application to amend. *See* vol. i. p. 18. See *Fisher v. Maynay*, 6 Scott, N. C. 599. But see *Cole v. Hinton*, 4 T. R. 234.

When the process of a superior or inferior court has been abused (*Woodgate v. Knatchbull*, 2 T. R. 148), trespass against the sheriff and his officer, or other ministerial official (*Holroyd v. Breare*, 2 B. & A. 473), committing the abuse, is the proper action. As if the officer arrest out of the sheriff's bailiwick (*Olliet v. Bessey*, Sir T. Jones, 214. *Sanderson v. Baker*, 2 Bl. Rep. 834); or if he break open an outer door, &c. *Lee v. Gansell*, Cowp. 1. *Ratcliffe v. Bruton*, 3 B. & P. 223. As to when party justified in breaking open doors, &c. see *Lloyd v. Sandilands*, 2 Moore, 207; 8 Taunt. 250. S. C. *Laumock v. Brown*, 2 B. & A. 592; or seize under a *fieri facias* fixtures of the defendant, who was the freeholder, *Winne v. Ingiby*, 5 id. 625; and although the conduct of the officer were in the first instance lawful, yet if he abuse his authority and commit some act of trespass unwarranted by the process, as if he detain a party on a *capias ad satisfaciendum* after he tender the debt and costs (*per Dennison, J.: Smith v. Sibson*, 1 Wils. 154), he becomes a trespasser *ab initio*. Bac. Abr. Trespass, B. *Reed v. Harrison*, 2 Bl. Rep. 1219. So by detaining a prisoner after notice of his acquittal. *Webb v. Allen*, 1 Anstr. 261. As to when trespass or case is proper in such cases, see *Price v. Peek*, 1 Bing. N. C. 380. *Blessley v. Slowman*, 3 Mee. & W. 40. *Smith v. Eggington*, 7 Ad. & E. 667; 2 Nev. & P. 143. If the abuse be merely a nonfeasance, or any act not in itself a forcible trespass, case for such abuse or wrongful act, and not trespass, is, in general, the proper remedy. *Shortland v. Gosell*, 5 B. & C. 485. And in general, when the act complained of consists of a mere nonfeasance, as if the sheriff or a magistrate, &c. improperly refuse bail, or to act when they should do so, an action upon the case, and not an action of trespass, is the form to be adopted. *Osborn v. Gough*, 3 B. & P. 551. *Green and the Hundred of Bucclechurch's Case*, 1 Leon. 323. *Parsons v. Lloyd*, 3 Wils. 342, 343. *Ackerley v. Parkinson*, 3 M. & S. 421.

Neither the attorney suing out the writ nor his client is responsible as such for its wrongful execution, for it is not to be presumed that they authorised an illegal act. If, however, he accompanies the bailiff (*Lowell v. Champion*, 6 Ad. & E. 407), and the bailiff is directed by him where to go, or he otherwise interferes, he is of course a joint trespasser. Thus, where the debt for which the levy was made had been assigned to the defendant, who sued out the process as attorney in the action, and whose agents indorsed the *fi. fa.* with a description of the party whose goods were to be seized, it was held that he had by his conduct rendered himself liable for the seizure of the wrong goods. *Rowles v. Senior*, 8 Q. B. 677.

Where the wrongful act is committed by a bailiff in the regular course of his employment the action may either be brought against him or against the sheriff, or against the latter and the sheriff jointly (*Slack v. Brander*, 1 Esp. 42); for it is a general rule that the sheriff is responsible for all injuries resulting from the misconduct of his officers in the course of executing his writs. *Ackworth v. Kempe*, Dougl. 40. *Cameron v. Reynolds*, Cowp. 403. *Anon.* Lofft, 81. *Price v. Peek*, 1 Bing. N. C. 380. *Roberts v. Read*, 16 East, 215. But for this purpose it is essential that the officer should be acting for the sheriff, that is, that the warrant be directed to the bailiff by name, and that the act complained of be not wilful. *Drake v. Sykes*, 7 T.R. 113. *George v. Perring*, 4 Esp. 63. *Martin v. Bell*, 1 Stark. 413. *Rex v. Whalley*, 7 C. & P. 245.

It has been held, that where a bailiff seized goods, which the sheriff subsequently directed him to return, the latter was not liable for the detention of the goods by his officer after the determination of his authority. 2 Roll. Abr. Trespass, O, pl. 9, 10. *Brown v. Copley*, 7 Man. & G. 558. Nor is the sheriff liable for the misconduct of the bailiff of a liberty to whom he has in due course committed the execution of the writ. 2 Roll. Abr. *Ackworth v. Kempe*, *supra.*

An executive or ministerial officer has not the same protection which the law throws around a judicial functionary. Hawk. P. C. c. 8, s. 74. See *Dr. Bonham's case*, 8 Co. 121. Thus, it has been held that a secretary of state may be sued for issuing an illegal warrant. *Beardmore v. Carrington*, 2 Wils. 244. And although no action lies against a judge of a court of record upon an allegation of malice or corruption (which the law will not presume), the same tenderness is not shown to an executive or ministerial officer. The governor of a colony may be sued for maliciously, and without probable cause, suspending the functions of an officer there (*Sutherland v. Murray*, cited 1 T. R.

(E) *Where Ministerial Officer has acted without a Warrant.*[1]
(F) „ *the Process was Legal, but Maliciously Issued.*[2]
(H) „ *Private Person believed he had Authority.*[3] *See* also vol. iv. p. 400.

538), or for imprisoning a person for an unreasonable time upon a supposed criminal charge (*Wall v. M'Namara*, cited id. 536); and the captain of a man-of-war for imprisoning the purser on a charge of breach of duty without inquiring into it. *Swinton v. Molloy*, cited id. 337.

In every case where an officer has duties to perform by the common law or by statute, an action lies against him for neglect or misconduct in his office, whereby another sustains an injury. *Ashby v. White*, 2 Ld. Raym. 955. *Whiteley v. Richards*, 2 B. & C. 45; Com. Dig. Action, A. 6.

[1] When a ministerial officer proceeds without a warrant, on the information of another, trespass is the proper form of action against the informer, if no offence for which an arrest without warrant is justifiable has been committed by any person. *Stonehouse v. Elliot*, 6 T. R. 516. *Hedges v. Chapman*, 2 Bing. 523. *Flewster v. Royle*, 1 Camp. 187. And trespass lies against the informer, if there were no warrant, although it appear that some person had committed the offence, provided there was not reasonable or probable cause for charging the plaintiff with having committed the offence. The officer is not liable if he act on information of a felony, although no offence had been committed (*Lawrence v. Hedger*, 3 Taunt. 14. *Hedges v. Chapman*, 2 Bing. 526; 1 Chit. *Crim. Law*, 21, 22), or reasonable ground to suspect one has been committed. 6 B. & C. 635; 3 H. & N. 417; 27 L. J Ex. 443. He has, however, no power at common law to arrest without warrant, on suspicion of a misdemeanor. *Bowditch v. Bolchin*, 5 Ex. 380. *Griffin v. Coleman*, 3 H. & N. 417; 27 L. J. Ex. 443. For offences committed within the Metropolitan Police district, the 2 & 3 Vic. c. 47, s. 54, enables members of the police to take into custody, without warrant, any person who, within his view, shall commit any of the offences therein specified. *See* sect. 63, and *Justice v. Gosling*, 21 L. J. C. P. 94; and sect. 66, any person found committing an indictable misdemeanor, or one punishable summarily, may be apprehended by the owner of the property, or by his servant, to be delivered to a constable. See *Simmons v. Millingen*, 2 C. B. 533. The 24 & 25 Vic. cc. 96–100, authorises private persons to apprehend persons committing any of the offences enumerated therein.

In an action of trespass by A. against B., for false imprisonment, the latter cannot defend himself under a magistrate's warrant against C., although A., the plaintiff, was the party charged with the felony, and was the person against whom the warrant was intended to issue. *Hoye v. Bush*, 1 Man. & G. 775; 2 Scott, N. R. 86, S. C.

When an officer proceeds without warrant, and without foundation, upon his own apprehension, trespass is the form of action against him. *Groenvelt v. Barwell*, 1 Salk. 396; 1 Ld. Raym. 454, S. C. *Lawrence v. Hedger*, *supra*; 1 Chit. *supra*.

A plea justifying the breaking and entering a house without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him. *Smith v. Shirley*, 3 C. B. 142; 15 L. J. C. P. 230. Although, on a plea of justification, the defendant ought to set out his grounds of suspicion, yet he would be entitled to a verdict without proof of the whole of them, if he proved that a felony was in fact committed, and proved so much of the grounds of suspicion as satisfied the jury that he had reasonable cause to suspect the plaintiff.

[2] No person who acts upon a regular writ or warrant can be liable to this action, however malicious his conduct, but case for the malicious motive, and want of probable cause for the proceeding, is the only sustainable form of action. *See* vol. v. p. 421.

[3] *Arrest by Private Persons, without Warrant, for Treason or Felony.*—"If treason or felony be done, and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices, in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus*." *Davis v. Russell*, 5 Bing. 357; 2 M. & P. 590.

If a private individual state facts to a constable, who thereupon, on his own responsibility, arrests a person, the imprisonment is not his act, and he may show this under the plea of not guilty. *Barber v. Rollinson*, 1 C. & M. 330. *Stonehouse v. Elliott*, 6 T. R. 315. *Brandt v. Craddock*, 27 L. J. Ex. 314. *Grinham v. Willey*, 28 id. 242. He is at common law justified in himself arresting a person, or ordering him to be arrested, when a felony has been committed, and he has a reasonable ground of suspicion that the person arrested is guilty of it. *Beckwith v. Philby*, 6 B. & C. 635. *Matthews v. Biddeslyste*, 3 Man. & G. 390. But strictly, no private person can of his own authority, without warrant, arrest another for a misdemeanor, except for a breach of the peace whilst the strife is going on, and to prevent its continuance. Where the case is only one of suspicion the arrest is unjustifiable. In cases of misdemeanor, the parties aggrieved should apply to a justice of the peace for a warrant, not take the law into their own hands. *Fox v. Gaunt*, 3 B. & Adol. 800.

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A private person cannot apprehend another upon a suspicion of felony for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. *Hall v. Booth*, 3 Nev. & M. 316. *Stammers v. Yearsley*, 3 Man. & G. 410.

A defendant in an action for false imprisonment is answerable for all the ordinary acts of precaution on the part of the policemen to whom he has given the plaintiff into custody on a charge of felony, though more severity may have been used than the occasion required. *Edgill v. Francis*, 4 Jur. 365, C. P.

Defendant gave information before a magistrate, upon which the plaintiff was taken up on a warrant, and brought before the magistrate. After the charge was dismissed for the time, and the plaintiff liberated on his promise to appear at a future day, the defendant stated that he had another charge of forgery against the plaintiff, who was retiring, but was again put to the bar:—*Held*, that trespass was not maintainable. *Barber v. Rollinson*, 1 C. & M. 330.

Where a party charges another with felony, a police officer or constable ought to take him into custody, unless there are circumstances showing that the charge is an unreasonable one. If he takes the party into custody where there are no such circumstances, he is liable to an action for false imprisonment. *Hogg v. Ward*, 3 H. & N. 417; 4 Jur. 885; 27 L. J. Ex. 443.

In an action for giving the plaintiff into custody of a policeman, it appeared that the charge upon which the defendant arrested him was for fraudulently heaping up mounds of earth, to make it appear that he was entitled to receive from the defendant a larger sum for work contracted to be done:—*Held*, that as the charge could not be pleaded as a justification, evidence of the truth of it was admissible in mitigation of damages, under the plea of not guilty. *Linford v. Lake*, 3 H. & N. 276; 27 L. J. Ex. 334.

Justification may be amended either by striking out so much as is not proved, or by correcting the averments in the plea in accordance with the evidence. *Hailes v. Marks*, 7 Jur. N. S. 851; 30 L. J. Ex. 389; 7 H. & N. 50.

The question of reasonable and probable cause in a plea of justification, in an action for false imprisonment, is one of law and not of fact. (Id.) In such case the defendant is entitled to notice of action under sect. 33 of 24 & 25 Vic. c. 99 (against coinage offences), if he honestly believed in the guilt of the plaintiff, and also believed that the defendant was exercising a legal power, although it is also expressly found by the jury that the defendant did not reasonably so believe, the latter finding being immaterial. *Hermann v. Seneschal*, 11 W. R. 184; 6 L. T. (N. S.) 616, C. P.

It is doubtful whether, in an action for false imprisonment, mere personal resemblance between the plaintiff and the person who had committed a felony can afford reasonable ground of suspicion, justifying an arrest on the part of a private person without a warrant. But at all events the plea will fail unless either the defendant himself saw the felony committed, or unless the person who saw it, and on whose information he acted, spoke positively to the identity. *Rayner v. German*, 1 F. & F. 700. See *Jones v. Howell*, 29 L. J. Ex. 19.

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I. At Bar.

(A) *When Granted.*[1] (B) *Motion for.*[2]

(C) *Day of Trial, how Appointed.*[3]

[1] The attorney-general may, where the Crown is concerned, demand a trial at bar (*R. v. Hales*, 2 Stra, 816), but in other cases it is entirely discretionary with the court (*R. v. Burgesses of Carmarthen*, Say. 79), according to the circumstances of each case (*R. v. Amery*, 1 T. R. 363); and even if the parties consent, such trial cannot be had without leave of the court. 1 Stra. 693. It will in general be only granted where the matter in dispute is of great value, and difficulties are expected to arise in the course of the investigation. *Holmes v. Brown*, 2 Dougl. 437. *Lord Rivers v. Pratt*, 1 B. & B. 265. It was refused where the application was made on the ground that the defendant was the Lord Chancellor and the plaintiff an attorney. *Dimes v. Lord Cottenham*, 5 Ex. 311.

In London it is said that a cause cannot be tried at bar by reason of the charter exempting the citizens to serve as jurymen out of the City. 2 Salk. 644; 2 Litt. P. R. 607. *Lockyn v. East India Co.* 2 Salk. 644; 1 T. R. 366. A cause, however, has been tried by a special jury of London, the jury consenting to be sworn and waive their privileges. 2 Wils. 136. The same difficulty might also occur in a county palatine. Say. Rep. 47; 1 T. R. 363.

As granting the trial at all is discretionary, the court may impose terms. *Holmes v. Brown*, *supra*.

[2] The motion must be made after issue joined (*In re Borough of Christchurch*, 1 Stra. 696), and can only be made on the last paper-day of the term, when the Crown is a party. *Lord Bellamont's case*, 2 Salk. 625. The motion is for a rule *nisi* only, and must be supported by an affidavit showing the value of the subject-matter and the difficulties likely to arise. Say. 79.

[3] The judges may appoint any day of trial (11 Geo. 4 and 1 Wm. 4, c. 70, s. 1); and the time so appointed shall for such purpose be deemed part of the preceding term.

(D) *Notice of Trial.*[1] (E) *Of the Jury.*[2] (F) *Practice at Trial.*[3]

II. At Nisi Prius.

(A) *Notice of Trial in general.*

(*a*) *In what Cases.*[4]
(*b*) *What Notice necessary.*[5]
(*c*) *When Notice may be given.*[6]
(*d*) *To Whom.*[7]
(*e*) *Form of.*[8]
(*f*) *By Continuance.*[9]
(*g*) *Notice of Countermand.*[10]

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[1] By r. 41, H. T. 1853, notice of trial at bar shall be given to the masters of the court before giving notice of trial to the party. Ten days' notice of trial is sufficient, unless otherwise ordered by the court or a judge. C. L. P. Act, 1852, s. 97. If notice be countermanded, a fresh rule to try at bar must be obtained. R. M. 4 Anne, Fitz. 267.

[2] The action is tried by a jury of the county in which the action is laid, as in other cases. 2 Dougl. 437. *See* Jury, vol. v. p. 277.

[3] The trial is had at Westminster. If any question of law arises, each judge gives his opinion *seriatim*, and the chief justice or senior judge sums up the evidence. *Seven Bishops*, 12 St. Tr. A bill of exceptions lies at a trial at bar (*Rowe v. Brenton*, 3 M. & R. 171; 8 B. & C. 737); and if either party be dissatisfied with the verdict he may move for a new trial, as in other cases. 1 P. Wms. 212; 2 Ld. Raym. 1358; 1 Stra. 584; 1 Burr. 395.

[4] In all cases notice of trial must be given, even though plaintiff be under a peremptory undertaking to try (*Ifield v. Weeks*, 1 H. Black. 222. *Monk v. Wade*, 8 T. R. 246); or a day of trial be named by a rule of court (*Ellis v. Trusler*, 2 Black. 798); or although the cause be made a remanet from one assizes to the following. *Gains v. Bilson*, 4 Bing. 414. But if made a remanet from one sittings to another in town, no new notice is requisite. It is also requisite if a new trial be granted. *Bingley v. Mallison*, 3 Dougl. 402.

[5] By C. L. P. Act, 1852, s. 97, "ten days' notice of trial or inquiry shall be given, and shall be sufficient in all cases, whether at bar or nisi prius, unless otherwise ordered by the court or a judge." And days usually reckoned as holidays are reckoned. R. 175, H. T. 1853.

"*Short Notice of Trial*, or short notice of inquiry," shall in all cases be taken to mean four days. R. 35, H. T. 1853. As to the words "if necessary," usually added in the order, see *Flowers v. Welch*, 23 L. J. Ex. 7. *Dignam v. Ibbotson*, 3 Mee. & W. 431.

[6] By r. 40, H. T. 1853, "in all cases where the plaintiff's pleading is in denial of the pleading of the defendant without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available." *See* also Compelling Plaintiff to Proceed to Trial, *post*, p. 570.

[7] By r. 34, H. T. 1853, "notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by a court or judge." If there be several defendants, notice must be given to each, if they appear in person; or if they appear separately by different attornies, it must be given in town to the attorney of both.

[8] The notice must be in writing. R. 161, H. T. 1853. No particular form is requisite if it clearly informs defendant that the plaintiff intends to proceed to trial at a certain time and place. *Ginger v. Pycroft*, 17 L. J. Q. B. 182. *Cory v. Hotson*, 19 id. 250. *Fenn v. Green*, 26 id. 353. If the notice be indorsed on the issue it need not be entitled, nor so particular as if on a separate piece of paper. *Henbury v. Rose*, 2 Stra. 1237. But a notice so defective as to mislead will not do (*Cross v. Lang*, 1 Dowl. 342); and if the issue be delivered with notice for one day indorsed, and also a separate paper with notice for another day, the notice is irregular. *Kerry v. Reynolds*, 2 C., M. & R. 310.

If there be time, a plaintiff may withdraw a bad notice of trial, and give a fresh one. *Fell v. Tyne*, 5 Dowl. 246. If the notice be insufficient, and the plaintiff obtain a verdict, the court will set it aside. *Aliter* if defendant appear, and so waive the irregularity. 3 B. & Adol. 402.

[9] By r. 36, H. T. 1853, "notice of trial or inquiry may be continued to any sittings in or after term, on giving a notice of continuance four days before the time mentioned in the notice of trial or inquiry, unless short notice of trial has been given, in which cases two days' previous notice shall be sufficient, unless otherwise ordered by a court or a judge by consent." It must be given in town. R. 34, H. T. 1853. Notice of continuance can only be given once. *Boyes v. Twist*, Barnes, 292; 2 Stra. 1219. Nor can it be given after notice of countermand has been served. *Smith v. Hoff*, Barnes, 301.

[10] By C. L. P. Act, 1852, s. 98, "a countermand of notice of trial shall be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, and then two days before the time mentioned in the notice of trial, unless otherwise ordered by the court or a judge, or by consent." It may be given either in town or country. R. 34, H. T. 1853. If

IV. Proceedings at the Trial.

(A) *Order in which Causes will be Tried.*[1]
(C) *Stating the Case.*[2]
(D) *Examination of Witnesses.*[3]
(E) *Recalling a Witness.*[4]

given in town in a country cause on the last day allowed, it should be given before post time. *Pound v. Penfold*, 3 Ad. & E. 655.

[1] At Nisi Prius every cause is tried in the order in which it has been entered, without preference or delay, unless it be made out to the satisfaction of the judge in open court that it is impracticable or inconvenient so to do, who thereupon may make such order for the trial of the cause so put off as to him shall seem just. And he will sometimes, for convenience, try a cause out of its order, or postpone it. *Dunn v. Coutts*, 17 Jur. 347. *Cottam v. Banks*, 1 B. C. 302.

If the cause be coming on, and the parties are not prepared to proceed in the trial, they may withdraw the record. *See post*, Withdrawing Record. When the cause is called on, the record, or abstract of it made out by the judge's marshal, is handed to the judge, in order that he may know the issues the jury have to try.

Causes, of which notice has been given that they will be taken as undefended, are taken before defended causes. In London and Middlesex, special jury causes are tried only at the sittings after Michaelmas, Hilary, and Trinity terms, and days are appointed when they are to be tried. Sometimes the court will order a special jury cause in London or Middlesex to be tried in term. *Roberts v. Bradshaw*, 1 Stark. 31; C. L. P. Act, 1852, s. 111. At the assizes, days are usually appointed on the first business day of the assizes for taking the special jury causes. Remanets are generally taken before new causes.

Where there are lists of the causes to be tried each day affixed outside the court, the fact of a cause being in such list is notice that it may be tried at any time during the day. *Fourdrinier v. Bradbury*, 3 B. & A. 328.

[2] The junior counsel for the plaintiff opens the pleadings, that is, states shortly the substance of them to the jury, and the points upon which the issue has been joined. The senior counsel for the party, who has the right to begin, then states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effect in proving the case stated, and remarks upon any point of law on which, together with the matters of fact, the jury will have to found their verdict. *Plunkett v. Cobbett*, 5 Esp. 136. Counsel should not state facts which he cannot go into evidence to prove. *Howard v. Gossett*, Car. & M. 380. He is not, generally, very strictly confined to the case opened by him (*Kirkman v. Jervis*, 7 Dowl. 678. *Murray v. Butler*, 3 Esp. 105. *Penson v. Lee*, 2 B. & P. 333), though, of course, any misstatements made by him may prejudice his case with the jury. Where in an action for an assault, with but one count in the declaration, the plaintiff, having proved one assault, wished to abandon that and prove another, the court would not allow him to do so. *Stante v. Pricket*, 1 Camp. 473.

The plaintiff's counsel may also state the matter of defence, if it appear upon the record, and the evidence upon which he can disprove it (*Delauney v. Mitchell*, 1 Stark. 439), or he may make out a *primâ facie* right only, and reserve his answer to the defendant's case; but, as a general rule, he cannot answer part of the defendant's case by anticipation, and then afterwards call evidence in reply to the residue (*Williams v. Davies*, 1 C. & M. 464. *Shaw v. Beck*, 8 Ex. 392. *Rees v. Smith*, 2 Stark. 31), though the judge in his discretion may allow this to be done (*Wright v. Willcox*, 19 L. J. C.P. 333); and where defendant traverses, and also justifies, the plaintiff may reserve his case until the defendant has proved the latter. *Brown v. Murray*, R. & M. 254. See *Roe v. Brenton*, 3 M. & R. 139–281.

[3] After the senior counsel has thus stated the case, the witnesses to prove it are next called and examined in their order; the first is examined by the counsel next in rank to the senior; the second by the junior; if there be three counsel engaged on that side, the third by the senior, each serjeant or barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. 2 Camp. 280. Where there are several defendants, who appear by separate attorneys, and have separate counsel, if their defences be different and distinct from each other, the counsel of each have a right to address the jury, and examine witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly. 4 Camp. 147. *See* also *Doe d. Hogg v. Tindall*, 3 C. & P. 565. *Seale v. Evans*, 7 id. 593. And where two defendants appear by the same attorney, but at the trial counsel appears for the one only, and the other appears in person, the counsel only will be allowed to address the jury; but the defendant who has no counsel may cross-examine the witness. *Perring v. Tucker*, 4 C. & P. 70. As to the competency, examination and cross-examination, &c. of witnesses, *see post*, Witness.

[4] It is entirely in the discretion of the judge to allow a witness to be recalled.

(F) *Arguments of Counsel on Objections.*[1]

(G) *Matters of Fact on which the Admissibility of any Evidence may be refused to be determined by the Judge.*[2]

(H) *Of the Defence.*[3]

(I) „ *Reply and Summing up the Evidence by Counsel.*[4]

(J) *Summing up of Judge.*[5]

(Q) *Adjourning Trial.*[6]

V. Trial by a Judge without a Jury.[7]

Adams v. Bankart, 1 C. M. & R. 681. *Catlin v. Barker*, 17 L. J. C. P. 62. *Middleton v. Barned*, 18 L. J. Ex. 433.

[1] Where points of law arise incidentally during the trial, *all* the counsel on both sides are heard by the court, and the leading counsel of the party making the objection or submitting the point alone replies. But if the counsel in replying cite a case, the opposite counsel will be allowed to observe on the case so cited. *Fairlie v. Denton*, 3 C. & P. 103. *Power v. Barham*, 7 id. 356. *See* also *Arden v. Tucker*, 1 M. & R. 192. Only one counsel will be heard on the right to begin. *Rawlins v. Desborough*, 2 M. & R. 70.

[2] Matters of fact on which the admissibility of any evidence depends are to be decided by the judge alone, and the jury have nothing to do with them. *Boyle v. Wiseman*, 24 L. J. Ex. 284.

[3] When the party who began has concluded his case, he asks the counsel on the opposite side whether he will call witnesses or put in evidence. If he says he will not, the counsel who began sums up his evidence, and the other counsel then makes his speech to the jury. But if he says that he will put in evidence, &c., he addresses the jury, and then calls his witnesses; after which he sums up his evidence, and the counsel who began has the general reply. C. L. P. Act, 1854, s. 18. A counsel who has elected not to call witnesses, and allowed his opponent to sum up, cannot afterwards alter his mind. *Darby v. Ousely*, 1 H. & N. 1; 25 L.J.Ex. 227.

[4] By C. L. P. Act, 1854, s. 18, "Upon the trial of any cause, the addresses of counsel shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any): and the right to reply shall be the same as at present. As to whether counsel can sum up when judge rules there is no evidence, see *Hodges v. Ancrum*, 24 L. J. Ex. 257. If counsel for the defence have adduced evidence, his opponent has a right to reply generally, otherwise not, except when the queen is a party, in which case the attorney-general has always a right to reply. 1 Esp. 226. *R. v. Bignold*, 4 D. & R. 70. *R. v. Marsden*, 1 M. & M. 439.

[5] When the case is closed on both sides, if the plaintiff do not elect, or have not previously elected, to be nonsuit, the judge sums up the evidence, as it is termed; that is, he states to the jury the matters really in dispute between the parties, calls to their attention such parts of the evidence as he thinks proper, and makes his remarks on it when necessary. He also states the principles of law upon which the case must be decided, and, if necessary, the form in which they are to give the verdict. *Davidson v. Stanley*, 3 Scott, N. R. 49. *Parmiter v. Coupland*, 6 Mee. & W. 105. *Baylis v. Laurence*, 11 Ad. & E. 920.

[6] By the C. L. P. Act, 1854, s. 19, "it shall be lawful for the court or judge, at the trial of any cause, when they or he may deem it right for the purposes of justice, to order an adjournment for such time, and subject to such terms and conditions as to costs and otherwise, as they or he may think fit."

[7] "The parties to any cause may, by consent in writing, signed by them or their attornies, as the case may be, leave the decision of any issue of fact to the court, provided that the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such a trial; or provided the judges of the superior courts of law at Westminster shall, in pursuance of the power hereinafter given to them, make any general rule or order dispensing with such allowance, either in all cases, or in any particular class of cases to be defined in such rule or order; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary, in open court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at the assizes; and the verdict of such judge or judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the court or judge, the evidence, and otherwise, shall be the same as in the case of trial by jury." 17 & 18 Vic. c. 125, s. 7.

If the parties consent orally, and without

VI. Trial by Proviso.[1]

VIII. Postponing Trial.[2]

IX. New Trials.

(A) *When Granted in general.*[3]

writing, rule, or summons, to a trial by the judge or a commissioner of assize, the proceeding cannot be questioned after trial or motion in the court above, for the judge has general jurisdiction, and the want of written consent is only irregular. *Andrews v. Elliott* (in error), 6 El. & Bl. 388; 2 Jur. N. S. 663; 25 L. J. Q. B. 336, Ex. Ch.; affirming judgment of the Queen's Bench, 5 El. & Bl. 502; 2 Jur. N. S. 1046; 25 L. J. Q. B. 7.

[1] The old practice of proceeding by motion for judgment, as in the case of a nonsuit, is superseded by 15 & 16 Vic. c. 76, s. 100, by which in all cases where the plaintiff, after issue joined, does not proceed to trial, where, by the course and practice of the court, he might have done so, the defendant may, if he wish, have the action tried by proviso; that is, he may give the plaintiff notice of trial, make up the Nisi Prius record, carry it down, and enter it with the marshal, and proceed in the trial as in ordinary cases. This, however, can be done only in cases where the plaintiff has been guilty of some laches, or default after issued joined, except in replevin, prohibition, *quare impedit* (2 Salk. 652), and error in fact. 2 Saund. 336, a. In which cases, both parties being actors, the defendant may make up the Nisi Prius record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The court have also allowed a defendant to bring down the record of an issue directed to the Court of Chancery to trial by proviso, upon it being suggested to them that the plaintiff wished to delay the cause. 4 T. R. 767.

By rule 42, H. T. 1853, "no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary." And where, upon a special jury cause being called on, there was not a full jury and neither party prayed a tales, it was held that the defendant could not afterwards try by proviso. *Phillips v. Dance*, 9 B. & C. 769.

By the C. L. P. Act, 1852, s. 116, "nothing herein contained shall affect the right of a defendant to take down a cause for trial, after default by the plaintiff to proceed to trial, according to the course and practice of the court." Neither can the court, in general, interfere with such right. *Whittaker v. Mason*, 4 Bing. N. C. 503.

By C. L. P. Act, 1852, s. 116, "if records are entered both by the plaintiff and the defendant, the defendant's record shall be treated as standing next in order after the plaintiff's record in the list of causes, and the trial of the cause shall take place accordingly."

If plaintiff do not appear to the defendant's record, the proper course is to nonsuit him. *Gardner v. Davis*, 1 Wils. 300. *Hicks v. Young*, 2 Saund. 336, b. *Hodgson v. Forster*, 1 B. & C. 110.

[2] The court or a judge will, on application, postpone a trial where it appears to be necessary for the purposes of justice. As for the absence of a necessary witness (*Stratford v. Marshall*, Barnes, 440), it should appear by affidavit when he will probably return. *R. v. D'Eon*, 1 W. Black. 515. And such absence is no ground, where the witness did not go abroad till after notice of trial (*Bourne v. Church*, Barnes, 442); and the party applying must not have been guilty of delay. *Saunders v. Pitman*, 1 B. & P. 33.

Where the defendant, a master mariner, went abroad in the course of his business, after time obtained to plead, but before issue joined, the court refused to postpone the trial on the ground of his being a necessary witness. *Solomon v. Haward*, 12 C. B. 463.

Where the defendant's attorney was so ill that he could not attend, the trial has been postponed. *Hayley v. Grant*, Say. 63. So, where the copy of a judicial document in the West Indies was alleged to be material, the court put off the trial to obtain it. *Mackensie v. Hudson*, 1 D. & R. 152. It was refused on an application by the plaintiff in a penal action. Tidd, 699. The fact of counsel not being prepared is no ground for a postponement. *Colebrook v. Dobbs*, 3 Burr. 1319. This application is usually only made by the defendant, for the plaintiff may withdraw his record. *Pain v. Bustin*, 1 Stark. 74. But see *Turquand v. Dawson*, 1 C., M. & R. 709. *Ansley v. Birch*, 3 Camp. 333); though sometimes, for a short interval, it may be postponed at the request of the plaintiff.

The application should be made to the court, or a judge at chambers, or to the judge at Nisi Prius, if the sittings have begun. *Atkinson v. Dickenson*, 3 Camp. 41. It must be made on affidavit, stating clearly the grounds of the application by the party applying, or his attorney, or his clerk having the management of the cause. *Duberly v. Gunning*, Peake, 97. *Sullivan v. M'Gill*, 1 H. Black. 637.

[3] The application for a new trial is generally to the discretion of the court, who ought to exercise such discretionary power as will best answer the ends of justice. *Edmonson v. Machell*, 2 T. R. 4. To induce the court to grant it, it must appear that the jury have given their verdict under a misconception of the law; or believing what they ought to have discredited; or not recognising what they ought to have taken into consideration (*Carstairs v. Stein*, 6 M. & S. 192. *R. v. Burr*,

(B) *Special Grounds on which Granted.*

(*a*) *Absence of Attorney, Counsel, &c.*[1]

(*b*) *Damages too Small or too Large.*[2]

(*c*) *Evidence Improperly Admitted or Rejected.*[3]

(*d*) *Verdict against Evidence.*[4]

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5 Price, 173); or contrary to the direction of the judge. *Mountedgecombe v. Symons*, 1 Price, 278. Value and importance are not alone sufficient grounds for its being granted (*Vernon v. Hankey*, 2 T. R. 113); and it will not be granted on an objection which might have been and was not made, or was abandoned at the trial (Id.) *Rogers v. Stephens*, 2 T. R. 713. *Robinson v. Cook*, 6 Taunt. 336. *Morrish v. Murray*, 13 Mee. & W. 52. *Williams v. Wilcox*, 8 Ad. & E. 314. New trial on the ground of misdirection, is a claim of right, and if refused, the subject of appeal. *See post*, p. 574.

[1] Where a cause is undefended by the neglect of the attorney a new trial will be granted, and the attorney ordered to pay costs. *De Roufigny v. Peale*, 3 Taunt. 489. *Banks v. Newton*, 4 D. & L. 632. And where a cause in the written list for the day was tried out of its order as an undefended case, in the absence of the defendant's attorney, the court granted a new trial only on payment of costs, and an affidavit of merits. *Fourdrinier v. Bradbury*, 3 B. & A. 328. *See* also *Aust v. Fenwick*, 2 Dowl. 246. *Dorrien v. Howell*, 6 Bing. N. C. 245. *De Medina v. Sharpnell*, 12 L. J. C. P. 37. But if the cause be tried in its order, in the absence of the opposite party or his counsel, the court will not grant a new trial, unless there be very special circumstances, and then only on payment of costs and an affidavit of merits. *Bland v. Warren*, 7 Ad. & E. 13. *Watson v. Reeve*, 5 Bing. N. C. 112. *Nash v. Swinborn*, 3 Man. & G. 630. And the omission of counsel to call evidence stated in his brief is no ground. *Spong v. Hog*, 2 Black. 802. It will be granted in a proper affidavit on account of the absence of a material witness. 7 L. T. (N. S.) 363.

[2] *Damages being too small* is no cause for a new trial (*Hayward v. Newton*, 2 Stra. 940; 2 Dougl. 507), unless it has arisen from some mistake in point of law (*Markham v. Middleton*, 2 Stra. 1259. *Baker v. Brown*, 2 Mee. & W. 199), or the jury (*Snell v. Timbrell*, 1 Stra. 643. *Levy v. Baillie*, 7 Bing. 349); or from some unfair practice on the part of the defendant (*Rex v. Bear*, 2 Salk. 417). And in actions of tort the court will never grant a new trial on this ground (*Manton v. Bates*, 1 C. B. 444. *Richards v. Rose*, 23 L. J. Ex. 3. *Apps v. Day*, 14 C. B. 112. *Haward v. Barnard*, 11 C. B. 653. *Rendall v. Hayward*, 5 Bing. N. C. 424): and it is no cause for setting aside a verdict that the jury have given one shilling damages under the impression that it would carry costs. *Mears v. Griffin*, 2 Scott, N. R. 15; 1 Man. & G. 796.

In actions *ex delicto*, damages being too large is no reason for a new trial, unless outrageously so (*Sharp v. Brice*, 2 Black. 942. *Pleydell v. Lord Dorchester*, 7 T. R. 529. *Lockley v. Pye*, 8 Mee. & W. 133. *Bennett v. Allcott*, 2 T. R. 166. *Irwin v. Dearman*, 11 East, 23. *Huckle v. Money*, 2 Wils. 205); or the jury have acted from undue motives or gross error. *Rex v. Mawbey*, 6 T. R. 619. *Chambers v. Caulfield*, 6 East, 244. *Creed v. Fisher*, 23 L. J. Ex. 143. And the court will not receive affidavits of the defendant's witnesses to explain or add to evidence given by them at the trial (*Phillips v. Hatfield*, 8 Dowl. 882); and the same as to writs of inquiry. *Benson v. Frederick*, 3 Burr. 1845. But in actions *ex contractu*, where the damages are mere matter of calculation, or are clearly shown to be excessive, the court will grant a new trial or set aside the execution of a writ of inquiry (*Day v. Edwards*, 1 Taunt. 491. *Ward v. Hurd*, 2 Bing. N. C. 166. *Selby v. Powis*, 1 H. & W. 2. *Hilton v. Fowler*, 5 Dowl. 312. *Wheeler v. Sims*, 5 Jur. 151, B. C. *Beavon v. Jackson*, 4 Jur. 701), unless the plaintiff will consent to reduce them.

[3] The improper admission of evidence is no ground for a new trial, where the other proof authorises the verdict (*Harford v. Wilson*, 1 Taunt. 12. *Teynham v. Tyler*, 6 Bing. N. C. 561); nor is the rejection of one kind of evidence, where the same fact was proved by another (*Edwards v. Evans*, 3 East, 451. *Doe d. Welch v. Langfield*, 16 Mee. & W. 497); or where it was admitted at the trial. *Mortimer v. M'Callan*, 6 id. 58. But in general, if a judge admit improper evidence (*Baron de Rutzer v. Farr*, 4 Ad. & E. 53. *Doe d. Tatham v. Wright*, 1 H. & W. 729), or reject evidence which ought to have been received (*Smedley v. Hill*, 2 W. Black. 1105. *Boyle v. Wiseman*, 10 Ex. 647), by which means the result of the trial might have been different, the court will grant a new trial. *Freeman v. Arkell*, 2 B. & B. 494. *Bailey v. Haines*, 19 L. J. Q. B. 73.

By C. L. P. Act, 1854, s. 31, "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." *See* Stamp, *ante*, p. 481.

[4] Verdict against evidence is no ground for a new trial for either party, where the damages found or recoverable are *under* 20*l.* (*Roberts v. Karr*, 1 Taunt. 495); but otherwise if the damages exceed this sum (*Bright v. Eynon*, 1 Burr. 390. *Morris v. Cleasby*, 1 M. & S. 576. *Levy v. Milne*, 12 Moore, 418. *Musgrave v. Nevinson*, 2 Raym. 1358): but the court will be much influenced by the satisfaction or dissatisfac-

(*e*) *Discovery of New Evidence.*[1]
(*f*) *Misconduct of Opposite Side.*[2]
(*g*) ,, *of the Jury.*[3]
(*h*) *Misdirection of the Judge.*[4]
(*i*) *Default of Officer of the Court.*[5]
(*j*) *Where Action or Defence is Frivolous.*[6]
(*k*) *Upon Issue out of Chancery.*[7]

tion with the verdict of the judge who tried the cause. *Leeke v. Deer*, 1 Jur. 983. *See* also *Wilkinson v. Payne*, 4 T. R. 468. *Bolton v. Pritchard*, 4 D. & L. 117. *Smith v. Bramston*, 2 Salk. 644; 1 Ld. Raym. 62. *Lacey v. Forrester*, 3 Dowl. 668. *Davis v. Hardy*, 6 B. & C. 231. But even if he be satisfied the court may direct a new trial; but not if the result is certain to be the same. 27 L. J. Ex. 37; 29 id. 35.

When the trial is before a judge without a jury, under C. L. P. Act, 1854, s. 1, "the verdict shall not be questioned on the ground of its being against the weight of evidence."

[1] New evidence since discovered is a ground for a new trial (*Broadhead v. Marshall*, 2 Black. 955. *Thurtell v. Beaumont*, 1 Bing. 339); but not the discovery of witnesses who can contradict those produced at the former trial. *Dickenson v. Blake*, 7 Bro. P. C. 177.

[2] If the opposite party have done anything to improperly influence the jury, as by handing them evidence which has not been shown to the court (*Graves v. Short*, Cro. Eliz. 616); or by the distribution of handbills reflecting on the character of the plaintiff to the jury (*Costar v. Mesent*, 3 B. & B. 272), the court will grant a new trial. And so also if he has misled or taken the opposite party by surprise. *Anderson v. George*, 1 Burr. 353. *Hewlett v. Cruchley*, 5 Taunt. 277. *Long v. Bilke*, 1 Scott, N. R. 176. *Doe d. Tindall v. Roe*, 5 Dowl. 420.

[3] If it can be shown that the jury have not given grave and impartial consideration to the matters before them, the court will grant a new trial (*Hughes v. Budd*, 8 Dowl. 315. *Dent v. Hundred of Hertford*, 2 Salk. 645. *Gainsborough v. Blackford*, 6 Price, 36); but a confession by jurymen that they cast lots for their verdict is not a sufficient ground (*Aylett v. Jewell*, 2 Black. 1299); nor will the court receive affidavits of the jurymen (*Harvey v. Hewett*, 8 Dowl. 598. *Roberts v. Hughes*, 7 Mee. & W. 399. *Bailey v. Macaulay*, 19 L. J. Q. B. 73); or affidavits of what any of the jurors have said to prove such misconduct. *Straker v. Graham*, 7 Dowl. 223; 4 Mee. & W. 721. But see *Raphael v. Bank of England*, 25 L. J. C. P. 33. Also if the jury, or any of them, be interested in the cause, the court will set aside the verdict. *Bailey v. Macaulay, supra;* 7 L. T. (N. S.) 274. But as to what is not a sufficient interest, see *Prime v. Titchmarsh*, 7 Jur. 202, Ex.; 28 L. J. Ex. 2. Also if they give a perverse verdict it will be set aside without costs. *Harrison v. Fane*, 1 Scott, N. R. 287. *Gibson v. Muskett*, 3 id. 427. *Parker v. Great Western Railway Co.* 3 Rail. Ca. 17, C. P. *Hope v. West*, 7 Scott, 826.

[4] A misdirection or omission of the judge to direct the jury is a ground of new trial (*How v. Strode*, 2 Wils. 269, 273. *Calcraft v. Gibbs*, 5 T. R. 19); but it is strictly only a matter of right where a bill of exceptions will lie, though the court in its discretion will grant it whenever injustice has been done by the misdirection, though even on a collateral point. *Black v. Jones*, 6 Ex. 213. *Moore v. Tuckwell*, 15 L. J. C. P. 153. *Robinson v. Cooke*, 6 Taunt. 336. *Duke of Newcastle v. Inhabitants of Broxtowe*, 1 Nev. & M. 598. *Bresey v. Windham*, 5 Q. B. 166); and even where the misdirection might have been misunderstood, though substantially correct. *Toulmin v. Headey*, 2 C. & Kir. 157. A wrong observation as to a matter of fact is not a misdirection (*Taylor v. Ashton*, 11 Mee. & W. 401; and further, as to what is or is not a misdirection, see *Vane v. Cobbold*, 1 Ex. 798. *Elliott v. South Devon Railway Co.* 17 L. J. Ex. 262. *Hadley v. Baxendale*, 23 id. 179. *Doe d. Strickland v. Strickland*, 19 L. J. C. P. 89.

[5] Where there has been a miscarriage by the default or mistake of the officer of the court, as by entering the cause on the wrong list, or in the taking or entry of the verdict, the court will grant a new trial (*Hunter v. Hornblower*, 3 Dowl. 491. *Bentley v. Fleming*, 14 L. J. C. P. 174; 1 C. B. 479); and the affidavit of a juryman is receivable on this subject. *Roberts v. Hughes*, 7 Mee. & W. 399. *Raphael v. Bank of England*, 25 L. J. C. P. 33. As to misconduct of officers of the court, see *Baylis v. Lucas*, Cowp. 112. *Stainton v. Beadle*, 4 T. R. 473.

[6] The value or amount, we have seen, must, where the verdict is against evidence, be 20*l.*, or in a trial before a sheriff, 5*l.* (*Sowell v. Champion*, 2 Nev. & P. 627. *Hawkins v. Alder*, 18 C. B. 640. *Williams v. Evans*, 2 Mee. & W. 220. *Fleetwood v. Taylor*, 6 Dowl. 796); or some right independent of the damages be involved to induce the court to grant a new trial (*Bevan v. Jones*, 2 Y. & J. 264. *Branson v. Bidsbury*, 4 Per. & D. 441; 12 Ad. & E. 631. *Young v. Harris*, 2 C. & J. 14. *Watts v. Judd*, 6 Scott, N. R. 639. Mere importance to the parties not sufficient (12 C. B. (N. S.) 368); but otherwise if there have been fraud in the opposite party (*Bunson v. Dishing*, 4 Per. & D. 641); or a misdirection. *Haine v Davey*, 4 Ad. & E. 892. *Rendall v. Hayward*, 7 Scott, 407. *See* also *Allum v. Boultbee*, 23 L. J. Ex. 208.

[7] When the Court of Chancery directs an action at law, even in cases where such action could not be maintained without its direction, as where the defendant therein is a certificated bankrupt, it does not consider the action as tried unless the court at law is satisfied with the verdict. Until that event, therefore, such court has full dominion over the suit, and may direct a new trial if dissatisfied with the verdict. *Carstairs v. Stein*, 4 M. & S. 192. *See post*, p. 573, n. [4].

(*l*) *After Bill of Exceptions or Error brought.*[1]
(*m*) „ *Trial at Bar.*[2]
(*n*) „ *Motion in Arrest of Judgment.*[3]

(C) *Application for.*

(*a*) *To what Court.*[4]
(*b*) *When to be Made.*[5]
(*c*) *Motion for.*[6]
(*d*) *Argument on.*[7]

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[1] When a bill of exceptions has been tendered, the court will not grant a motion for a new trial unless the bill of exceptions be abandoned (2 Chit. Rep.), unless it be on a different point (*Crotty v. Price*, 5 Jur. 434, Q. B.); nor will it do so after error brought by the party applying. Tidd, 913; 1 B. & P. 149.

[2] A new trial may be had after a trial at bar. *Gay v. Cross*, 7 Mod. 37. *Smith d. Dormer v. Parkhurst*, 2 Stra. 1105.

[3] After a distinct motion in arrest of judgment no application can be made for a new trial (2 Salk. 647; 4 Burr. 2224; 2 id. 1244. *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102); but an application may be made in the alternative. (Id.) *Price v. Reid*, 6 Scott, N. R. 1010. *See* Arrest of Judgment, vol. i. p. 520.

[4] The application must be made to the court in which the action is brought, or to which the issue in Chancery is referred. *Carstairs v. Stein*, 4 M. & S. 192. In actions tried in the Common Pleas of Lancaster or Durham, it may be made in any court of Westminster sitting *in banco* (4 & 5 Wm. 4, c. 62, and 2 & 3 Vic. c. 16, s. 23), though it is usually made in that court of which the judge who tried the cause is a member. *Smethurst v. Taylor*, 1 D. & L. 375. *Plumley v. Sherwood*, 12 Mee. & W. 190. See *Bury v. Peers*, 4 D. & L. 163.

[5] By r. 50, H. T. 1853, "no motion of a new trial, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the day of trial, or in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court."

This rule will be rigidly adhered to (*Ellaby v. Moore*, 22 L. J. C. P. 253. *Lanyon v. Kelly*, 8 L. J. Q. B. 40. *Deacon v. Stodhart*, 2 Man. & G. 317. *Kirkham v. Master*, 1 Ch. 382); though under very special circumstances the court will allow the application to be made before judgment has actually been signed. *R. v. Holt*, 5 T. R. 436. *Price v. Duggan*, 2 Man. & G. 641. *Willis v. Bennett*, Barnes, 443. *Johnson v. Warwick*, 17 C. B. 516. *Pitmore v. Hood*, 8 Scott, 180. *Newton v. Boodle*, 4 D. & L.

By r. 51, H. T. 1853, "no suitor who appears in person shall be at liberty to set down any motion in such list of postponed motions without the express leave of the court."

By r. 53, H. T. 1853, "if such motion as above mentioned be entered in such list of postponed motions, or if such motion be postponed by leave of the court, in the case of a cause tried in term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular; and every suitor who appears in person shall give a similar notice. See *Lloyd v. Berkovitz*, 16 Mee. & W. 31. *Doe d. Witty v. Carr*, 20 L. J. Q. B. 83.

[6] By r. 52, H. T. 1853, "no affidavits shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making such motion, without the special permission of the court for that purpose." It would seem that the "time limited" means the four days mentioned in r. 50, H. T. 53, *supra*, notwithstanding the cause be in the postponed list. *Allum v. Boultbee*, 23 L. J. Ex. 108. *Williams v. Mortimer*, 11 Mee. & W. 104.

The judge's notes are conclusive as to the evidence, and affidavits cannot be admitted to contradict or supply omissions in them. *R. v. Grant*, 3 Nev. & M. 106. *Gibbs v. Pike*, 2 Mee. & W. 351. *Phillips v. Hatfield*, 10 L. J. Ex. 33.

By C. L. P. Act, 1854, s. 33, "in every rule *nisi* for a new trial, or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein." And it is not sufficient to say, "On the grounds set forth in the said affidavit." *Drayson v. Andrews*, 24 L. J. Ex. 22. If the rule is moved on behalf of one of several defendants, it should call on the other defendants, as well as the plaintiff, to show cause. *Doe d. Dudgeon v. Martin*, 13 Mee. & W. 811. *Belcher v. Magnay*, id. 815. *R. v. Gompertz*, 9 Q. B. 824. As to death of parties after rule *nisi*, see *Higgins v. Nichols*, 7 Dowl. 551. *Cawne v. Garment*, 1 Bing. N. C. 320. *Sloman v. Allen*, 1 Man. & G. 96. *Thomas v. Dunn*, 1 C. B. 139.

[7] The rule will be called on in its order in the paper, when the judge who tried the cause will read his notes; or if the cause was tried by a judge of another court, his notes (having been bespoken) will be read by the junior puisne judge, after which the counsel opposing will be heard, and then the counsel in support. If one of several defendants obtain a rule, although it must be served upon the others, they cannot be heard in support of the rule, but only in opposition to it. *Wakley v. Healey*, 18 L. J. Ex. 426.

(*e*) *Terms Imposed.*[1] (*f*) *Costs on.*[2]

X. Appeal from Decision of Court on Application for New Trial.[3]

[1] Where the new trial is not a matter of right, the court will, in their discretion, impose terms as to the examination of witnesses, the introduction of documents, the reading of witnesses' testimony on first trial, receipt of depositions, &c. *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102. *Anon.* 13 L. J. Q. B. 80. *Thwaites v. Sainsbury*, 7 Bing. 437. *Noble v. Adams*, 7 Taunt. 59. *Doe d. Cooling, v. Appleby*, 4 Per. & D. 538.

[2] By C. L. P. Act, 1854, s. 44, "when a new trial is granted on the ground that the verdict is against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order." And the effect of this section is, that where a verdict is set aside on the ground of its being against evidence, a party who fails on the first trial, but succeeds on the second, has to pay his own costs of the first trial. *Evans v. Robinson*, 24 L. J. Ex. 212.

By r. 54, H. T. 1853, "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second."

Where the question of costs is reserved till after the second trial, they will be in the discretion of the court. *Body v. Esdaile*, 3 Bing. 174. *Hunter v. Caldwell*, 10 Q. B. 83.

Where costs are ordered to abide the "event of the second trial," which means the ultimate end of the cause (*Meule v. Goddard*, 5 B. & A. 766), if the same party succeed on both trials, he shall have the costs of both (*Sherlock v. Barnet*, 1 Bing. 21. *Trelawney v. Thomas*, 1 H. Bl. 641); but otherwise the first shall not be allowed. *Austen v. Gibbs*, 8 T. R. 619. *Dodd v. Neal*, 2 C. & M. 225. *Evans v. Robinson*, 23 L. J. Ex. 212; but see *Haworth v. Samuel*, 1 B. & A. 566. *Joliffe v. Mundy*, 8 L. J. Ex. 100; 9 Dowl. 225; 4 Mee. & W. 502. *Hudson v. Marjoribanks*, 8 Moore, 440; 1 Bing. 393.

[3] *If Rule Nisi refused, Party may Appeal.*—By C. L. P. Act, 1854, s. 34, "in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted, and then discharged or made absolute, the party decided against may appeal."

Appeal upon Rule Discharged or Absolute.—By s. 35, "in all cases of motions for a new trial, upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or provided the court in its discretion think fit that an appeal should be allowed: provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed." As to whether this section applies to indictments, see *R. v. Justices of Bedford*, 24 L. J. Q. B. 81.

Courts of Error to be Courts of Appeal.—By s. 36, "the Court of Error, the Exchequer Chamber, and the House of Lords, shall be courts of appeal for the purposes of this act."

Notice of Appeal.—By s. 37, "No appeal shall be allowed unless notice thereof be given in writing to the opposite party, or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge."

Bail to be given in order to stay Execution.—By s. 38, "notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, in like manner, and to the same amount, as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff." Or, on an application for further time to deliver notice of appeal from a decision on a motion for a new trial, within four days from the time of the decision, it is necessary not only to show sufficient reason to account for the default, but likewise to satisfy the court that, supposing they had originally a discretionary power to allow an appeal, they could have allowed it in a particular case. And it is not a sufficient reason for the default that the attorney inadvertently allowed the time to elapse. *Watson v. Lane*, 25 L. J. Ex. 240.

Form of Appeal.—By s. 39, "The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the court or a judge of the court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the court of appeal."

Rule Nisi granted on Appeal: how disposed of.—By s. 40, "when the appeal is from the refusal of the court below to grant a rule to show cause, and the court of appeal grant such rule, such rule shall be argued and disposed of in the court of appeal."

Judgment in Court of Appeal.—By s. 41, "the court of appeal shall give such judgment as ought to have been given in the court below; and all such further proceedings may be taken thereupon as if the judgment had been given by the court in which the record originated." See *Kingsford v. Merry*, 26 L. J. Ex. 83.

Powers of Court of Appeal as to Costs and otherwise.—By s. 42, "the court of appeal shall have power to adjudge payment of costs, and to order restitution; and they

XI. Trial before Sheriff.[1]

shall have the same powers as the court of error in respect of awarding process and otherwise." When the court of appeal affirm the judgment below, they will give costs to the successful party, but no costs will be given when the judgment below is reversed. *Windle v. Barker*, 25 L. J. Q. B. 349. *Walker v. Bartlett*, 18 C. B. 845.

[1] By 3 & 4 Wm. 4, c. 42, s. 17, "in any action depending in any of the said superior courts for any debt or demand, in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts (if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of *any court of record* for the recovery of debt in such county; and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." A county is not a court of record for this purpose. *Owens v. Breese*, 6 Ex. 916, 413. The above section embraces not only actions for debts or liquidated demands in money, but all claims or demands *ejusdem generis* with debts, and the amount of which the plaintiff is bound by the 8th sect. of the C. L. P. Act, 1852, to indorse on the writ, or which can be considered as falling within the 25th sect. of it. *Walker v. Needham*, 4 Scott, N. R. 222; 3 Man. & G. 557. *Allen v. Pink*, 4 Mee. & W. 140. *Hatton v. Macready*, 2 D. & L. 5. But it does not extend to a case where the claim is not indorsable on the writ under C. L. P. Act, s. 8, or to an action of tort (*Roffy v. Shoobridge*, 9 Dowl. 957. *Watson v. Abbott*, 2 C. & M. 150. *Smith v. Brown*, 2 Mee. & W. 851), nor to any case where the sum indorsed exceeds 20*l.*; but if the jury give interest, and so make the sum awarded more than 20*l.*, the plaintiff may enter a remittitur. *Burleigh v. Kingdom*, 2 C. & M. 476. *See* also *Gutteridge v. Seth*, 2 Dowl. N. S. 954. *Fryer v. Smith*, 5 Man. & G. 695. The application for the writ may be made by either party to the court or a judge; but issue must first be joined, but before it is delivered. *Dendy v. Hardy*, 9 Jur. 135. The issue is delivered and motion of trial given in the usual way. Ch. Arch. Prac. 400.

The trial is conducted as at Nisi Prius. It must be had before the writ is returnable (*Mortimer v. Preedy*, 3 Mee. & W. 602. *Peter v. Booth*, 1 Dowl. N. S. 545), and this objection cannot be waived either by appearance at the trial or otherwise. *Ashburton v. Sykes*, 1 D. & L. 133. *Sherman v. Tinsley*, 4 Scott, 286.

The presiding judge has the powers of amendment given by the 3 & 4 Wm. 4, c. 42, s. 18, but not those given by the C. L. P. Act, 1852. He can certify for immediate execution under 1 Wm. 4, c. 7, ss. 2, 19, and under the County Courts Act, 12 & 13 Vic. c. 61, s. 12. But he is not a "judge" within the meaning of statutes which confer powers on "judges." *Johnson v. Wells*, 2 Dowl. 352. *Rickets v. Burman*, 4 id. 578. He cannot allow a verdict to be taken subject to a reference (*Wilson v. Thorpe*, 6 Mee. & W. 721), nor give leave to move on a point reserved (*Johnson v. Wells*, *supra*); but he may direct a nonsuit. *Watson v. Abbott*, 2 Car. & M. 150.

By the 3 & 4 Wm. 4, c. 42, s. 18, at the return of any such writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, or the judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not be signed until the defendant shall have had an opportunity to apply to the court for a new trial, or a judge, if any, of the said courts shall think fit to order that judgment or execution shall be stayed till a day be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as the verdict of a jury at Nisi Prius; and the sheriff or his deputy, or judge presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at Nisi Prius. *Holmes v. London and South-Western Railway Co.* 18 L. J. Q. B. 87; 13 Q. B. 214. The successful party is entitled to the writ of trial. *Parker v. Clarke*, 18 L. J. Q. B. 252; 7 D. & L. 1. The form of the writ is given by P. R., H. T. 1853, Sched. No. 8.

The costs are the same as at Nisi Prius. *See* Costs, vol. iii. p. 287. So are proceedings to compel the plaintiff to proceed to trial and trials by proviso. *See ante*, p. 570. The court will grant a new trial or set aside a nonsuit within the same time, and on the same grounds, as in other cases, and this notwithstanding execution may have issued. 3 & 4 Wm. 4, c. 42, s. 18. *Angel v. Ihler*, 5 Mee. & W. 600.

The sheriff's notes, or an examined copy verified by affidavit, should be obtained before the motion for a new trial, and "upon all motions respecting causes tried before the sheriffs or judges of inferior courts of record, pursuant to the stat. 3 & 4 Wm. 4, c. 42, ss. 17, 18, the party making the application to the court above must produce an examined copy of the notes of the sheriff or his deputy, or of the judge who tried the cause, together

XII. New Trial in Criminal Proceedings.[1]

TROVER, or Action for the Conversion of Chattels.

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I. Definition, and General Nature of the Remedy.[2]

with an affidavit verifying such to be a true copy; and also, in cases where no counsel has been retained to conduct the cause or defence in the court below, an affidavit setting forth the cause or nature of the application, and that all motions to set aside verdicts obtained in such courts shall come on for hearing as motions in the ordinary course, and not be set down in the new trial paper." 4 M. & Scott, 484. The affidavit verifying the notes should be intituled in the cause. *Reynold v. Stone*, 1 Dowl. N. S. 578. *Bodly v. Reynolds*, 15 L. J. Q. B. 152. It need not state the pleadings. *Milligan v. Thomas*, 2 C., M. & R. 756. *Angell v. Ihler*, 5 Mee. & W. 600. Affidavits to correct the under-sheriff's notes are not allowed to be used. *Coles v. Bulman*, 17 L. J. C. P. 302. When there is nothing on the notes or otherwise to show how the case had been presented to the jury, the court will, in the absence of any affidavit to the contrary, assume that the case was properly left. *Margetts v. Cowley*, 2 Scott, N. R. 583. The party showing cause against the motion must be prepared with an office copy of the affidavit on which the rule was moved, and also the sheriff's notes, if they are annexed. *Walker v. Needham*, 3 Man. & G. 557. *Re Rogers*, 9 Dowl. 926. If the sheriff had no jurisdiction, the court will set aside the proceedings. *Walker v. Needham*, *supra*. *Lismore v. Beadle*, 1 Dowl. N. S. 566. *Smith v. Brown*, 5 Dowl. 736.

[1] In cases of treason or felony, no new trial can be granted where the proceedings have been regular. 6 T. R. 625; 14 East, 416. *R. v. Fowler*, 4 B. & A. 273. But in all cases of misdemeanor, the superior courts may grant a new trial after a conviction (and, as now seems to be the better opinion, after an acquittal also, 29 L. J. M. C. 132), for any cause which would entitle a party in a civil case to a new trial; as for misdirection of the judge, the reception of improper or rejection of legal evidence, perjury of the witnesses, absence of material witnesses, a verdict found against the evidence, misbehaviour of the jury, &c. *See* the authorities collected, 1 Chit. Cr. L. 624, *et seq.* And even in cases of treason or felony, where there has been a mis-trial, as where one of the jurors after retiring talked with a stranger about the verdict (*R. v. Fowler*, *supra*), a *venire de novo* may be awarded, and a fresh trial had thereon.

[2] "To find:" called trover because, in the ancient writ and declaration, it was stated that the defendant found the chattel (by whatever means he may have acquired it), and converted it to his own use. The allegation, even while it was retained, was immaterial, and not traversable. In the form given in the schedule to 15 & 16 Vic. c. 76, the averment is omitted, and the precedent prescribed is, "That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods; (that is to say), iron hoops, household furniture [*or as the case may be*]."

This is a concurrent remedy with trespass where there has been a wrongful taking, as well as a wrongful detention or conversion, and the plaintiff may waive the trespass if he will and sue for the former. 1 B. & C. 146, *per Cur.* But it is distinguished from trespass in these particulars: the latter will lie for a wrongful taking of goods, although they may have been returned; trover will not, unless they have been previously used, or otherwise converted (*Gower's case*, Sty. 261); or treated in a manner equivalent to it. *Shipwick v. Blanchard*, 6 T. R. 298. And trover

II. By Whom, and for what Action Maintainable.

(A) *Plaintiff's Possession, or Right to Possession, and Interest in the Chattel.*[1]

will lie where there is a wrongful detention; after a rightful taking, trespass will not. *Wilson v. Barker*, 4 B. & Ad. 614. *Foulds v. Willoughby*, 8 Mee. & W. 440. *Smith v. Goodwin*, 4 B. & Adol. 420.

[1] It is essential to sustain the action that the plaintiff, at the time of conversion (*Horwood v. Smith*, 2 T. R. 750. *Phillips v. Robinson*, 4 Bing. 106), should have a property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession of it. 2 Saund. 47, a, n. 1. *Bloxam v. Sanders*, 4 B. & C. 941; 7 D. & R. 407, S. C. Absolute ownership is not required; a special property or interest suffices. Hence, in the case of a simple bailment of a chattel without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession. *Nicholls v. Bastard*, 2 C., M. & R. 659. The special property of a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, suffices to bring trover for timber which grew upon and was severed from the estate, for the tenant for life has a right to the trees immediately they are cut down (*Pyne v. Dor*, 1 T. R. 55); but the trustees of an estate *pur autre vie* cannot maintain trover for trees felled upon the estate, for when felled the trees belong to the owner of the inheritance. *Blaker v. Anscombe*, 1 N. R. 25.

As to the rights of a landlord to sue as to trees, &c., *see ante*, Trees, p. 542; Trespass, p. 545.

The absolute and general owner may maintain trover, where he has sold or bailed goods under a void contract. *Smith v. Plomer*, 15 East, 607; 2 Saund, 47, b, n. f, 5th ed. But if the owner has bailed the goods to the defendant, and before a conversion of the goods by the latter the bailor sells them, or otherwise ceases to be the owner, the action should be brought in the name of the person who was the proprietor at the time of the conversion. *Phillips v. Robinson*, *supra*. A party who purchases goods under a distress for rent, valid though irregular, may maintain trover. *Lyon v. Weldon*, 2 Bing. 334. *Pattison v. Robinson*, 5 M. & S. 105.

As regards title-deeds, the person who was entitled to the estate at the time of the wrongful detention should be the plaintiff. *Atkinson v. Baker*, 4 T. R. 231. *Phillips v. Robinson*, *supra*. A lessor cannot bring trover against the lessee on the termination of the lease by forfeiture, for a counterpart of the lease containing covenants by the lessor. *Hall v. Ball*, 3 Man. & G. 242; 3 Scott, N. R. 577.

We have seen, vol. iv. p. 604, the verbal gift of a chattel, without actual delivery, is not sufficient to pass the property to the donee, so as to enable him to sue the donor (*Irons v. Smallpiece*, 2 B. & A. 551. See *Reeves v. Capper*, 5 Bing. N. C. 136), although it may perhaps give the donee a sufficient special interest to enable him to sue a mere wrongdoer (*see* 2 Saund. 47, a, and note d, 5th ed. *Hunter v. Westbrook*, 2 C. & B. 578); nor is an award that a chattel should be delivered by A. to B., on the former being paid a sum of money, sufficient *per se* to pass the property, and entitle B. to maintain trover, although he tender the money, it being refused by A. *Hunter v. Rice*, 15 East, 100. *See* Arbitration, vol. i. p. 427.

Where both parties have agreed that particular goods shall be the article contracted for, and shall become the property of the vendee, and nothing further remains to be done in order to transfer the goods, that is an appropriation, which operates in law so as to vest the property in the vendee. *Wait v. Baker*, 2 Ex. 1; 12 L. J. Ex. 307.

The plaintiff agreed to buy of the defendant a stack of hay for a sum of money, to be paid for as taken away, and to be removed by the 31st of May. Part of the hay was removed and paid for by the plaintiff before the 31st of May, and in August the remainder was cut up and used by the defendant:—*Held*, that as the defendant's lien on the hay was determined by the act of conversion, the plaintiff was entitled to the possession of the hay, and might maintain trover. *Gurr v. Cuthbert*, 12 L. J. Ex. 309.

As regards stolen property, if a party have reason to believe that it has been stolen, he cannot maintain trover against the person who bought it of the supposed thief, unless he has done everything in his power to bring the thief to justice (*Gimson v. Woodfull*, 2 C. & P. 41; Lofft, 601); and even then he cannot recover the value of the goods in trover from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. *Horwood v. Smith*, 2 T. R. 750; 2 Camp. 335; 2 Stark. 311; 2 B. & N. 329, n. See *Parker v. Patrick*, 5 T. R. 175; and *White v. Garden*, 20 L. J. C. P. 166.

Where a person purchases stolen goods not in market overt, and after notice of their having been stolen sells them in market overt, the owner, having prosecuted the thief to conviction, may maintain trover against such person. *Peer v. Humphrey*, 2 Ad. & E. 495.

An action of trover is maintainable to recover the value of goods which have been stolen from the plaintiff, and which the defendant has innocently purchased, although no steps have been taken to bring the thief to justice. *White v. Spettigue*, 13 Mee. & W. 603. It is questionable whether the plaintiff can maintain such an action against a party who has received goods, knowing

them to have been stolen. (Id.) 14 L. J. Ex. 99. A defence that the goods had been stolen, and that the plaintiff has not prosecuted the thief to conviction, ought to be specially pleaded. (Id.) See *Down v. Halling*, 4 B. & C. 334. See *Scattergood v. Sylevester*, 15 Q. B. 506; 19 L. J. Q. B. 447.

Executors or administrators, or assignees of bankrupts, may maintain this action.

A judgment in replevin vests the property of the goods in the avowant. *Moore v. Watts*, 1 Ld. Raym. 614. See *Holmes v. Wilson*, 10 Ad. & E. 503, 511, n. So, a judgment in trover for damages vests the property in the goods in the defendant (*Adams v. Broughton*, 2 Stra. 1078. *See* 6 Man. & G. 640 n.) The damages need not be paid. *Buckland v. Johnson*, 15 C. B. 163.

A. having employed B. to build him a greenhouse for a sum of money, the latter, when it was completed, gave A. notice, and requested him to remit the price. A. remitted the amount to B., and desired B. to keep the greenhouse until sent for. Soon afterwards B., unknown to A., packed up the sashes and frame-work, and deposited them with C., telling him it was the property of A., and requested him to keep it for A., which he agreed to do. B. having become bankrupt, his assignees took possession of the greenhouse:—*Held*, that the property in the greenhouse passed to A., there having been an appropriation of it to him by B., and an assent thereto on his part. *Wilkins v. Broomhead*, 6 Man. & G. 1102; 7 Sc. N. R. 921; 8 Jur. 83; 13 L. J. C. P. 74.

The defendant agreed to sell to the plaintiff apples, to be taken away and paid for by the latter on a given day. In the interim the apples were deposited in a kiln within an oast-house, the key of the kiln being delivered to the plaintiff, that of the oast-house being retained by the defendant. The plaintiff making default, the defendant re-sold the apples:—*Held*, that the plaintiff had not such a possession as to entitle him to maintain trover against the defendant for re-selling before the lapse of a reasonable time. *Millgate v. Kebble*, 3 Scott, N. R. 358; 3 Man. & G. 100.

It has been before noticed that a special property is sufficient; therefore a carrier or other bailee may maintain trover against a stranger who takes the goods out of his possession. 1 Roll. Abr. 4, I, pl. 1. *Arnold v. Jefferson*, 1 Ld. Raym. 276; Bull. N. P. 33. *Nicholls v. Bastard*, 2 C., M. & R. 659. So may a factor or other consignee, or pawnee, or trustee. So, if a house be blown down, and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of it for the purpose of rebuilding, although the general property is in the owner. Bull. N. P. 33. *Abington v. Lipscomb*, 1 Q. B. 776. (See *Buckley v. Gross*, 32 L. J. Q. B. 120, as to property saved from a fire). So, if a man lends his cattle to J. S., to plough his land, and a stranger takes them away, J. S. may maintain trover (Bro. Abr. Trespass, 92); so may the agister of cattle against a stranger who takes them away. Id. 67. A person who, having a temporary possession of goods, re-delivers them to the general owner for a special purpose, may, after that purpose is answered, maintain trover for them. *Roberts v. Wyatt*, 2 Taunt. 268. Possession under a general bailment is sufficient (*Burton v. Hughes*, 6 Moo. 334; 2 Bing. 173; 2 Taunt. 302); or under a gratuitous bailment. 1 B. & Adol. 39. So, churchwardens may bring trover for the goods of the church taken away, either in their own time or in that of their predecessors. 11 Hen. 4, 12, a; Com. Dig. Eglise, F, 3; F. N. B. 7th ed. 208, K; Bro. Abr. Garden d'Eglise, 4, 6, 7. *Attorney-General v. Ruper*, 2 P. Wms. 126. *Dent v. Prudence*, 2 Stra. 852. A sheriff has such a special property in goods taken by him under a *fi. fa.* as to enable him to maintain this action against a wrongdoer (2 Saund. 47; 1 Vent. 52; 6 Mod. 292; Bull. N. P. 67); but a landlord has not a sufficient property in goods distrained by him to enable him to sue in trover for them; nor can a mere servant support this action. Owen, 52; 1 Camp. 369. *Hopkinson v. Gibson*, 2 Sm. 205, 206. A person who has only a special interest may, in some cases, maintain trover, although he has never had actual possession. *Fowler v. Down*, 1 B. & P. 44. Thus, a factor, to whom goods have been consigned, but which he has never received, may bring this action. (Id.) Where goods have been consigned as a mere security to meet bills accepted by the consignee for the consignor, the former may sue in trover, although there has been no bill of lading executed. *Evans v. Nicholl*, 3 Man. & G. 614.

Possession, with an assertion of title, or even possession alone, gives the possessor such an interest as will enable him to maintain this action against a wrongdoer, for possession is in all cases *primâ facie* evidence of property. *Blackham's case*, 1 Salk. 290. *Basset v. Maynard*, Cro. Eliz. 819; 5 Rep. 24, b; Moo. 691, 692; and *see* 2 Stra. 777; and *Jenkyns v. Brown*, 19 L. J. Q. B. 286. Thus the owner of a ship, where a cargo is put on board, is presumptive owner of the cargo, so as to sue a wrongdoer in trover. *Brancker v. Molyneux*, 3 Man. & G. 84. On its being proved that the plaintiff was in possession of land, in which he sunk a shaft, and raised copper ore, it was held that this was *primâ facie* evidence of plaintiff's right to the ore. *Rowe v. Brenton*, 8 B. & C. 737.

Trover lies against a mere wrongdoer having no authority from the real owner, at at the suit of one who had only the actual possession of the goods at the time of the wrongful taking, or conversion, as the finder, gratuitous bailee, or borrower of goods. *Nicholls v. Bastard*, 2 C., M. & R. 659. So, at the suit of a bailor of goods against the innocent purchaser from an unauthorised bailee. *Cooper v. Wilmott*, 1 C.B. 672. *Metcalf v. Lumsden*, 1 C. & Kir. 309. So at the suit of a finder of property, for he is entitled to keep it against all but the rightful owner. *Armory v. Delamirie*, 1 Stra. 505. 1 Smith, L. C. 151.

The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. *Bridges v. Hawkesworth*, 15 Jur. 1079; 21 L. J. Q. B. 75.

Jewellers lost a diamond necklace consisting of fifty-six brilliants, of the value of 500*l*., out of their shop. Thirty of the stones which formed the sides of the necklace, together with a large diamond which was in its centre, were traced to the possession of the defendant, and he gave contradictory accounts as to how he had obtained these diamonds:—*Held*, that, in trover by the jewellers against him for the value of the whole of the necklace, it was well left to the jury, whether, from the facts, the whole necklace had been in his possession after it was lost. *Mortimer v. Cradock*, 7 Jur. 45; 12 L. J. C. P. 166.

A deputy vice-admiral, who received an anchor and hawser, alleged to have been left at sea, from the finder, refused on application by the real owner to deliver them up until the salvage was paid, or security given for the payment of it:—*Held*, that this was a conversion, but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. *Clark v. Chamberlain*, 2 Mee. & W. 78; 2 Gale, 217.

The plaintiff must establish his right of possession as well as of property (*Addison v. Round*, 4 Ad. & E. 803. *Hardman v. Booth*, 32 L. J. Ex. 105); therefore, where a man let a house and furniture for a term, and the furniture was wrongfully taken in execution pending the term, it was holden that the lessor could not maintain trover, because, during the term, he had parted with the right of possession. *Gordon v. Harper*, 7 T. R. 9; and *see* 2 Esp. 465. *Benjamin v. Bank of England*, 3 Camp. 417. *Pain v. Whittaker*, R. & M. 99. *Bloxam v. Saunders*, 4 B. & C. 941; 7 D. & R. 896. *Mills v. Graham*, 1 N. R. 45. *Milgate v. Kebble*, 3 Man. & G. 100. The purchaser of goods not sold upon credit, though by the contract of sale he acquires the right of property, has no right of possession until he pays or tenders the price. Where goods, lent on hire, have been wrongfully taken in execution by the sheriff under a writ of *fi. fa.*, the owner cannot maintain trover against him, he not having the right of possession, as well as the right of property, at the time of the sale. *Pain v. Middlesex (Sheriff of)*, R. & M. 99. But where the person to whom goods were let was unable to gain any property in them, it was held that such a bailment did not deprive the real owner of his action of trover. *Smith v. Plomer*, cited in Peake, Ev. 4th ed. 342. Where a bill of sale covenanted that the assignor should retain possession of goods until default of payment of the debt, it was held that the assignee could not maintain trover for the goods against the sheriff for taking them in execution (*Bradley v. Copley*, 1 C. B. 685. See *Pattison v. Robinson*, 5 M. & S. 105); and although, where goods are let for a term of years, the lessor cannot maintain trover for them during the term, yet if trees, or other things fixed and annexed to the freehold, and demised therewith, be severed during the term, they immediately become vested in the owner of the inheritance, and he may maintain trover for them. *Farrant v. Thompson*, 5 B. & A. 826.

Where A. made a *bonâ fide* assignment of goods to secure a debt, covenanting for payment on demand, and in the meantime to remain in possession until default; the goods were afterwards, and before demand of the debt, taken in execution; it was held that the sheriff was not liable in trover at the suit of the assignee, and the want of right to immediate possession is evidence under not possessed. *Bradley v. Copley*, 1 C. B. 685. But if in such case the assignee of the goods wrongfully sell them, so that he cannot deliver them on demand, the assignee may recover against a *bonâ fide* purchaser the value of the goods. *Cooper v. Willomatt*, 1 C. B. 672. *Bryant v. Wardell*, 2 Ex. 479. A watch, books, and wearing apparel were given by a father to his infant son, aged sixteen years; the former cannot maintain trover, for the right of possession is in the latter. *Hunter v. Westbrook*, 2 C. & P. 578. See *Manders v. Williams*, 18 L. J. Ex. 437.

A. has sufficient property in goods shipped by B. for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A. to entitle A. to maintain trover, although no bill of lading is executed, and A. holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods to be delivered to A. *Evans v. Nicholl*, 3 Man. & G. 614; 4 Scott, N. R. 43. An assignee of a chose in action cannot maintain trover. *Broadbent v. Varley*, 12 C. B. (N. S.) 214.

In trover by assignees against a sheriff for conversion of the bankrupt's goods seized under a *fi. fa.* against C. and D., it appeared that immediately before the seizure the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted that statement, and said they were the goods of D. The jury found that the goods were in reality the bankrupt's; but also that he represented the goods to the officer as the goods of C., so as to induce the officer by that false representation to seize them:—*Held*, that this finding did not estop the bankrupt and his assignees from complaining of the seizure by the sheriff of the goods as their own. *Freeman v. Cook*, 2 Ex. 654; 6 D. & L. 187; 12 Jur. 777; 18 L. J. Ex. 114. *Waller v. Drakeford*, 1 E. & B. 749; 17 Jur. 853; 22 L. J. Q. B. 274.

Where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of goods to another, and they were seized upon premises in which the plaintiff's tenancy had expired:—*Held*, that there was a sufficient possession as against a wrongdoer, without regard to the question

(B) *For what Chattels it will lie.*[1]

III. When, and against Whom Maintainable.[2]

of ownership, to maintain trover. *Cameron v. Wynch*, 2 C. & Kir. 264.

[1] The action is confined to the wrongful conversion of personal chattels. It lies for bank-notes, where the holder has fraudulently taken them (*see* vol. ii. p. 138. *Snow v. Peacock*, 3 Bing. 406. *Same v. Leatham*, 2 Car. & P. 314. *Easley v. Crockford*, 10 Bing. 243); bills of exchange and other negotiable instruments (*Truettel v. Barandon*, 1 Moore, 543. *Goggerley v. Cuthbert*, 2 N. R. 170. *Lovell v. Martin*, 4 Taunt. 799. *Knight v. Legh*, 4 Bing. 589. *Morrison v. Buchanan*, 6 Car. & P. 18. *Jones v. Fort*, 9 B. & C. 764. *Wilkinson v. Whalley*, 5 Man. & G. 590; 12 L. J. C. P. 270. *Middleton v. Barnes*, 4 Ex. 241); for a policy of insurance (*Harding v. Carter*, Park. Ins. 4. See *Wookey v. Pole*, 4 B. & A. 11. *Georgie v. Mieville*, 3 B. & C. 45. *Burn v. Morvis*, 2 C. & M. 579. *Benjamin v. Bank of England*, 3 Camp. 417. *De la Chaumette v. Bank of England*, 9 B. & C. 208; *sec* Bull. N. P. 34); for bonds (*Siddowne v. Miller*, 1 Vin. Abr. Action, K, 3); for an agreement, although unstamped (*Scott v. Jones*, 4 Taunt. 865); for money in or out of a bag (1 Vin. Abr. Action, K, pl. 1, 2; Bull. N. P. 37), as for a certain number of dollars, part of a larger parcel (*Jackson v. Anderson*, 4 Taunt. 24), or the like; for title-deeds by the party entitled to them (*Anon.* 2 Leon. 220. *Hooper v. Ramsbottom*, 6 Taunt. 12. *Parry v. Frame*, 2 B. & P. 451. *Esdaile v. Oxenham*, 3 B. & C. 225. *Lord v. Wardle*, 3 Bing. N. C. 680. *Harrington v. Price et al.* 3 B. & Adol. 170. *Davies v. Vernon et al.* 14 L. J. Q. B. 30; and see *Hall v. Ball*, 10 L. J. C. P. 285); for a hawk, if reclaimed (*Lister v. Home*, Cro. Car. 545; 1 Vin. Abr. Action, K, pl. 4), or a parrot (Cro. Jac. 262); musk-cats, monkeys, &c., which are matters of merchandise (*Grymes v. Shack*, Cro. Jac. 262); or dogs (1 Vin. Abr. Action, K, 5. *Binstead v. Buck*, 2 W. Black. 1117); for coals, when severed from the mine (*Player v. Roberts*, T. Jones, 243); for trees, when cut down. *Skidnes v. Huson*, Noy. 125. But trover will not lie for fixtures whilst attached to the freehold, even although they be such as the tenant has a right to remove (*Mackintosh v. Trotter et al.* 3 Mee. & W. 184. See *Sheen et al. v. Rickie*, 5 id. 175); but after they have been severed from the freehold, of course trover will lie for them. *Weeton et al. v. Woodcock et al.* 7 id. 14. *Minshall et al. v. Lloyd*, 2 id. 450. *Hitchman v. Walton*, 8 L. J. Ex. 31. *Dalton v. Whittem et al.* 12 L. J. Q. B. 55; 3 Q. B. 961; and see *Darby v. Harris et al.* 1 Q. B. 895. It will lie, however, for certain detached parts of machinery which are not affixed to the freehold, although the principal part of the machine may be (*Davis et al. v. Jones et al.* 2 B. & A. 165; and *see* Bull. N. P. 34); or for tapestry hangings, iron backs to grates, &c. (*Harvey v. Harvey*, 2 Stra. 1141), or the like. So trover will lie for an undivided part of a chattel, as for the three-fourths of a ship (*Watson et Ux. v. King*, 4 Camp. 272), or the like.

After the expiration of a lease (containing covenants of the lessor under seal) the lessor is not entitled to the possession of the indenture as against the lessee, and therefore trover does not lie by the former against the latter for the lease. *Hall v. Ball*, 3 Man. & G. 242; 3 Scott, N. R. 577.

[2] The action must be brought against the party, who has been guilty of the conversion, or by whose orders or directions it has been done; or it may lie against a person for whose benefit it has been done, and who has subsequently recognised and adopted it, in the same manner as in trespass. And if goods be entrusted to a bailee, to be re-delivered to the bailor when required, and the bailee afterwards refuse to give them up when demanded, the bailor may maintain trover against him. *Llewellin v. Rave*, Bulst. 1 Vin. Abr. Action, 1 pl. 5. If a man lodge jewels sealed up in a bag with a banker, and the banker break open the bag and pawn the jewels to another, the owner may bring trover, either against the banker or against the pawnee. *Hartop v. Hoare*, 1 Wils. 8; 2 Stra. 1187; Bull. N. P. 33. If A., having a bill drawn in his favour and accepted, indorse it to B. for the purpose of raising money for him by negotiating it, and B. give it to C., and C. place it in the hands of D. without consideration, A. may maintain trover for it against D. *Goggerley v. Cuthbert*, 2 N. R. 170. There may be cases also where this action is maintainable against the very owner of the goods: as, for instance, where a person entitled to the temporary possession of them delivers them back to the owner for an especial purpose, and the owner afterwards refuse to re-deliver them after the special purpose has been answered (*Roberts v. Wyatt*, 2 Taunt. 268); or where the owner pawns them, and the pawnee allows him to have them for a certain time, after which he refuses to re-deliver them, or the like. If goods be converted by a servant, at the command or by the directions of his master, it was formerly holden that no action would lie against the servant, but against the master only (*Mires v. Solebay*, 2 Mod. 242); but this may very much be doubted, particularly where the act of conversion is an apparent wrong.

Where a trader was on the eve of bankruptcy, and his place of business shut up, and a clerk of one of his creditors received certain goods from him for his master, and sold them for his master's use: it was holden that the assignees of the trader, who had afterwards become bankrupt, might maintain trover for these goods against the clerk. *Perkins v. Smith*, 1 Wils. 328. So,

IV. The Conversion or Injury.[1]

(A) *By a Wrongful Taking.*[2]

where title-deeds were in the hands of an attorney, as agent for his client, it was holden that trover would lie against him for them by the party entitled to them. *Davies v. Vernon*, 14 L. J. Q. B. 30.

Trover, not trespass, is the proper form of action against a sheriff who seizes the goods of a trader after an act of bankruptcy, but before the issuing of the fiat. *Balme et al. v. Hutton* (in error), 1 C. & M. 262; 9 Bing. 471. *Garland v. Carlisle* (in error), 2 C. & M. 31, and affirmed in the Lords, 3 Mee. & W. 152; 4 Bing. N. C. 7.

In a joint action against several defendants, all cannot be found guilty on the same count without proof of a joint conversion by all. *Miall v. Glennie*, 1 M. & S. 588. But one tenant in common of a personal chattel cannot sue his co-tenant if the goods remain in the possession of the latter, although he refuse to permit the former to participate in the use of the article. 2 Saund. 47, h. *Holliday v. Camsell*, 1 T. R. 658. *Smith v. Stokes*, 1 East, 363; Selw. N. P. Trover, 11, 10th ed. 1369. The reason is, that in law, the possession of one is the possession of both. But if one tenant in common destroy the chattel, or commit an act which is equivalent, as selling it (*Mayhew v. Herrick*, 7 C. B. 229; 18 L. J. C. P. 179. *Morgan v. Marquis*, 9 Ex. 145; 23 L. J. Ex. 21. See *Edwards v. Hooper*, 14 Mee. & W. 363; 12 L. J. Ex. 304), his companion may recover the value of his share in trover. 2 Saund. 47, h. *Martyn v. Knowllys*, 8 T. R. 146. The same will apply to joint tenants. See *Broom v. Porter*, 5 Adm. 216; and *Brown v. Hodges*, 1 Salk. 290.

Trover lies against a corporation (*Yarborough v. Bank of England*, 16 East, 6. *Maund v. Monmouthshire Canal Co.* 4 Man. & G. 452; 5 Scott, N. R. 457), or against husband and wife. *See* vol. v. p. 59.

[1] A conversion is the basis of this action. It may arise, either by a wrongful taking of the chattel, or by some other illegal assumption of dominion, or by illegal using or misusing it, or by a wrongful detention. Hence it does not lie where goods are *in custodii legis*. *Pellatt v. Wilkinson*, 8 L. T. (N. S.) 361.

A conversion does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff. *Keyworth v. Hill*, 3 B. & A. 687. See *Foulkes v. Willoughby*, 8 Mee. & W. 540; and *Burroughes v. Bayne*, 29 L. J. Ex. 185. See *Tear v. Freebody*, 4 C. B. (N. S.) 228. *Poulton v. Wilson*, 1 F. & F. 403.

If an owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which is paid to him, he cannot afterwards treat the seller as a wrongdoer and maintain trover against him. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J. Ex. 164.

If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J. Ex. 188; 2 L. T. (N. S.) 16.

[2] The wrongful taking, if followed by *carrying away* of the goods, of another who has the right of immediate possession, is of itself a conversion. 2 Saund. 470. But a wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel (29 L. J. Ex. 185. *Foulder v. Willoughby, supra. Burroughes v. Bayne*, id.), for simple seizure by a stranger, who afterwards relinquishes the possession, is no conversion. *Samuel v. Morris*, 6 C. & P. 620. And if goods be wrongfully seized as a distress, though they be not removed from the place in which they were, yet trover may be supported, because the possession, in point of law, is changed by their being seized as a distress. *Cooper v. Monke*, Willes, 56. A sheriff who seizes and sells goods after an act of bankruptcy committed by the defendant, against whom a *fieri facias* issued, and before the adjudication, is, if the *fieri facias* be void against the assignees, liable to them in trover. And this action may be supported after an acquittal of the defendant for the felonious taking of goods. *Crosby v. Leng*, 12 East, 409. In the case of a conversion by wrongful taking it is not necessary to prove a demand and refusal (*Baldwin v. Cole*, 6 Mod. 212; Bull. N. P. 44. *Forsdick v. Collins*, 1 Stark. 173. *Summersett v. Jarvis*, 3 B. & B. 2; 6 Moore, 56, S. C.); and the intent of the party is immaterial. But if the possession was obtained under colour of a contract trover cannot be sustained. *Emanuel v. Dane*, 3 Camp. 299. See *Read v. Hutchinson*, id. 352; and *Hill v. Perrott*, 3 Taunt. 274. *Fairman v. Grimble*, 2 C. & P. 266), unless a case of fraud can be proved. *Noble v. Adams*, 7 Taunt. 59. *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; 2 D. & R. 755, S. C. So if assignees affirm the act of a party who wrongfully sold the bankrupt's goods, they cannot support trover against him. *Brewer v. Sparrow*, 7 B. & C. 310; 1 M. & R. 2, S. C. See *Fairburn v. Eastwood*, 6 Mee. & W. 679. And trover does not lie for an excessive levy of goods under a valid execution. And if a sheriff seize under a writ of *fieri facias* more goods than was necessary, the proper remedy is case, and not trover. *Batchelor v. Vyse*, 1 M. & Rob. 333. A party acting under a valid and also under an unfounded authority, may protect himself by virtue of the former. *Stierneld v. Holden*, 4 B. & C. 6; 6 D. & R. 17, S. C.

(B) *By a Wrongful Assumption of Property in the Chattel.*[1]

Trover lies against a landlord who makes a second distress for the same rent when he might have taken sufficient at first, or where, having taken sufficient distress at first, he voluntarily abandons it. *Dawson v. Cropp*, 1 C. B. 961; 9 Jur. 944; 14 L. J. C. P. 281.

The defendant, an officer of an inferior court of record, seized under a *fi. fa.* against A. partnership property of A. & B., and sold it to various purchasers, who carried it away. In trover by the assignees of B. (who had become bankrupt):—*Held*, the seizure and sale under the circumstances did not amount to a conversion. *Mayhew v. Herrick*, 7 C. B. 229; 13 Jur. 1078; 18 L. J. C. P. 179. The plaintiff lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession by W.'s consent, a *fieri facias* against W., at the suit of another creditor, was put into the premises, and the officer seized the pianoforte, and removed it to the premises of the defendant, an auctioneer, for sale:—*Held*, that the plaintiff (after the demand and refusal to deliver it) was entitled to recover it from the defendant in trover. *Turner v. Ford*, 15 Mee. & W. 212; 15 L. J. Ex. 215.

To constitute a conversion of goods for which trover will lie, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right. *Heald v. Carey*, 11 C. B. 977; 16 Jur. 197; 21 L. J. C. P. 97.

Where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering under the writ of possession, turned the plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having been no subsequent demand or refusal:—*Held*, that the jury might find that there was no conversion.

A bailee of goods for hire, by selling them determines the bailment, and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*. *Cooper v. Willomatt*, 1 C. B. 672; 9 Jur. 598; 14 L. J. C. P. 219.

It appeared that the defendant came to the plaintiff's house, which was left in the care of a servant, and said that, having authority from the Lord Chancellor, he was come to take charge of the goods in the house. He put a man in possession, and took an inventory of the goods; and subsequently the servant was by him refused admittance into the house. The judge nonsuited the plaintiff, on the ground that, without a demand, there was no evidence of a conversion:—*Held*, that there was some evidence which ought to have been submitted to a jury. *Needham v. Rawbone*, 6 Q. B. 771, n.; 9 Jur. 274.

[1] The wrongful assumption of property in a chattel, or right of disposing of it, is in itself evidence of a conversion, and renders unnecessary a demand and refusal. *M'Combie v. Davies*, 6 East, 540. *Jackson v. Anderson*, 4 Taunt. 24. *Summersett v. Jarvis*, 3 B. & B. 2. As where it was found that a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in his master's name, and sold them for his master's use, the court determined that the sale, whether for the use of the seller or another, was a conversion; for, where a person takes upon himself to dispose of another's property, it is a tortious act, and the gist of the action (*Perkins v. Smith*, 1 Wils. 328. S. P. *Parker v. Godin*, 2 Stra. 813); and accordingly it was held that a servant may be charged in trover, though the conversion be done by him for the benefit of his master. *Stephens v. Elwall*, 4 M. & S. 259. *Baldwin v. Cole*, 6 Mod. 212. So where a man, intrusted with the goods of another, puts them into the hands of a third person, without orders, it is a conversion. *Syeds v. Hay*, 4 T. R. 260. Where, however, the defendant, who had been intrusted by the plaintiff to sell certain goods in India, not being able to sell them there himself, delivered them to an agent in India, to be disposed of by him, it was held no conversion. *Bromley v. Coxwell*, 2 B. & P. 438. And where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants, having sold the goods, could not be sued for them in trover by the original owner. *Stierneld v. Holden*, 4 B. & C. 5; 6 D. & R. 17. Where plaintiff gave defendant a bill of exchange, to get discounted, who afterwards misapplied the proceeds, it was held that trover would not lie against him. *Palmer v. Jarmain*, 2 Mee. & W. 282. But discounting a lost bill after notice is a conversion. *Lovell v. Martin*, 4 Taunt. 799. *Beckwith v. Corral*, 3 Bing. 444.

If the holder of a bill for a specific purpose get money on it by discount, without authority, this is a conversion of the whole, though he may have received part only of the money due upon it, and the jury may give the whole amount of damages. *Alsager v. Close*, 10 Mee. & W. 576. See *Robson v. Rolls*, 1 M. & Rob. 239.

Where A. consigned the goods of B. to C., and C., without notice of the right of B., sold a part, and kept the remainder in his possession, the sale was held to be a conversion. *Featherstonehaugh v. Johnstone*, 8 Taunt. 237; 2 Moo. 181. If a man, against the owner's consent, make use of a thing entrusted or delivered to him, it is a conversion (Cro. Eliz. 219; 3 B. & A. 687); as, if a carrier draw out part of the contents of a vessel, and fill it with water, it is a conversion of all

(C) *By a Wrongful Refusal to Deliver on Demand.*[1]

the liquor (*Richardson v. Atkinson*, 1 Stra. 576); or, if a carrier or wharfinger break open a box containing goods, or sell them. 2 Salk. 855. If a person, coming to the possession of land, find chattels there, and remove them to a great distance, it is a conversion. *Fordsdick v. Collins*, 1 Stark. 173; 4 T. R. 364. Trover will lie against a carrier who delivers goods to a wrong person, though by mistake (*Youl v. Hardbottle*, Peake, 68. *Stephenson v. Hart*, 4 Bing. 483); but not where he loses them by accident (Id. *Ross v. Johnson*, 5 Burr. 2825. *Kirkman v. Hargreaves*, 1 Selw. N. P. 425); or against a warehouseman for delivery to a wrong person (*Devereux v. Barclay*, 2 B. & A. 702); or where he delivers them upon a forged order. *Lubbock v. Inglis*, 1 Stark. 104. However, for a bare non-delivery it will not lie (*per Lord Ellenborough, C. J.*, in *Severin v. Keppell*, 4 Esp. 157); unless the goods be in the possession of the defendant, and he refuse to deliver them on demand. *Dewell v. Moxon*, 1 Taunt. 391. Not only claiming property as one's own, but asserting the right of another over it, is, upon demand and refusal, sufficient evidence of a conversion. 2 Saund. 47, f; *see* 6 B. & C. 36; 2 C. & P. 334. Taking the property of another by assignment, from one who had no authority to dispose of it, is a conversion. *M'Combie v. Davies, supra.* So is a wrongful sale of goods. So the taking a bill of exchange from a bankrupt, after an act of bankruptcy, in contravention of the bankrupt laws, is of itself a conversion. See *Bloxam v. Hubbard*, 5 East, 407. And, in general, in trover by the assignee of a bankrupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary. *Soames v. Watts*, 1 C. & P. 400. But the assignees cannot bring trover, without a demand and refusal, for goods collusively sold by a bankrupt on the eve of his bankruptcy, for the parties contracting were competent at the time; and if the assignees disaffirm the contract, they should give notice by a demand. *Nixon v. Jenkins*, 2 H. Black. 135; and *see*, further, *Lovill v. Martin*, 4 Taunt. 799. A party having a lien on goods will be guilty of a conversion if he claim the detention of them on another ground than on the right of lien. But a mere assertion will not, in general, constitute a conversion; as, where a carrier asserted he had delivered the goods to the consignee, which assertion was false, it was held not evidence of a conversion. *Attersol v. Briant*, 1 Camp. 409. And proof that the defendant in trover stated that he sold the property in question on the plaintiff's account, is not *primâ facie* evidence of a conversion. *English v. Charters*, 2 Stark. 30. But where the captain of a vessel, on application for a delivery of goods, said he had signed a bill of lading to deliver the goods to another, this was held a conversion. *Thompson v. Trail*, 6 B. & C. 36; 2 C. & P. 334.

[1] In many instances, we have already pointed out that the wrongful act of the defendant is in itself a complete conversion of chattels without any demand and refusal to restore them. *Lovell v. Martin*, 4 Taunt. 801.

Where there is no proof of an actual conversion, proof of a demand of the goods, and a refusal to deliver them, will be evidence of a conversion to support the action. 1 Vin. Abr. Action, L. pl. 2, 3. *Anon.* 12 Mod. 344. *Watkins v. Woolley*, Gow, 69. And if the demand be made upon a wife in the absence of her husband, and she refuse to give the goods up, this will be good evidence of a conversion to support an action against husband and wife. *Catterall v. Kenyon et Ux.* 3 Q. B. 310. If a demand be made upon a pawnbroker of a pledge, and the money due be tendered to him,—if he refuse to re-deliver it, trover lies against him, the demand and refusal being good evidence of a conversion. *Ratcliff v. Davis*, Cro. Jac. 244. So, a demand upon a person having a lien upon the goods, and a refusal by him, are evidence of a conversion, even although the amount of his lien be not tendered to him, if the lien be not assigned as the ground of his refusal. *Cannee v. Spanton*, 14 L. J. C. P. 23. See *Pattison v. Robinson*, 5 M. & S. 105. So, where a bill of exchange was given to a person to get discounted, but he, instead of doing so, gave it to the defendant, a clerk to one of his creditors, who gave him credit for it in account; and although the defendant was afterwards apprised of the circumstances under which the bill had been obtained, and the bill was demanded of him, yet he refused to give it up: the court held this to be a good demand and refusal, and that the action well lay. *Crunch v. White*, 1 Bing. N. C. 414. So where a captain of a ship, who had taken goods upon freight, claimed a lien upon them, and delivered them to a bailee; the owner then demanded them of the bailee, who refused to give them up without the directions of the captain: the court held, that it being proved that the captain really had no lien upon the goods, the demand and refusal proved a sufficient conversion. *Wilson v. Anderton*, 1 B. & Adol. 450. So, if the holder of goods refuse to deliver them up, until the owner pay or secure a debt which he owes him, this is a conversion. *Sharp v. Pratt*, 3 Car. & P. 34. *Davies v. Vernon et al.* 14 L. J. Q. B. 30. But if the refusal arise merely from a *bonâ fide* doubt as to the plaintiff being entitled to the goods (*Vaughan v. Watt*, 6 Mee. & W. 492. *Isaac v. Clark*, 2 Bulst. 312: *per Coke, C. J. Green v. Dunn*, 3 Camp. 215, n.; but see *Pillot v. Wilkinson*, 32 L. J. Lx. 201); or where the demand is not made by the plaintiff himself, whether the party making it is authorised to do so (*Solomans v. Dawes*, 1 Esp. 83); or from the goods being attached in the hands of the holder, by process out of some court

V. Pleadings, Evidence, and Damages.

(A) *Declaration.*[1]

(B) *Pleas.*

(*a*) *Not Guilty.*[2]

(*Verrall v. Robinson*, 2 C., M. & R. 495; see *Pillot v. Wilkinson*, *ante*, 583); or because the party has demanded more goods than he was entitled to (*Abingdon v. Lipscomb*, 10 L. J. Q. B. 330; 1 Q. B. 776); or because the party making the demand was but one of two who jointly deposited the goods with the defendant (*May v. Harvey*, 13 East, 197); or because the goods are not in his hands, but in the hands of some other whom he names (*Carrott v. Hughes*, 2 Bing. N. C. 448); or where goods were saved from a fire, and the fireman refused to give them up without an order from his insurance company (*Alexander v. Southey*, 5 B. & A. 247); or where a gun was demanded of the defendant, and he said it had burst, and that he would rather pay ten times the value than repair it (*Rushworth v. Taylor*, 12 L. J. Q. B. 80; 3 Q. B. 699); or where any feasible excuse is *bonâ fide* made, showing that the party does not wish to appropriate the goods to his own use, or in exclusion of the real owner: in these cases the refusal will be no evidence of a conversion. But a refusal to deliver them up because another person has also demanded them, is evidence of a conversion. *Atkinson v. Marshall*, 12 L. J. Ex. 117. So, setting up a *jus tertii*, or keeping goods in order to maintain the title of a third party, is evidence of a conversion. Id.: *per Parke, B.* So, where the defendant at first refused to give up the goods, but afterwards tendered them before action brought, it was holden that the action could not be maintained. *Heyward v. Seaward*, 1 M. & Scott, 459. So, where the refusal was not by the defendant, but by her son, it was holden not to be sufficient, without proof that he acted under the defendant's special direction. *Pothonier v. Dawson*, Holt, 383.

The demand may either be verbal or in writing; if in writing, it may be left for the defendant at his place of residence. *Logan v. Houlditch*, 1 Esp. 22. If there be a verbal and also a written demand at the same time, but neither referring to the other, evidence may be given of the verbal demand without producing that in writing. *Smith v. Young*, 1 Camp. 439. It should be made before writ issued, though it may be left to the jury whether a demand and refusal, after action, is not evidence of a prior conversion. *Morris v. Pugh*, 3 Burr. 1243; *see* 5 B. & Adol. 847.

A written notice of demand to deliver up deeds was served on three persons at different times and places: — *Held*, that it was for the jury to say, from the whole of the evidence, whether they had not previously agreed to act in such a manner with reference to the deeds as to render their refusal, although separately given, evidence of a joint conversion. *Atkin v. Slater*, 1 C. & Kir. 356: *Rolfe.*

Detaining goods under a pretext which, if just and true, would not amount to a justification, is a conversion.

[1] The following form is given in sched. to 15 & 16 Vic. c. 76, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods; that is to say, iron hoops, household furniture, or as the case may be." See remarks of *Willes, J.*, in *London Loan Co. v. Drake*, 6 Jur. N. S. 1407. *See* other forms, B. & L. Pr. 175. A general description of the chattels suffices, even before the act of 1852; as, "500 pieces of ends of deal boards" (*Knight v. Barker*, 11 Mod. 66), was deemed sufficient. Deeds are usually described by the dates and parties, and the general purport of them. See *Harrison v. Vallance*, 1 Bing. 45. In trover for a wild animal it should be stated to be reclaimed. *Fines's case*, Danv. Abr. 306; 6 pl. 66. *Grymes v. Shack*, Cro. Jac. 262. A conversion must be alleged. *Tollitt v. Shenstone*, 7 Dowl. P. C. 455. When necessary, special damages should be laid.

[2] As to the effect of the plea, *see* Reg. Gen. (H. T.) 4 Wm. 4, vol. v. pp. 561, 562. Under it the plaintiff has only to prove the conversion, the quantity and description of the goods, and their value, and special damages, if any be alleged. The plea admits the ownership (*White v. Teal*, 12 Ad. & E. 106. *Barton v. Brown*, 5 Mee. & W. 298. *Jones v. Davies*, 6 Ex. 663); and the plaintiff will be entitled to a verdict if he prove the conversion, even although it appear from the evidence that he had previously parted with his property in the goods. *Vernon v. Shipton*, 2 Mee. & W. 9. Under not guilty the defendant may show there was not a wrongful conversion. *Mayhew v. Herrick*, 7 C. B. 229; 18 L. J. C. P. 179. Not guilty puts in issue the legality of the conversion, and not the mere fact of conversion only. *Young v. Cooper*, 6 Ex. 259; 2 Pr. Rep. 217; 20 L. J. Ex. 136. S. P. *Kynaston v. Crouch*, 14 Mee. & W. 266; 9 Jur. 584; 14 L. J. Ex. 324. *The case of Stancliffe v. Hardwicke*, 2 C., M. & R. 1, in this respect overruled. (Id.) Therefore a plea which professes to admit the conversion, but alleges facts which tend to show that it was lawful, amounts to not guilty. (Id.) So, the defendant cannot set up an absolute property in himself, by sale from the plaintiff, although the only evidence of a conversion be by demand and refusal. *Barton v. Brown*, *supra.* Nor can he show that he had a lien upon the goods in question. *White v. Teal*, *supra.* Nor

(*b*) *Traverse of Plaintiff's Property in the Chattel.*[1]

will he be allowed to give evidence of any of these matters, even in mitigation of damages. *Finch v. Blount*, 7 Car. & P. 478. But it has been holden by the Court of Exchequer, that this plea does not prevent the defendant from showing that he is tenant in common of the goods in question; and this, not merely for the purpose of preventing the plaintiff from recovering more than the value of his share in the goods, but for the purpose of defeating the action altogether. *Stancliffe v. Hardwicke, supra.*

Where the action is against several, it must be proved that all were guilty of a joint conversion. *Nicoll v. Glennie, ante.*

[1] "That the said goods were not, nor was any of them, the plaintiff's, as alleged." This is a denial of the plaintiff's right to possession of the chattel as against the defendant at the time of the conversion (*Bradley v. Copley*, 1 C. B. 685), if the defendant were a mere wrongdoer or otherwise, a right of property and a right to immediate possession. *Legg v. Evans*, 6 Mee. & W. 36. *Bradley v. Copley*, 1 C. B. 685; 14 L. J. C. B. 222. *Wiles v. Woodward*, 20 L. J. Ex. 261. Therefore the defendant may prove that he had, at the time of the alleged conversion, a lien upon the goods in question; for if he had a lien, the plaintiff could not at the same time have had the possession, or the right to immediate possession. *Webb v. Tripp*, 11 L. J. Q. B. 154. *Ferreira Brandao v. Barnett et al.* 1 Man. & G. 908. *Owen v. Knight*, 4 Bing. N. C. 54. *Milgate v. Kebble*, 3 Man. & G. 100. *Richards v. Symons*, 8 Q. B. 90; and see *Bowman et al. v. Malcolm*, 11 Mee. & W. 833. *O'Connor et al. v. Majoribanks et al.* 12 L. J. C. P. 161. And the plaintiff, on the other hand, may prove that he tendered the amount of the lien at the time of demanding the goods. But where a carrier had a lien upon a particular parcel of goods for their carriage, but refused to deliver them up until an old balance of account should also be paid to him, it was holden, in trover for the goods, that it was not necessary to prove a tender of the price of the carriage. *Jones v. Tarleton*, 9 Mee. & W. 675. So, the defendant may prove that the goods were pledged with him by the plaintiff, as a security for money (*Samuel v. Morris*, 6 Car. & P. 620); or he may show, that although the plaintiff purchased them from him, yet he had not paid for them, and they were still on the defendant's premises at the time of the conversion. *Milgate v. Kebble*, 10 L. J. C. P. 277; 3 Man. & G. 100. So, if an action be brought by the assignees of the vendee against the vendor, he may prove under this plea that he stopped the goods *in transitu* (*Lackington et al. v. Atherton*, 13 L. J. C. P. 140); or if the goods be deposited with a third person for the vendee, and the vendor bring trover for them on the ground that he had stopped them *in transitu*, the defendant, under this plea, may prove that at the time of the stoppage the *transitus* was at an end (*Dodson v. Wentworth*, 4 Man. & G. 1080; and see *Wentworth v. Outhwaite*, 10 Mee. & W. 436); or that a bill was sent to him to get discounted, and that he got it discounted accordingly, although he claimed to keep the produce in payment of a debt owing to him by the plaintiff. *Wilkinson v. Whalley*, 5 Man. & G. 590. So, in an action against assignees of a bankrupt, they may show that at the time of the act of bankruptcy the goods were in the possession, order, and disposition of the bankrupt (*Isaac v. Belcher et al.* 5 Mee. & W. 139); or in an action against a third party he may set up this title of the assignees, under the plea of "not possessed." *Leake v. Loveday et al.* 12 L. J. C. P. 65. But where the plaintiff in trover claims under a sale of the goods to him, the defendant under this plea cannot show that the sale was fraudulent; that ought to be pleaded specially. *Howell v. White*, 1 M. & Rob. 400. He can show, however, that the plaintiff, by his conduct, led him to believe the goods were the property of J. S., and that he, imagining them to be so, purchased them of J. S. *Taylor et al. v. Parry et al.* 1 Man. & G. 604; but see *Sandys v. Hodgson*, 10 Ad. & E. 472.

In trover, it is competent to a bailee, sued by the bailor, to plead facts, showing that the bailor's title has determined, even although it also appear that the title, by reason of relation, has been defeated *ab initio*. *Thorne v. Tilbury*, 3 H. & N. 534; 27 L. J. Ex. 407.

In trover for bank-notes, the plaintiff, to show that they belonged to him, proved that they were delivered out by a banker's clerk, in payment of a cheque payable to the plaintiff or bearer, but to what person could not be proved; this was held to be *primâ facie* evidence of property. *Greenstreet v. Car*, 1 Camp. 551.

In an action for conversion of a bill of exchange, it being proved that the defendant had said, in answer to a demand for it, that he could not give it up because it had been burnt, and he not being called as a witness:—*Held*, that the case was rightly left to the jury, and that their verdict for the plaintiff was justified by the evidence. *M'Kewen v. Cotching*, 27 L. J. Ex. 41.

Under "not possessed," the defendant may set up the title of a third party to the goods. *Leake v. Loveday*, 2 Dowl. N. S. 624; 5 Scott, N. R. 908; 4 Man. & G. 972; 7 Jur. 17; 12 L. J. C. P. 65.

Trover for churns, bedding, &c. *Plea*, a justification under a distress for rent. *Replication*, that the goods and chattels were implements of husbandry, and that there were other goods and chattels which might have been distrained:—*Held*, on special demurrer, that as some of the articles named could not be implements of husbandry, the

(C) *Statute of Limitations.*[1]

(*a*) *Payment of Money into Court.*[2]

(*b*) *Release and other Special Pleas.*

(D) *Verdict and Damages.*[3]

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replication was bad for answering only part of the plea, when it professed to answer the whole. *Davies v. Aston*, 1 C. B. 746; 3 D. & L. 188; 9 Jur. 612; 14 L. J. C. P. 228. *Semble*, that the defence that the goods, which are the subject of trover, were stolen from the plaintiff, ought to be specially pleaded. *White v. Spettigue*, 13 Mee. & W. 603; 9 Jur. 70; 14 L. J. Ex. 99.

[1] The action must be commenced within six years from the cause of action or the conversion. 21 Jac. 1, c. 16, s. 3. *Montague v. Sandwich*, 7 Mod. 99. To support, therefore, a plea of the Statute of Limitations, the defendant must prove either an actual conversion in fact, or give evidence of a positive absolute demand and refusal more than six years before the commencement of the suit. *Philpott v. Kelley*, 3 Ad. & E. 106.

[2] Money may be paid into court, and pleaded (3 & 4 Wm. 4, c. 42, s. 21), or a release, or any matter which confesses the conversion and avoids it. *Acraman v. Cooper*, 12 L. J. Ex. 122; 10 Mee. & W. 585.

Where the defendant pleaded that one J. S., lawfully in possession of the goods, pledged them with the plaintiff, the plea was holden bad on demurrur, because it was not shown what authority J. S. had to pledge the goods (*Jaullery v. Britten*, 4 Bing. N. C. 242. See *Bonzi et al. v. Stewart*, 14 L. J. 109, C. P.); but the plea was also bad, as amounting to a general issue.

Where to trover for a bill of exchange the defendant pleaded that the plaintiff had indorsed the bill in blank, that R. became the holder, and that he, the defendant, believing that R. had authority to dispose of the bill, took it of him as a pledge to secure the payment of a debt; to which the plaintiff replied that, at the time of the taking of the bill from R., the defendant knew that he had no authority to pledge it; this replication was holden sufficient. *Hilton v. Swann*, 5 Bing. N. C. 413. *Wilmhurst v. Bowker*, id. 541.

Defendant may plead that he cut down trees growing on land as tenant in fee. *Morant v. Sign*, 2 Mee. & W. 95. *See* a plea of stoppage *in transitu* and a new assignment thereon, *Branker v. Molyneux*, 1 Man. & G. 710. But in an action by the vendor of goods, on the ground that he had stopped them *in transitu*, the defendant, under the plea of not possessed, may prove that at the time of the stoppage the *transitus* was at an end. *Dodson v. Wentworth*, 4 Man. & G. 1080. See *Jenkins v. Usborne*, 13 L. J. 196, C. P. Also in an action against the vendor by the assignees of the vendee, it should seem that the defendant may, under the plea of not possessed, give in evidence that he stopped them *in transitu*. *Jones v. Jones*, 8 Mee. & W. 431. *Sheridan v. New Quay Co.* 28 L. J. C. P. 58. *Weeding v. Aldrich*, 9 Ad. & E. 861.

In trover by the assignee of a bankrupt, the plea admitted the property and possession of the plaintiff as assignee, by relation back, but stated that the defendant, having no notice of any act of bankruptcy, and before fiat, purchased the goods of the bankrupt, and concluded with a special traverse of the goods being the property of the plaintiff, or of right belonging to him as assignee; it was held that the defendant's traverse rendered the plea bad, as the plea had already confessed and avoided the conversion. *Pearson v. Rogers*, 8 L. J. Q. B. 54.

[3] The verdict for plaintiff is for damages. And in estimating the damages, the jury are not necessarily limited to the value of the goods at the time of their conversion, but may, in their discretion, find as damages the value at any subsequent time. *Greening v. Wilkinson*, 1 Car. & P. 625. Also, in an action against the sheriff, where he had sold the goods, the jury are not limited to the sum produced by them at the sale, but may give as damages the real value. *Whitehouse v. Atkinson*, 3 Car. & P. 344. But in actions by assignees, if the sheriff's sale appear to have been a fair one, the jury usually give as damages the amount produced by it, because the plaintiffs, if they had the goods, must have also disposed of them by a public sale; and the jury, in such a case, may even deduct the expenses of the sale. *Clarke et al. v. Nicholson*, 1 C., M. & R. 724.

In trover for a bill of exchange, the proper measure of damages is the amount of the principal and interest due upon the bill at the time of the conversion (*Mercer v. Jones*, 3 Camp. 477), although it appear that the defendant has merely deposited it with another person as security for an advance upon it to about half the amount. *Alsager et al. v. Close*, 10 Mee. & W. 576. So, in trover for an unstamped guarantee of the defendant, of which he had obtained possession, it was holden that the proper measure of damages was the sum the plaintiff might have recovered in an action upon it. *M'Leod v. M'Ghie*, 2 Man. & G. 326. See *Mortimer et al. v. Cradock*, 12 L. J. C. P. 166.

In trover, damages may be given in respect of special damage, besides the value of the goods converted, if special damage is laid in the declaration; as where, in trover for carpenter's tools, special damage was laid in respect of the plaintiff, a carpenter, being hindered from working for the want of the use of his tools. *Bodley v. Reynolds*, 8 Q. B. 779; 10 Jur. 310; 15 L. J. Q. B. 219.

TRUCK Act.[1]

In trover and trespass for entering plaintiff's house and farm, and seizing and selling all the stock on the farm, the defendant's case being that, a year before the plaintiff became possessed of it, the stock on it had been assigned by the owner to an executrix, who had subsequently assigned to the defendant all the personal estate she took under the will; the question left to the jury, having seized a year afterwards and taken stock not in the bill of sale, was, whether the debt was due to the executrix, and, if not, then the plaintiff was entitled to recover not merely the value of the goods, and compensation for the injury sustained, but damages, taking all the circumstances into consideration. *Thomas v. Harris*, 1 F. & F. 67: 27 L. J. Ex. 353.

Where in an action for an irregular distress, with a count in trover, the plaintiff got but one shilling damages on the count in case, and the whole value of the goods on the count in trover, and it appeared that the goods were sold for their value, and that the rent due exceeded the amount; the court held that the plaintiff was only entitled to nominal damages on the count in trover. *Proudlove v. Twemlow*, 1 C. & M. 326.

Where the action is brought for several things, and the plaintiff recovers for some of them only, the defendant is entitled to a verdict as to the residue; but he is not entitled to costs, unless he have been put to expenses in respect of the residue claimed. *Nicolls v. Bastard*, 2 C., M. & R. 659. *Williams et al. v. Great Western Railway Co.* 1 Dowl. N. C. 16.

In *mitigation of damages* defendant may show that he has returned the chattels. *Countess of Rutland's case*, 1 Roll. Abr. 5. He may also show that he was joint-tenant, or tenant in common, with other persons, thereby merely limiting the damages to a proportionable share, but not destroying the plaintiff's right of action. 4 East, 121. *Bloxham v. Hubbard*, 5 East, 420. *Nelthorpe v. Dorrington*, 2 Lev. 113.

In an action by a rightful executor against defendant as executor of his own wrong, the defendant may show, in mitigation of damages, the due payment of the deceased's debts (Carth. 104); but it would be no ground of defence that the defendant had duly paid all the money he had received. *Mountford v. Gibson*, 4 East, 447. If defendant only plead that he did not convert, he cannot cross-examine the plaintiff's witness to show, in mitigation of damages, that the goods really belonged to a third person. *Finch v. Blount*, 7 C. & P. 478.

Trover is maintainable by the bailor of a bailee against a wrongful taker, and allowed to recover the costs of suit by his own bailor. *Pritchard v. Blick*, 1 F. & F. 404.

A. having bought some sheep on credit, left them in the custody of the vendor. Without any default on the part of A., the vendor sold the sheep:—*Held*, in an action of trover, that the measure of damage was not the value of the sheep, but the loss A. sustained by not having the sheep delivered to him at the price agreed on. *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180; 8 W. R. 629.

In trover for goods by assignees of a bankrupt, which had been purchased by him under an agreement, by which the purchase-money was to be paid by instalments, and an assignment of the property was to be executed by the vendor, when the whole purchase-money had been paid, with power for the vendor to re-enter in case of default in payment of the instalments, they are entitled to recover the full value of such goods against a mere wrongdoer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods. *Turner v. Hardcastle*, 11 C. B. (N.S.) 683; 31 L. J. C. P. 193.

A recovery in trover vests the property in the chattel in the defendant as against the plaintiff (*Cooper v. Shepherd*, 3 C. B. 266; 4 D. & L. 218; 10 Jur. 785; 15 L. J. C. P. 237), it seems, by relation from the time of conversion. *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. C. P. 204.

[1] By 1 & 2 Wm. 4, c. 37, it is enacted (ss. 1, 19), "that in all contracts for hiring of any artificer in the iron or steel manufactures, or in the working of mines of coal, iron, limestone, or salt-rock, or the getting of stone, slate, or clay, or in the preparing of salt-bricks, tiles, or quarries, or in the manufacturing of nails, chains, rivets, &c., spades, shovels, &c., or any articles or hardwares of iron or steel, or plated articles, cutlery, or goods or wares, or in the spinning, hoisting, &c., weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, or worsted yarn, stuff, &c., cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in the glass, porcelain, china, or earthenware manufacture, or the making or preparing of line, thread, silk, or cotton lace, &c., the wages of such artificer shall be made payable in the current coin of the realm only, and that if in any such contract the whole or any part of such wages shall be made payable in any other manner, such contract shall be illegal, null and void." Also (sect. 2), "that if in any contract between any artificer in any of the trades enumerated and his employer, any provision shall be made respecting the place where, or the manner in which, or the person with whom, the whole or any part of the wages of such artificer shall be expended, such contract shall be illegal and void. All such artificers are empowered (sect. 4) to sue for and recover any wages that have not been paid them in the current coin of the realm. Payment may, however, be made (sect. 8) in bank-notes, if such artificer consent thereto. If

TRUE Bill.[1]

TRUSTEE and Cestui que Trust. *See post*, Turnpike-Roads, p. 592.

I. Definition.[2]

a person is not hired to do the work himself, the fact of his being employed and contracting to get it done does not make him an artificer within the meaning of the act. The persons intended to be protected by the legislature are those who are hired to labour with their hands for daily wages. *Riley v. Warren*, 2 Ex. 59. *Sharman v. Sanders*, 22 L. J. C. P. 86; 12 C. B. *Weaver v. Floyd*, 21 L. J. Q. B. 151; 16 Jur. 289.

To be an "artificer" within the statute, the person must contract to do the work himself for which he is to be paid wages; and a person who merely contracts to procure the work to be done is not such artificer, although in fact he assists in doing the work himself. *Sharman v. Sanders*, 17 Jur. 765; 3 C. & Kir. 298; 22 L. J. C. P. 86.

The plaintiff was employed by the defendant as a frame-work knitter, or weaver of gloves, in frames provided by the defendant, and paid according to the quantity of work he performed, at an agreed price per dozen pairs, subject to certain charges and deductions, according to the usage of the trade, which was known to the plaintiff. Those deductions were, charge for frames and standing-room, for a boy winding, and a small per-centage when the weekly wages of the plaintiff exceeded a certain sum:—*Held*, first, that they were not within the prohibition in sect. 8 of 1 & 2 Wm. 4, c. 37, being the mode of calculating the amount of wages. *Chawner v. Cummings*, 8 Q. B. 311; 10 Jur. 454; 15 L. J. Q. B. 161:—*Held*, secondly, that, if they had been within that prohibition, they would, by virtue of s. 4, be recoverable under a count for work and labour, and by s. 5 would not be available for defendant in the shape of set-off. (Id.)

The provisions of the act apply only to agreements for personal service, and not to agreements for the performance of a certain quantity of work, which the contractor cannot perform except by making use of the labour of others. *Floyd v. Weaver*, 16 Jur. 289; 21 L. J. Q. B. 151.

The mode of paying the wages, as specified in the agreement, will not prevent a case from coming within the act. (Id.) It is questionable, if employers of workmen are also interested as partners in a shop for the sale of goods, adjoining or near to the office where the men's wages are paid, and wages are expended there in goods, whether they can be recovered as having been paid in violation of the Truck Act. *Semble*, they can, if any constraint has been used by the employers to induce the workmen to spend their wages at their shop. *Olding v. Smith*, 16 Jur. 497.

An artificer, to whom wages were due, was paid by his master by means of a note for the payment in goods, the master knowing that the payment would be made in goods, and not in the current coin of the realm. The agent of the master delivered goods in obedience to the note, and the master was convicted before justices of an offence under the Truck Act, although the place where the goods were delivered was not within the jurisdiction of the justices:—*Held*, that the conviction was right, as under the circumstances the offence was complete when the note was given. *Ashersmith v. Drury*, 1 E. & B. 46; 28 L. J. M. C. 5.

The plaintiff, who was a labouring man, entered into a written contract with the defendant, a contractor, for making a line of railway, by which he engaged to make as many bricks as the defendant required him to make; to take the clay in its present state, and to find all labour required in turning the clay, and mixing it with ashes, &c.; to mould, set, and burn the bricks, and to stack them when burnt, finding all labour for drying the bricks, the defendant to find all materials, but all labour, of every description, to be found by the plaintiff, for the sum of 10*s.* 6*d.* per thousand for the brick when finished; the plaintiff to proceed with the work as fast as possible, and as directed by the defendant, and to his satisfaction; the plaintiff, in fact, did part of the work himself under this contract:—*Held*, by the majority of the judges, not within the act. *Ingram v. Barnes*, 26 L. J. Q. B. 82.

Deductions or stoppages were made from the wages of an artificer in the hosiery trade, in respect of frame-rent, machine-rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in waiting-room, amounting to about 3*s.* 9*d.* per week, fixed charges:—*Held*, that such deductions or stoppages were not illegal under the 1 & 2 Wm. 4, c. 37. *Archer v. James*, 2 B. & S. 61; 8 Jur. N. S. 166; 31 L. J. Q. B. 153; 10 W. R. 489; 6 L. T. (N. S.) 167, Ex. Ch. See *Wilson v. Cookson*, and *Fulkes v. Jones*, 32 L. J. M. C. 177; 13 C. B. (N. S.) 177.

[1] In criminal practice the indorsement made by a grand jury upon a bill of indictment, when they find it sustained by the evidence laid before them, and are satisfied of the truth of the accusation. 4 Bl. Com. 306.

[2] A trust is defined to be a confidence reposed in one person, who is termed the trustee, for the benefit of another, who is called the *cestui que trust*, and it is a confidence respecting property which is thus held by the former for the benefit of the latter. Out of this confidence arise two estates in the property which is the subject of it—a legal estate in the trustees, which consists essentially in obligation; and an equitable estate in the *cestui que trust*, which

II. Creation of Trustees.[1]

III. Trustees only Recognised at Law.[2]

consists in right and beneficial enjoyment. So that a trust embraces the two ideas of an obligation on the part of one person and a corresponding right on the part of another, which are presented in the definitions above given, both founded upon and growing out of the radical idea of faith and confidence.

In a trust thus constituted, the legal owner holds the direct and absolute dominion over the property in the view of the law, but the income, profits, or benefits thereof in his hands, belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges, in favour of others; and these benefits or charges constitute the trusts which courts of equity will compel the legal owner, as trustee, to perform in favour of the *cestui que trust*, or beneficiary. *See* Willis on Trustees; Lewis's able and elaborate treatise on Trustees, 15; Story's Equity; 2 Bl. Com, 327; 1 Steph. Com. 329. In Scotland, the creator or maker of a trust is called the *truster*.

[1] Trusts are either express, namely, such as are created by deed or will, or implied; which term comprehends all such as are not express, but which arise by implication of law, or the acts of the parties. Express trusts, or those created by deed, are generally, 1. Trusts created in marriage settlements; 2. In conveyances to purchasers; 3. In conveyances by way of mortgage, or otherwise, for the payment of debts; 4. In assignment of choses in action. 1 Madd. 17. Express trusts created by will relate to those testamentary dispositions only where the construction of the words of a will is different in equity from that which the same words would receive in a court of law, as where the trust created by will is merely executory and not executed, to which allusion has before been made under the title of "Mistake." Implied trusts relate to the administration of assets and the payment of legacies; for if the executors and administrators be not expressly trustees for this purpose, as well as for the other duties which devolve upon them in their office, they are so by implication in a court of equity, and the whole jurisdiction of the court in the administration of assets is based upon the principle that it is the duty of the court to enforce the execution of trusts. 1 Madd. 578.

The Statute of Frauds requires all declarations of trust of freehold, copyhold, or leasehold lands, tenements, or hereditaments, to be evidenced by some writing, signed by the party declaring the same. But declarations of trust of money secured on real estate, or of chattels personal, need not be so evidenced. Sta. 972; 1 Sp. 497, 498; 2 id. 19, 20, 897.

A declaration of trust, if *bonâ fide*, is valid, though at a distance of time, and even after the trustee has committed an act of bankruptcy. 2 Sp. 24. And if the terms of the trust do not sufficiently appear upon the face of the instrument, evidence may be received to show the position of the party signing, and the circumstances by which he knew himself to be surrounded, and the credibility of the instrument. 2 Sp. 22. It is not necessary that there should be any actual transfer of property to render a declaration of trust effectual.

A trustee for sale cannot, under ordinary circumstances, become himself the purchaser of the property confided to him to sell (*Crowe v. Ballard*, 2 Bro. Ch. C. 119. *Ex-parte Lacey*, 6 Ves. 626); nor a trustee from his *cestui que trust*, unless the surrounding circumstances prove beyond all doubt that the transaction was perfectly fair and advantageous for the *cestui que trust* affected by it. *Cune v. Lord Allen*, 2 Dow, 289. *Dawson v. Massey*, 1 B. & B. 219. *Lord Hardwick v. Vernon*, 4 Ves. 411; 14 id. 504; 2 Sugd. 200.

Sales by trustees will not be enforced by the Court of Chancery if they are improvident sales. "If the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trust* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence," for the court will not enforce any contract involving a breach of trust. *Ord v. Noel*, 5 Madd. 440. *Thompson v. Blackstone*, 6 Beav. 472.

[2] The courts of law will not, in general, notice mere equitable rights, as contradistinguished from the strict legal title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name; although the equitable right embrace the most extensive, or even the exclusive interest in the benefit to be derived from the contract or subject-matter of litigation. This rule could not be disregarded without destroying the fundamental distinction between courts of law and courts of equity, with regard to the remedy peculiar to each jurisdiction; if the *cestui que trust* were permitted to sue at law in his own name, the benefits and protection intended to result from the intervention of a trustee, clothed with a legal title, might be lost, and the advantages arising from giving courts of equity exclusive control over matters of trust would be defeated. *See* the observations of *Lord Kenyon* in *Goodtitle v. Jones*, 7 T. R. 50; and *Bauerman v. Radenius*, id. 667. Therefore, if a bond be given to A., conditioned for the payment of money to him for the use or benefit of B., or conditioned to pay the money to B., the action

IV. Duties and Liabilities at Law.[1]

must be brought in the name of A., and B. cannot sue for or release the demand (2 Inst. 673; 1 Lev. 235; 3 id. 139, 140; 3 B. & P. 149, n. a.; 7 East, 148; 1 M. & S. 575; 6 Vin. Abr. Covenant, 374; 1 East, 501); and if a deed be *inter partes*, that is as "between A. of the first part, and B. of the second part," C., if not expressly named as a party, cannot sue thereon, although the contract purport to have been made for his sole advantage, and contain an express covenant with him to perform an act for his benefit: in such a case C., in law, is a stranger to the deed (*per Tindal, C. J.*, in *Bushell v. Beavan*, 1 Bing. N. C. 120; 2 Inst. 673; 2 Roll. Abr. Faits, F. 1; 3 M. & S. 308, 322; 5 Moore, 23; 2 B. & B. 333; S. C. 5 B. & C. 355); nor can C. join with the other covenantee. 6 B. & C. 718. And where a deed of composition was made between a debtor of the first part, his surety of the second part, and "the several other persons whose hands and seals are set and subscribed hereto, being creditors, &c. of the third part," and A., one of the members of a firm to which the debtor owed money, set his own seal only to the deed; it was held, that A. only, and not the firm, should sue on the covenant to pay the composition, although A. subscribed the deed as for himself and partners: for the partners did not become parties and privies to the deed, as their seals were not affixed thereto. 6 M. & S. 75.

If a deed-poll, not being a deed *inter partes*, contain a covenant with A. to pay B. a sum of money, it may be doubtful whether B. could sue in his own name; the covenant being with A. though for the benefit of another, and the contract being under seal, it would appear that in such case A. should be the plaintiff; for the terms of the express covenant seem to invest him with the legal interest. 1 East, 497, 501. *See* Platt on Covenants, 513.

The rule upon this subject appears to be materially influenced or affected by the nature of the instrument upon which the contract arises. If the instrument be not under seal, it seems to be a general principle that the party, for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him. *Starkey v. Mylne*, 1 Roll. Abr. Action sur Case, 32, pl. 13. *Dutton v. Poole*, Mich. 29 Car. 2; 1 Ventr. 318, 332; S. C. in 2 Lev. 210; Sir T. Raym. 302, and Sir T. Jones, 102; recognised by *Lord Mansfield* in Cowp. 443, and *Mr. J. Burrough* in 5 Moore, 31, 32; 2 B. & B. 337, S. C. *See* Bull. N. P. 133, a.

Trustees, by submitting matters to arbitration, do not make themselves personally liable. *Davies v. Ridge*, 3 Esp. 101.

A party conveying to trustees an estate in land connected with an intricate establishment, which, after the conveyance, he continues to manage without their interference:—*Held*, to have authority from the trustees to bind them and the land by all acts in the ordinary management of the establishment. *Taylor v. Waters*, 7 Taunt. 374; S. C. 2 Marsh, 551.

For a considerable period it was a rule that a trust should never be set up in an ejectment against him for whom the trust was intended. *See* 1 T. R. 758, n.; 3 Burr. 1898. This doctrine is now nearly entirely exploded. *See* 5 East, 38, n. And it has accordingly been holden, that trustees could maintain an ejectment against the grantee of *cestui que trust*, although the *cestui que trust* were in receipt of the rents and profits of the estate for upwards of twenty years after the creation of the trust, without the interference of the trustees, such reception of the rents, &c. being consistent with the terms of the trust-deed. *Keene v. Deardon et al.* 8 East, 248; and see *Goodtitle v. Way*, 1 T. R. 735. Nor will the court, in such a case, presume a conveyance by the trustees to the *cestui que trust*, where it would be a breach of trust to have made it. (Id.) So, it has been holden that possession for many years, under a deed declaratory of a beneficial interest, in which a covenant to convey the legal estate was inserted, will not of itself raise a presumption that such estate has been conveyed to the possessor, nor entitle him to bring an ejectment. *Goodright v. Swymmer*, 1 Ld. Ken. 385.

A *cestui que trust*, or person beneficially but not legally interested, can in no case sue his trustee at law for any misconduct, but must file a bill. Sanders on Uses and Trusts. But in equity trustees are liable for any abuse of trust, although the deed appointing them contain the usual indemnity clause; and if there be two trustees, and both suffer a debt from one of them to remain long outstanding, and a loss arise (*Mucklow v. Fuller*, 1 Jac. 198; 3 Swanst. 78; Chitty's Eq. Dig. 1310), though where there is an express clause that each trustee shall be liable only for one moiety, the court will not extend the liability. *Birls v. Betty*, 6 Madd. 90. If trustees refuse to act when they ought, the only safe course is to file a bill to compel them, though it is usual at law, if it be necessary to proceed in their name, to tender them an adequate indemnity.

Where trustees were authorised to give receipts for the purchase-money of lands directed to be sold, and such money was to be laid out in the purchase of other lands, to be settled in the same manner as those sold, a purchaser, having paid the purchase money *bonâ fide* to the trustees, and having taken their receipt, cannot be affected by any misapplication of the money by them. *Raper v. Hallifax*, 8 Taunt. 845.

A clause in a deed "that trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or per-

TURBARY. *See* Common, vol. iii. p. 144, n.

sons so to be accountable shall actually receive," does not bind the trustees as a covenant, but is a clause of indemnity to remove responsibility. *Bartlett v. Hodgson*, 1 T. R. 42.

Payment by bankers to one of several trustees of the proceeds of stock, sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorised by them. *Stone v. Marsh*, 1 R. & M. 364.

[1] In general no action at law will lie against trustees, either by their *cestui que trust* or, in case of bankruptcy, by his assignees. The law does not imply a promise from trustees to pay over to their *cestui qui trust* money received by them in the course of the execution of their trust, for the action for money had and received must not be turned into a bill in equity. *Bartlett v. Dimond*, 14 Mee. & W. 56. *Pardoe v. Price*, 16 id. 457–459; 13 id. 267. *Edwards v. Bates*, 8 Scott, N. R. 406; 7 Man. & G. 605. *Same v. Lowndes*, 22 L. J. Q. B. 108. But if a trustee expressly admits that a certain ascertained sum is due from him to his *cestui que trust*, the law implies a promise from him to pay over the amount, as being money had and received for the use of the latter. *Roper v. Holland*, 3 Ad. & E. 99. *Remon v. Hayward*, 2 id. 669. *Howard v. Brownhill*, 23 L. J. Q. B. 23.

By 22 & 23 Vic. c. 35, s. 26, no trustee, executor, or administrator, making any payment, or doing any act *bonâ fide* under or in pursuance of any power of attorney, shall be liable for the monies so paid, or the act so done, by reason that the person who have the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power: Provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power of attorney."

By sect. 32, "when a trustee, executor, or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust-fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator, to invest such trust-fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." And by 23 & 24 Vic. c. 38, s. 12, this enactment shall operate retrospectively.

The 23 & 24 Vic. c. 38, s. 10, enables the Chancery judges, both in England and Ireland, to make general orders as to the investment of cash under the control of the court, either in the 3*l.* per cent Consols, or Reduced or New Bank Annuities, or in such other stocks, funds, or securities, as they may deem fit.

By 25 & 26 Vic. c. 108, s. 1, powers of sale, exchange, partition, and enfranchisement, by trustees and others, are confirmed, notwithstanding the want of express reservation of minerals, &c.; and by sect. 2, trustees may dispose of land or minerals separately, unless forbidden to do so. See *Buckley v. Howell*, 29 Beav. 546; 7 Jur. N. S. 536; 30 L. J. Ch. 524.

Criminal Proceedings against Trustee for Fraudulent Disposition of Property.—By 24 & 25 Vic. c. 96, s. 80, "whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned, viz. to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (*see* sect. 73): Provided that no proceeding or prosecution for any offence included herein shall be commenced without the sanction of the attorney-general, or, in case that office be vacant, of the solicitor-general: Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending."

The court sanctioned criminal proceedings under sect. 13 of the 20 & 21 Vic. c. 54 (similar to the 24 & 25 Vic. c. 96, s. 80), upon an affidavit that a trustee had paid 140*l.* into his own bankers; had drawn out the whole, with the exception of 28*l.*; and had paid a private debt of 150*l.* out of the trust fund. *Wadham v. Rigg*, 1 D. & S. 216.

TURNPIKE-ROADS.[1] *See* also Highways, vol. v. p. 33.

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I. Origin and Definition.[2]

II. Interpretation of Words in Acts.[3]

[1] Woolrych, Highways, 2d ed.; Oke's Law of Turnpikes; Burn's, J. Highway; Archbold, J. Highway.

[2] The major portion of the public thoroughfares are what are technically called turnpike-roads, from their having been either originally formed, or subsequently regulated by acts of parliament, which have provided for keeping them in repair, by the tolls taken at the turnpikes erected for the purpose. The definition of "turnpike-road" is, a road on which parties have by law a right to erect gates and bars, for the purpose of taking toll, and of refusing the permission to pass to all persons who refuse to pay. *Northam Bridge and Roads Co. v. London & Southampton Railway Co.* 6 Mee. & W. 428; 1 Railw. Cas. 665; 4 Jur. 892. This is a distinctive characteristic of turnpike-roads. *R. v. Trustees of Great Dover Street*, 5 Ad. & E. 693. *Northam Bridge Co. v. London & Southampton Railway Co. supra.* The words "turnpike-road" in the 8 Vic. c. 20 (Railway Clauses Act) mean a road which is repaired by tolls payable by passengers for the use of the road. *R. v. East India Junction Railway Co.* 22 L. J. Q. B. 380. Road means a surface over which the public have a right to pass. *R. v. Commissioners of Llandilo*, 2 T. R. 232. In addition to the local acts under which most of the turnpike-roads have been made and managed, there is a general act (3 Geo. 4, c. 126, 1822), which has been amended and repealed in various details by the 4 Geo. 4, c. 95; 7 & 8 id. c. 24; and 9 & 10 id. c. 77. The various acts have from time to time been continued by annual acts; the last is 26 & 27 Vic. c. 94, which continues the acts in force till Nov. 1, 1864. The 26 & 27 Vic. c. 94, removes doubts as to highway-boards established under 25 & 26 Vic. c. 61, being liable to contribute to repair of turnpike-roads in the provisions of 4 & 5 Vic. c. 59. It continues certain acts mentioned in it. The 26 & 27 Vic. c. 78, amends the acts relating to turnpike-roads in the neighbourhood of the metropolis north of the Thames; and provides that after 1 July, 1864, roads in parishes in schedule shall cease to be maintained by commissioners, and shall be maintained by parishes according to apportionment. *See* sects. 4 and 5.

[3] Stat. 3 Geo. 4, c. 126, s. 124, enacts, that where in this or any other act relating to turnpike-roads, any matter is directed or forbidden to be done within a certain distance of the centre of the road, that portion of ground shall be taken to be the road which has been maintained by the trustees or commissioners as *hard* road, and repaired with stones, gravel, or other materials used in forming roads, for six months immediately preceding any offence committed; and the centre of the road shall be the middle of such hard road, where a line, being drawn along the road, or a point marked an equal number of feet of hard road, which

III. Trustees.

(A) *Appointment and Qualification.*[1]

(B) *Rights, Duties, and Liabilities.*[2]

have been so maintained and repaired as aforesaid for six months before, shall be found on each side of such line or mark: Provided always, that nothing herein contained shall authorise any encroachment on the waste lands lying on the side of the road." A day, for the purposes of all local turnpike-acts, is computed from twelve o'clock at night to twelve o'clock the next succeeding night. This definition refers to the taking of tolls. *See* 9 Geo. 4, c. 77, s. 16. By 7 & 8 Geo. 4, c. 24, s. 19, the word "trustees" in the acts 3 Geo. 4, c. 126; 4 Geo. 4, c. 95, shall be deemed to extend to all commissioners appointed for the execution of any act for making, amending, repairing, maintaining, or keeping in repair, any turnpike-road; and the word "person," in the said recited acts, shall be deemed to extend to any one or more person or persons, and of either sex; and the word "county" shall be deemed to extend to a riding or division; and the word "parish" shall be deemed to extend to ward, district, hamlet, township, or place.

[1] Besides the trustees or commissioners appointed by and under each particular turnpike-act, it is enacted by stat. 3 Geo. 4, c. 126, s. 61, that all justices of the peace for the time being, acting for the county, riding, division, or soke (5 Geo. 4, c. 69), through which any turnpike-road shall pass, shall be added to and joined with the trustees or commissioners for making, repairing, or maintaining every such turnpike-road, and shall have all the same powers and authorities, to all intents and purposes, as if the said justices had severally been named or elected trustees or commissioners in or under any act or acts of parliament under which such roads shall be made, repaired, or maintained. 3 Geo. 4, c. 126, s. 61. It is not necessary that they should take the oath of qualification required of other trustees or commissioners. 4 Geo. 4, c. 95, s. 34.

The appointment of other trustees than justices must be according to the local act.

By the 3 Geo. 4, c. 126, s. 62, "no person who shall hereafter be chosen a trustee or commissioner shall be qualified, unless he shall be in his own right, or in the right of his wife, in the actual possession or receipt of the rents and profits of freehold or copyhold lands of the clear yearly value of 100*l.* above reprises, or shall be heir-apparent of a person possessed of freehold or copyhold lands of the clear yearly value of 200*l.* above, &c.; and unless he shall, before he shall act as such trustee or commissioner, take and subscribe the prescribed oath or affirmation of being qualified."

By the 5 & 6 Wm. 4, c. 62, s. 10, "a declaration to the same effect is to be made. Sect. 63, "nothing in act to prevent any person from acting as trustee or commissioner within ten miles of the Royal Exchange in London, who shall be possessed of personal property to the value of 10,000*l.* after payment of his debts."

By 4 Geo. 4, c. 95, s. 32, trustees are to be sworn to performance of their duties, subject to a penalty of 50*l.* if they act before being sworn; but proceedings are to be valid, though oaths be omitted to be taken. By sect. 33, Quakers making the required affirmation may act. Sect. 35 provides for trustee losing his qualification, to become incapable of acting; and sect. 66, 3 Geo. 4, c. 126, provides for appointment of new trustees on vacancies.

By sect. 64, trustees not to act where interested, or while keeping a victualling-house, &c. or lease of tolls. Penalty for acting, not being qualified, 50*l.* Person sued to prove his qualification. Proceedings not to be impeached on account of disqualifications. Mortgagees on the tolls not disqualified on that account.

By 7 & 8 Geo. 4, c. 24, s. 1, reciting 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, owners of estates within trust not to be disqualified as interested persons.

By sect. 65, 3 Geo. 4, c. 126, trustees not to hold places of profit, or be concerned in contracts, or receive money out of the tolls to their use, penalty for 100*l.* Contracts to be void. Acts previous to conviction valid. Prohibition not applicable to purchase-money for lands, &c. sold.

By 4 Geo. 4, c. 95, s. 37, trustees having shares in canal companies, &c. which shall contract for conveyance of materials for roads, not liable to penalty on account of such contract. By sect. 78, contracts for amending roads. By sect. 100, contracts for materials.

A trustee who accepted the office of treasurer, but allowed another person to receive the tolls, and never made any profit of it himself, is liable to the penalty if the office yielded a profit. *De Lane v. Holbeach*, 9 B. & C. 310; 4 M. & R. 175, S. C. Where A. had contracted with the trustees of a turnpike-road to make certain improvements on the road, and he agreed to perform the same for a specific sum, one of the trustees afterwards agreed with A. to let him his horses and cart at the rate of 5*s.* per day, and he did so let them, and they were used on that part of the road which was agreed to be improved by A., it was held that the trustee was liable to the penalty imposed by the above section. *Towsey v. White*, 5 B. & C. 125; 7 D. & R. 810, S. C.; 4 Geo. 4, c. 95.

[2] The trustees have no interest in the soil of the road. *Davison v. Gill*, 1 East, 69. *R. v. Mersey Navigation*, 9 B. & C.

95; id. 114; 4 M. & R. 84, S. C.; and by the express provisions of the 7 & 8 Geo. 4, c. 24, s. 18. By 3 Geo. 4, c. 126, s. 60, the property in toll-houses, &c. is vested in the trustees, and the scraping of the roads. Actions may be brought in the name of the clerk. (Id.) By sects. 57, 58, 59, 4 Geo. 4, c. 95, the trustees may sell unnecessary toll-houses. The tolls collected vest in them by 9 Geo. 4, c. 77, s. 16.

The general powers must be collected from the several acts and sections. To prevent inconvenience from the expiration of temporary and local acts, the 9 Geo. 4, c. 77, s. 11, directs that all bonds, contracts, &c. shall remain in force notwithstanding the repeal of any act. By sect. 12, trustees may cancel acts of former commissioners.

By 7 & 8 Geo. 4, c. 24, s. 3, no trustee shall be personally liable as such, unless he shall in express words have so rendered himself; nor (by sect. 61) personally liable on any mortgage: but by sect. 2 he is liable for money expended on roads not within the trust.

Liabilities on Contracts.—A chairman of trustees who had signed a resolution agreeing to an advance, no mortgage having been executed as prescribed by the 3 Geo. 4, c. 126, s. 61, was held personally liable, for that trustees were protected only when they have pursued the form of security prescribed by the statutes. *Parrott v. Gye*, 10 Bing. 282. The mere fact of presence at meetings does not constitute *primâ facie* grounds of personal liability; but where the trustees had signed contracts for carrying on works, the funds provided by the act being neither sufficient nor available, they are held personally liable. *Hygen v. Livingstone*, 4 Dowl. P. C. 341. *See* also *Burrell v. Jones*, 3 B. & A. 47. *Iveson v. Conington*, 2 D. & R. 307; 1 B. & C. 160, S. C.; Gow's C. N. P. 117. *Norton v. Herron*, R. & M. C. (N. P.) 229. *Cane v. Chapman*, 6 Ad. & E. 647.

Liability for Torts.—As neither the soil nor the possession of turnpike-roads is vested in the trustees, they are not personally responsible for the negligence of contractors and others employed by them in the repair of the roads, unless they personally interfere in the management. *Humfreys v. Mears*, 1 M. & Ry. 187. *Duncan v. Findlater*, 6 Clark & Fin. 394. Where certain trustees of a public road were empowered by act of parliament to place lamps along the road, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch it, and certain labourers employed in cleaning the roads left some scrapings in round heaps at the side of the road, which became hard, and, no lights being placed to light the road, the plaintiff stumbled over one of these heaps and was injured: it was held that the trustees were not personally responsible for the injury. *Harris v. Baker*, 4 M. & S. 29. But if trustees and commissioners of public works, acting within their jurisdiction and exercising powers given them by act of parliament, act wantonly and oppressively, and do unnecessary injury to individuals, they are personally responsible in damages to the parties injured.

By a turnpike-road act trustees were authorised to enter upon and take certain lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings, &c., so taken, for any loss or damage they may sustain thereby;" and it was also provided, that they should not be authorised to take other buildings, &c., without the consent "of the owners or proprietors thereof, or other persons interested therein:"—*Held*, 1st, that compensation was to be made in the case of premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also the lessees of the same for terms of years; 2d. that the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses. *Lister v. Lobley*, 7 Ad. & E. 124; 6 Nev. & M. 340; 2 Har. & W. 12; 1 Jur. 526.

A piece of road in a borough had been for many years common to two turnpike-trusts. An agreement had been entered into between them that one set of trustees should repair the road, and that the other should pay to them a certain sum annually so long as the road should remain common to both trusts, and should be maintained and kept in repair:—*Held*, that it was competent for the trustees to enter into this agreement, and that an action would lie to recover the sum of money so agreed to be paid. *Swinburne v. Robinson*, 28 L. J. Q. B. 4.

[1] By 3 Geo. 4, c. 126, s. 69, general annual meetings to be held. By sect. 70, if a sufficient number of trustees do not attend, another meeting shall be appointed, of which ten days' notice shall be given. By 4 Geo. 4, c. 35, where trustees cannot meet on day appointed for their first meeting, the day being antecedent to the passing of the act, any three of such trustees may meet on the fourteenth day after the passing of the act. By 3 Geo. 4, c. 126, s. 72, proceedings to be entered in books, which shall be open for inspection. By sect. 73, books of account to be kept, and to be open to the inspection of trustees and creditors; penalty on refusing inspection. By 4 Geo. 4, c. 95, s. 37, regulations as to meetings of trustees. By sect. 41, how meetings on emergencies shall be held. By sect. 47, officers to account when required by the trustees.

Proceedings on Neglect of Officers to Account.—By 3 Geo. 4, c. 126, s. 47, mort-

(D) *Officers connected with.*[1]

(E) *Actions by and against.*[2]

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gagees; by 9 Geo. 4, c. 77, s. 14, officers under expired acts to account with trustees under the new act. By 3 & 4 Wm. 4, c. 80; 3 Geo. 4, c. 126, ss. 69, 78, 79; 4 Geo. 4, c. 35, s. 42, clerks of trustees to transmit copies of all past annual statements of debts, &c., under the 3 Geo. 4, c. 126, to the secretary of state within a certain time. By sect. 2, general annual meeting to be held on or before 25th March. By sect. 3, regulating time for making out annual statement of debts, &c. By sect. 4, clerks to prepare estimates for annual meetings. By sect. 5, secretary of state to cause abstracts of annual statements to be laid before parliament. By sect. 6, and for that purpose to summons any clerks, surveyors, &c. before them, and inquire into state of roads and method of maintaining them. By sect. 7, clerks to trustees to send copies of resolutions of trustees as to continuation or alteration of turnpike-acts, &c. to secretary of state. By sect. 8, penalties how to be recovered.

In the *Southampton Dock Co. v. Richards* (1 Scott, N. R. 219), where the minutes were signed at a subsequent meeting:—*Held*, compliance with the act. *See* the *London and Birmingham Railway Co. v. Fairclough* (3 id. 68; *Sheffield, Ashton, and Manchester Railway Co. v. Woodcock* (7 Mee. & W. 574); in which it was held that a book of proceedings, purporting to be signed "W. S., deputy-chairman," was evidence *per se*, without proof that W. S. was, in fact, deputy-chairman, or as such presided at the meeting. By 14 & 15 Vic. c. 99, s. 14, examined or certified copies of such books, &c., can be given in evidence.

[1] The 4 Geo. 4, c. 95, s. 43, empowers the trustees or commissioners to appoint officers in general, and to remove them, and to fix the salaries.

By 3 Geo. 4, c. 126, s. 75, councillors not to hold places of profit.

By 9 Geo. 4, c. 77, s. 15, officers to hold their offices after any act is repealed, unless removed by trustees.

By 3 Geo. 4, c. 126, s. 136, penalty on constables and persons employed with salaries refusing to execute the act, 5*l*.

Officers and agents employed by the trustees, when guilty of misconduct, are personally liable for the consequences, although the act ordered to be done was in itself warranted by the powers vested in the trustees. *Hall v. Smith*, 2 Bing. 156; 9 Moore, 226, 447, S. C. And see *Jones v. Birch*, 5 B. & A. 837; 1 D. & R. 497, S. C. But such officers and agents will not be liable if the injury arose from the unavoidable consequence of an act authorised by statute to be executed. *Governor of Cast-Plate Manufacturers v. Meredith*, 4 T. R. 794. And whenever specific remedies are given by the statute, they must in general be pursued. *Sutton v. Clarke*, 6 Taunt. 35; 1 Marsh. 429, S. C.

The surveyor of a turnpike-road is not personally liable to answer for wages to labourers for their work in the repair of the road, but the commissioners or their treasurer are the proper parties to be sued. *Pochin v. Pawley*, 1 W. Black. 670. But if the contract be entered into personally with such surveyor, and he voluntarily stakes his individual credit, he will render himself personally liable. See *Sweet v. Wymondsold*, Hardw. 205.

A clerk of the peace is not subject to an execution against him personally on a judgment against him as clerk. *Wormwell v. Hailstone*, 6 Bing. 668.

A *mandamus* lies to the trustees, and not to a clerk or other officer duly appointed. *R. v. Trustees of Cheshire Turnpike-Roads*, 5 B. & Adol. 438.

By 7 & 8 Geo. 4, c. 24, s. 4, treasurer and clerk not to be the same person.

By 3 Geo. 4, c. 126, s. 76, treasurer may give security; security may be taken from any other officer.

By 4 Geo. 4, c. 95, s. 44, surveyor and clerk not to be the same person; surveyor to hold no other place of profit under the trustees. By sect. 45, surveyor not to be concerned in contracts, or sell materials.

By 4 Geo. 4, c. 95, s. 49, trustees may appoint temporary collector, &c., in certain cases of death, and he may recover tolls, although illegally appointed. Penalty on former collector, &c., neglecting duty, &c. By sect. 31, toll-collectors, &c., residing in any house erected by the trustees, not to gain a settlement.

By 3 Geo. 4, c. 126, s. 55, collectors permitting carriages to pass otherwise than allowed by the act, and not prosecuting, to forfeit not exceeding 5*l*.

By 4 Geo. 4, c. 95, s. 30, toll-collectors to put up their names. Taking greater or less toll, &c., other offences, obstructing passengers, penalty, 5*l*. By sect. 50, toll-collectors taking more toll than allowed, to be proceeded against before a justice, and not by indictment.

By 3 Geo. 4, c. 126, s. 54, penalties on toll-collectors, &c., absconding.

Destroying Gates and Toll-houses.—See 24 & 25 Vic. c. 97, s. 34.

[2] By 3 Geo. 4, c. 126, s. 74, trustees may sue and be sued in the name of their clerk, &c. Indemnity to trustees. By sect. 60, the property of toll-houses, &c., vested in trustees. Action may be brought, and prosecutions for offences, ordered by trustees. By 4 Geo. 4, c. 95, s. 78, contracts may be made for re-mending roads, &c. All contracts under the act binding on trustees and others; actions upon contract, and measure of damages. By sect. 143, prosecutors may recover by information, or by action, &c.

(F) *Uniting of different Trusts.*[1]

(G) *Purchasing and Contracting for Lands for Improvement, &c. of Roads, and Sale of Old Roads.*[2]

IV. Mortgagors, Mortgagees, and Creditors of Tolls, &c.[3]

If penalty exceeds 20*l.*, full costs. Provides for notice of action and limitation of action. If penalty not 20*l.*, recoverable only before justices. No *certiorari*. As to notice of action, *see* vol. v. p. 547. By sect. 61, costs of trustees to be paid out of tolls.

By 3 Geo. 4, c. 126, s. 134, if action be brought against a trustee, evidence of his being appointed and acting sufficient.

Tolls—Costs.—By 4 Jac. 1, c. 3, in any action of trespass or ejectment, or any action whatsoever wherein the plaintiff might have costs in case judgment should be given for him, if the plaintiff be nonsuited the defendant shall have judgment to recover his costs. A mortgagee of turnpike-tolls brought ejectment to recover the toll-gates, and one of the trustees of the road defended as landlord; the plaintiff having been nonsuited, the defendant signed judgment for costs:—*Held*, that the judgment was right, for that, assuming the statute to make it a condition to the defendant's right to costs that the plaintiff would have had his costs if he had succeeded in the particular action, still the case was within the statute, inasmuch as the plaintiff might have had his costs even if the defendant, as a trustee of the road, were protected from personal liability by sect. 74 of the 3 Geo. 4, c. 126. *Cobbett v. Wheeler*, 7 Jur. N. S. 260; 30 L. J. Q. B. 64; 3 L. T. (N. S.) 554.

An action for turnpike-tolls lies where the defendant has frequently passed through the gate, misrepresenting facts which led the collector to believe he was not entitled to receive toll, and consequently demanded no toll at the times the defendant passed through. *Maurice v. Marsden*, 19 L. J. C. P. 152.

Toll-gate keepers sued for acts done under the 25 Geo. 3, c. 51, need not be sued in the county where the fact was committed, as they must be under the 13 Geo. 3, c. 78, s. 81. *Bazing v. Skelton*, 5 T. R. 16.

A notice of action under an act of parliament against a toll-gate keeper, "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament intituled, &c.," is uncertain and bad. *Freeman v. Line*, 2 Chit. 673.

[1] By 12 & 13 Vic. c. 46, it is recited, that it would be expedient that all turnpike trusts which could conveniently be managed together should be united, and enacts that trustees of several turnpike-roads may hold joint meetings, and if deemed expedient to two-thirds of trustees present, trustees may resolve to unite trust.

Twenty-one days' notice of purpose of meeting to be given, and if two-thirds of trustees of each of the trusts resolve the union to be expedient, the same shall be united.

Notice of resolution and report, &c., to be sent to all the creditors of the trusts united, where three-fifths in amount of debts obtained; papers to be registered with clerk of peace, and trusts to become one united trust. By sect. 2, united trust subject to liabilities, and entitled to tolls of each trust so united. By sect. 3, special provisions in acts to apply only to the particular road. By sect. 4, nothing to affect the rights, &c. of persons to offices under turnpike-trusts. Sect. 5 provides for meeting of united trusts.

By 13 & 14 Vic. c. 79, s. 7, divisions or districts may be united into one trust, or with other trust.

[2] By 3 Geo. 4, c. 126, s. 84, lands may be purchased for improving the road. Bodies politic, &c., and incapacitated persons, not empowered to sell; such bodies and persons may convey by deed, &c., contracts binding. Bodies politic, &c.: indemnified. By sect. 85, where persons interested neglect or refuse to treat, the value may be assessed by a jury.

By 7 & 8 Geo. 4, c. 24, s. 7, mortgages on land purchased to be paid off. By sect. 9, application of compensation where the party entitled thereto is under any incapacity. By sect. 10, where under 200*l.* and above 20*l.* By sect. 11, where less than 20*l.* By sect. 12, payment of money where title not satisfactory, or owner not being found, &c. By sect. 13, persons in possession presumptively entitled. By sect. 14, the court may order reasonable expenses of purchasers to be paid.

By 4 Geo. 4, c. 95, s. 55, trustees to pay expenses of sales of lands, &c.

[3] By 3 Geo. 4, c. 126, s. 81, trustees are empowered to borrow money; copies to be entered in books; may be assigned and reassigned, and entry made thereof. By sect. 47, mortgagee to account to trustees for tolls; penalty, 50*l.* for not. By sect. 48, forfeit double amount if he keep possession after being paid. By sect. 49, mortgagee may bring ejectment. *See* 6 Jur. 948; 1 Nev. & M. 683; 4 B. & Adol. 137.

9 Geo. 4, c. 77, s. 10, directs mortgages under former acts to remain good. By sect. 12, trustees may cancel mortgages under former acts, and execute others. By sect. 13, trustees may renew mortgages, &c. lost or mislaid.

By 4 Geo. 4, c. 95, s. 60, instead of paying off creditors rateably, trustees may do so by lot.

By continuing acts, 12 & 13 Vic. c. 87, s. 3, sinking fund is provided for the discharge of money. By sect. 4, mortgagee in

V. Making, Diverting, and Repairing Roads and Footpaths.[1]

possession may let tolls. By sect. 6, to transmit accounts.

By 13 & 14 Vic. c. 79, s. 4, provision in 12 & 13 Vic. c. 87, s. 3, for forming a sinking fund, extended to debts contracted before the passing of that act.

By 14 & 15 Vic. c. 38, trustees of insolvent turnpike-trusts, with consent of two-thirds in value of the creditors, may apply for a provisional order for reduction of rate of interest, or extinguishment of arrears. Notice of resolution, consent of creditors, application to be signed by three trustees. By sect. 2, power to executors, &c., to consent to such application. By sect. 3, secretary of state may make a provisional order, which order to be binding if confirmed by parliament.

Reducing or Extinguishing Interest on Mortgage of Turnpike-Tolls.—22 & 23 Vict. c. 73, extends the provisions of the 14 & 15 Vic. c. 38, to turnpike-roads, the revenues of which are insufficient for the payment of the interest.

A mortgage executed by A., B., C., D., and E., as trustees of a turnpike-road, is not invalidated by showing that A., who had acted as a trustee for many years, had not been appointed under seal, as required by the local act. *Doe d. Baggaley v. Hares*, 1 Nev. & M. 237; 4 B. & Adol. 435.

The trustees of a public turnpike-act, which empowers them to erect toll-houses and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. *Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169.

Ejectment by a mortgagee under 3 Geo. 4, c. 126, s. 49, to recover possession of the toll-gates. After the commencement of the ejectment, another ejectment on the demise (laid earlier than that in the first action) of another mortgagee was commenced. Judgment went by default in the second ejectment; and before trial, the sheriff gave the lessor of the plaintiff in the second ejectment possession under a *habere facias possessionem*: — *Held*, that the lessor of the plaintiff who had commenced his ejectment first was entitled to the verdict. *Doe d. Butt v. Rous*, 1 El. & Bl. 419; 17 Jur. 502; 22 L. J. Q. B. 111.

[1] By 9 Geo. 4, c. 77, s. 9, trustees may shorten, vary, and alter roads through private lands; through waste lands, not exceeding sixty feet in width; power to enter on lands without being trespassers; penalties for destroying marks of trustees, &c.

By 3 Geo. 4, c. 126, s. 111, power to make and repair footway where road is ruinous; roads may be made through adjoining grounds; recompense to be made to owners for damages; in case of difference, two justices shall settle it. By sect. 112, trustees not to make or repair causeways in towns, unless specially directed.

By 4 Geo. 4, c. 95, s. 65, trustees not to pull down dwelling-houses, or deviate more that 100 yards, or take in gardens. By sect. 66, trustees to fence roads.

By 3 Geo. 4, c. 126, s. 88, where old road diverted, new road becomes a highway.

By 4 Geo. 4, c. 95, s. 68, persons liable by tenure, &c. to repair old road, shall repair the new.

By 7 & 8 Geo. 4, c. 24, s. 17, lands liable to repair of roads, bridges, &c., to continue to contracts; jurisdiction of justices to compel repairs.

4 Geo. 4, c. 95, s. 80, provides statute duty and compensations for; justices may order part of statute work to be done on turnpike-roads. By sect. 81, in case no highway surveyor appointed, lists of persons liable to do statute work to be made out in manner herein directed.

By 3 Geo. 4, c. 126, s. 105, statute work may be compounded for.

By 4 Geo. 4, c. 95, s. 82, compositions to be paid according to agreement.

By 3 Geo. 4, c. 126, s. 97, power to get materials from any river or brook, or from any common or waste lands, without expense, but filling up the holes, &c., or from lands of any person, not being garden ground, &c., on tendering satisfaction for damages; and materials may be carried through any enclosed or open lands on tendering damages; differences as to damages may be settled by two justices. By sect. 98, notice to be given before materials are taken from private hands. By sect. 100, power to purchase lands for materials.

By 7 & 8 Geo. 4, c. 24, s. 15, justices to award for materials no larger sum than they would actually be sold for.

By 3 Geo. 4, c. 126, s. 99, pits or holes made in getting materials to be filled up or fenced off by surveyor; penalty for neglect. By sect. 101, penalty for taking away materials before surveyor has discontinued digging for them, 5*l*. By sect. 102, repositories for materials to be purchased; two justices shall settle any difference that may arise as to value. By sect. 103, canal companies may lower their tolls on materials for repairing turnpike-roads.

By 4 Geo. 4, c. 95, s. 56, grounds may be purchased for repository of materials within ten miles of the Royal Exchange. By sect. 71, goods vested in trustees or treasurer liable to distress upon non-payment of compensation for damages or materials; his indemnity.

By 3 Geo. 4, c. 126, s. 119, mile-stones and direction-posts to be erected; names of the towns and villages to be put up at the entrance, and stones to mark the boundaries of parishes; penalty for defacing them not exceeding 10*l*. By sect. 125, extending time for watering roads.

By 4 Geo. 4, c. 95, s. 78, agreements may be made for mending roads, &c.

By 3 Geo. 4, c. 126, s. 106, trustees may contract with persons liable to the repairs of

VI. Tolls.

(A) *Imposition of, Power to Collect, and in whom Vested.*[1]

roads by tenure. By sect. 107, compositions may be entered into with counties for repairing bridges repaired by parishes. By sect. 108, compositions may be entered into by trustees with parishes for repair of bridges and drains; fines for not repairing. By sect. 110, where parish indicted for non-repair of a turnpike-road, the court to apportion the fine between the parish and the trustees or commissioners.

For Calls.—In order to proceed for calls under the General Turnpike Act, 9 Geo. 4, c. 77, against parties who have agreed to subscribe money for the making or repairing a highway, the agreement must be in writing, and must be substantially the same as the form given in the schedule of 3 Geo. 4, c. 26. *Meigh v. Clinton*, 3 Per. & D. 211; 11 Ad. & E. 418; 4 Jur. 603.

Validity of Agreements for.—A piece of road, forming the main street of a town, was common to two trusts, D. and W. In 1829 it was agreed between the two trusts that it should be repaired at the sole expense of that trust which had the larger amount of traffic, and that the other trust should contribute a yearly sum of money towards the repair. This agreement was acted upon until 1856. A local board of health had been constituted for the town:—*Held*, that under sect. 78 of the 4 Geo. 4, c. 95, which empowers trustees of a turnpike-road to make contracts for the repair of the road so as to bind their successors, the D. trustees were entitled to recover from the W. trustees the arrears of the annuity for two years; and that the W. trustees had the management of the road, notwithstanding there was a local board of health. *Swinburne v. Robinson*, 5 Jur. N. S. 462; 28 L. J. Q. B. 4.

Mandamus does not lie to compel the repair of a turnpike-road. *Reg. v. Trustees of Oxford and Witney Roads*, 4 Per. & D. 154; 12 Ad. & E. 427; 6 Jur. 216, n.

[1] The tolls are imposed, and the amount regulated, by the local acts of each district. Besides these there are general enactments applicable to all turnpike-roads.

The 9 Geo. 4, c. 77, s. 16, directs trustees of any turnpike-roads, or any person appointed collector of the tolls to be taken by virtue of any local turnpike-act, to demand and take every day (such day, for the purpose of all local turnpike-acts, being computed from twelve o'clock at night to twelve o'clock of the next succeeding night) the several tolls to be mentioned in any such act at the several toll-gates and turnpikes, or side-bars and chains, which are or shall be continued or erected by virtue of this or any local turnpike-act in, upon, across, or on the sides of any turnpike-road, or any part or parts thereof, and which tolls or sums of money shall be demanded and taken, as aforesaid, before any horses, cattle, or carriage whatsoever shall be permitted to pass through any toll-gate; and the tolls or sums of money to be levied and collected by virtue of any local act shall be vested in the trustees of such act.

A local act empowered trustees of a turnpike-road leading into a town to collect tolls from persons passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees were prohibited from repairing a certain portion of it nearest the town, and the town commissioners were to maintain it in future:—*Held*, that the roads trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike-road for all purposes but that of repair. *Phipson v. Harvett*, 1 C., M. & R. 473; 5 Tyrw. 54.

A person is liable to pay toll at a toll-gate on a turnpike-road, though he has not travelled 100 yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which, together with that he has passed over previously, exceeds in all the distance of 100 yards. *Horwood v. Powell*, 30 L. J. M. C. 203; 4 L. T. (N. S.) 372; 9 W. R. 659. He should explain to the toll-collector that he is going less than the hundred yards.

A turnpike-act imposed a toll, first, upon every carriage drawn by horses; then upon every horse not drawing; and then upon every drove of oxen or cattle: with a proviso "that no more than one toll should be taken from any person repassing on the same day with the same horses, cattle, beasts, and carriages." Where a stage-coach, drawn by four horses, paid the toll in the morning, and in the evening of the same day repassed with the same driver, but with different horses and passengers:—*Held*, that a second toll was not payable. *Waterhouse v. Keen*, 6 D. & R. 257; 4 B. & C. 200.

The 10 Geo. 4, c. 59, an act to amend an "act for consolidating the trusts of the several turnpike-roads north of the river Thames," by sect. 28 enacts, that the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage-coach, van, caravan, waggon, or other carriage, conveying passengers or goods for pay, hire or reward, for each time of passing along any of the roads in that district:—*Held*, that this section only applies where a carriage conveys passengers or goods, and a charge is made in respect of the passengers or goods, and not where the carriage itself is let to hire; and that, therefore, where a van was hired to fetch furniture from H. to L., and toll was paid as the van went out, a second toll was not payable as the van returned loaded. *Short v. Hudson*, 5 H. & N. 559; 29 L. J. M. C. 208; 8 W. R. 439.

By a local act, the trustees of a road were authorised to take tolls at the toll-gates. It was enacted, that if any person should have

(B) *What, and when Payable; Overweight; and Extra-Tolls.*[1]

(C) *Power to Vary Amount, and Compound for.*[2]

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paid the toll authorised to be taken for the passing of any horse through any of the turnpikes, the same horse should, upon a ticket denoting the payment on that day being produced, be permitted to pass and repass toll-free through the same toll-gate, and also through such other gates, if any, as a ticket for such payment should free, at any time during the same day. It also enacted, that no more than one full toll should be taken in respect of the same horse, for passing on the same day through all or any of the toll-gates along the whole line of the road: — *Held* that, after payment of one maximum toll, no toll was payable for passing once on the same day with the same horse through any toll-gate on the whole line of the road. *Johnson v. Cocksedge*, 27 L. J. M. C. 314: Q. B.

A local act provided that upon a turnpike-road certain tolls should be chargable "for every horse or other beast drawing any other chaise, chair, or caleche, or any taxed cart, a sum not exceeding 3*d.*:"—*Held*, that a cart upon which a tax had been imposed and paid in the previous year was within the enactment, and that no larger toll than 3*d.* could be charged for passing through the toll-gate. *Purdy v. Smith*, 5 Jur. N. S. 912; 28 L. J. M. C. 150. See *Johnson v. Cocksedge*, 5 C. B. 286.

Where a turnpike-act authorised the trustees to take at each and every toll-bar on the whole line of road a certain scale of tolls; and by another section they were authorised at a meeting, upon notice thereof to be affixed on all the gates, to reduce or advance all or any of the tolls granted by the act:—*Held*, that the trustees had no authority to reduce or advance the tolls at some gates and not at others. *Rex v. Bury and Stratton Roads*, 6 D. & R. 362; 4 B. & C. 361.

V., going in a carriage from his own house to a town, drove along a parish road; he then used a private road, without any express license from the owner, and by that way entered the turnpike-road: he then used the turnpike-road for eighty-six yards, and then by parish roads reached the town, and returned the same route. He could not, by any other route, have gone to the town without becoming liable to pay turnpike tolls:—*Held* that, assuming that V. used this route because, by using any other, he would become liable to pay toll, this was not an evasion of payment of toll within 3 Geo. 4, c. 126, s. 41, but a successful arrangement to avoid becoming liable to payment. *Veitch v. Exeter Turnpike-Roads (Trustees)*, 8 E. & B. 986; 4 Jur. N. S. 284; 27 L. J. M. C. 116.

The user, at different times, of portions of the turnpike-road, each less than 100 yards, but, taken together, more than 100 yards, does not deprive a party of the benefit of the exemption in the 3 Geo. 4, c. 126, s. 32. Id.: *Coleridge, J.*

24 & 25 Vic. c. 70, regulates the use of locomotives on turnpike and other roads in Great Britain, and the tolls to be levied on such locomotives, and on the waggons and carriages drawn or propelled by the same; but this enactment is not to authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance, and every such person so using such engine shall, notwithstanding the act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of the act, such indictment or action could be maintained. As to carriages not upon wheels, see *Radnorshire Roads v. Evans*, 32 L. J. M. C. 141; 7 L. T. (N. S.) 677.

[1] The local acts regulating the turnpike-road always define the amount of toll to be paid. Besides this, there are some general provisions in the turnpike-acts applicable to all roads. Thus, by 3 Geo. 4, c. 126, s. 31, tolls to be paid upon carriages affixed to others. By sect. 38, two oxen to be considered as one horse; additional tolls for watering. By sect. 12, the weights are regulated. Contractors of tolls may be released from their contracts, so far as regards tolls or penalties for overweight, on giving notice to treasurer or clerk of trustees by September. New contracts may be made with contractors. By sect. 13, additional weights for carriages built with springs. By sect. 14, two-wheeled drags drawn with three horses allowed two tons sixteen cwt. By sect. 15, additional tolls imposed for overweight. *See* 4 Geo. 4, c. 95, s. 20; and 2 & 3 Wm. 4, c. 124. Explanation of local acts as to double tolls. By 3 Geo. 4, c. 126, s. 21, power is given for erecting weighing-machines. By sect. 25, where turnpike-roads on different trusts meet, trustees to fix on some place for erecting a weighing-engine, and proportion the expense, &c. By sect. 20, penalties for evading toll are imposed,

By 3 Geo. 4, c. 126, s. 11, power to trustees to measure wheels; penalty on obstructing measurement not exceeding 5*l.*; penalty on toll-collector allowing waggons to pass before measurement, &c. not exceeding 5*l.* By sects. 5 & 6 of 2 & 3 Wm. 4, c. 18, no tolls to be taken for manure except lime. By sect. 2, not to exempt from toll imposed by local act. By 3 Geo. 4, c. 126, s. 26, exemptions from toll on manure, &c., or materials for roads, contained in any act, to be in force, notwithstanding the same should be carried into or brought from an adjoining parish.

[2] The local acts regulating the turnpike-roads generally contain a power for the trustees to reduce or advance the tolls. By 3 Geo. 4, c. 126, s. 43, trustees may reduce tolls and afterwards advance them: reduc-

(D) *Toll-Houses, Gates, &c.*[1]

(E) *Regulations as to Tables and Tickets.*[2]

(F) *Recovery of Tolls, and Penalty for Evasion.*[3]

(G) *Leases of, and Rights and Duties of Lessees.*[4]

(I) *Exemptions from Toll.*[5]

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tion not to be made without consent of creditors in certain cases. By sect. 44, reduction or advance of tolls to be made proportionably. By 4 Geo. 4, c. 95, s. 20, trustees or commissioners within ten miles of London may reduce tolls for overweight. By sect. 13, composition may be made for tolls for one year.

[1] The property in the toll-houses and toll-gates is vested in the trustees (3 Geo. 4, c. 126, s. 60); 9 Geo. 4, c. 77, s. 5, empowers the trustees to continue or to erect toll-gates. If they cause gates to be erected contrary to the act, justices may order the removal. 3 Geo. 4, c. 126, s. 46. Lamps are to be lighted to toll-houses. 7 & 8 Geo. 4, c. 54, s. 6. By 4 Geo. 4, c. 95, s. 57, toll-houses not required shall be pulled down, and materials sold.

[2] The trustees are to put table of tolls, with name of gates (4 Geo. 4, c. 95, s. 28), and provide tickets denoting payment of the toll.

[3] The penalties, when they do not exceed 20*l.*, are recoverable only by information before a justice (3 Geo. 4, c. 133); but the proceedings to be taken are generally prescribed by the local acts. Trustees may direct prosecutions. Sect. 133, justices may proceed by summons without information in writing. 4 Geo. 4, c. 95, s. 83. Sect. 140, Geo. 4, c. 126, authorises apprehension of unknown offenders without warrant. Sect. 141, penalties may be levied by distress.

[4] 3 Geo. 4, c. 126, s. 59, gives power to trustees to farm out tolls, or be put up at the sums they produced the preceding year: if not let at public auction, private tenders may be accepted. Collectors subject to penalty of 5*l.* if they take more or less than authorised toll; the term to be limited to three years. By 4 Geo. 4, c. 95, s. 52, may be let in lots; s. 53, trustees may appoint a bidder. The contracts or agreements to be valid, though not under seal. 3 Geo. 4, c. 126, s. 57. By 4 Geo. 4, c. 95, s. 59, trustees may take possession of toll-houses, &c., in default of performance of conditions; justices to grant warrant for the purpose; and trustees may vacate contract and re-demise. By 3 Geo. 4, c. 126, s. 58, lessees of tolls may appoint persons to receive the same, who shall be subject to the like penalties as collectors appointed by the trustees. S. 51, no person to gain a settlement by renting tolls, or residence in toll-houses, not liable to poor-rates, &c. Lessees may make compositions with persons using the road. *Stott v. Clegg*, 32 L. J. C. P. 102.

A declaration against the sureties of a farmer of tolls under the General Turnpike Act (3 Geo. 4, c. 126), need not set forth a compliance with all the requisites contained in the 55th section as to the letting of such tolls. It is sufficient to state that they were duly let under the act. *Oldroyd v. Crampton*, 5 Scott, 256; 4 Bing. N.C. 24; 3 Hodges, 261; 1 Jur. 823:—*Semble*, however, that it is necessary to state that the agreement for such letting was in writing, and signed by the trustees, their clerk or treasurer, under the 57th section. (Id.) *See* 8 Q. B. 169; 8 L. T. (N. S.); Q. B. 277.

A. agreed in writing to pay the rent of certain tolls which he had hired "to the treasurer of the commissioners:"—*Held*, that no action for rent could be maintained in the name of the treasurer. *Pigott v. Thompson*, 3 B. & P. 147.

[5] The local acts ordinarily contain exemptions from toll. These should always be consulted. The 3 Geo. 4, c. 126, is not to take away exemptions granted by local acts. By 5 & 6 Wm. 4, c. 10, no toll to be taken for manure (32 L. J. M. C. 144), save and except lime. By 4 Geo. 4, c. 126, s. 26, exemptions from toll on manure, &c., or materials for roads contained in any act, to be in force, notwithstanding the same should be carried into or brought from an adjoining parish. By sect. 27, tolls payable on waggons going empty for manure, or road materials, &c., to be repaid when returning laden. By sect. 28, implements for loading and unloading shall not cause the payment of toll from which the lading would otherwise be exempt. By 4 Geo. 4, c. 95, s. 23, carriages laden with dung not to be exempted from toll when charged by any local act. By 3 Geo. 4, c. 126, s. 29, post-horses, having passed through any gate, may return toll-free before nine in the next morning. By sect. 30, horses having passed through a gate, and returning drawing a carriage, the toll paid on the horses to be deducted.

By 1 & 2 Wm. 4, c. 25, s. 1, cattle going to pasture (*see* 8 L. T. N. S. 319), or to be shod, &c., exempt from toll. By sect. 2, toll not to be taken for any horse, cart, &c., employed in the performance of statute labour. By sect. 4, act not to extend to gates near London. By 3 Geo. 4, c. 126, s. 32, horses and carriages attending his majesty, &c., or manure (*see* 32 L. J. M. C. 144), (except lime) or agricultural produce, not sold or for sale, or for horses employed in husbandry, &c., or for going to or returning from church, or attending funerals, or for ministers attending their duty, or for conveying vagrants, or prisoners, or for conveying the mails, or for horses of officers or soldiers on duty, or for conveying baggage, or any sick,

ordnance or public stores, or for horses and carriages used by corps of yeomanry, &c., or for conveying persons to or from county elections, or for crossing roads, or not passing above one hundred yards. By sect. 33, exemptions from toll on Sundays, &c., for persons going to and from church, not to extend within five miles of London, &c. By 4 Geo. 4, c. 16, s. 1, 3 Geo. 4, c. 126, not to authorise collector of tolls to take toll for lime unless authorised by some local act. By sect. 2, abatement to be made in cases of contract for tolls where toll on lime was considered to be payable, or contract to be void after the expiration of one month. By 4 Geo. 4, c. 95, s. 10, no exemptions by former acts to be claimed, unless carriages with four and a-half inch fellies are used.

The Crown.—By sect. 24, horses and carriages belonging to the royal family exempted from toll. The wife of a Crown equerry, taking a drive for her own pleasure in one of the queen's carriages, drawn by her majesty's horses, and driven by her majesty's coachman (such user of the carriage being by permission of her majesty), passed through a turnpike-gate in the county of Somerset, the equerry being then in London:—*Held*, that the carriage and horses were exempt from the payment of toll by virtue of the prerogative. *Westover v. Perkins*, 5 Jur. N. S. 1352; 28 L. J. M. C. 227: Q. B.

Police and other Officers.—The 2 & 3 Vic. c. 47, s. 10, and 3 & 4 Vic. c. 88, s. 1, exempt from toll on any turnpike road or bridge any horse or police-van, carriage, or cart passing along such road or bridge in the service of the metropolitan police and rural police respectively.

The 5 & 6 Vic. c. 47, s. 38, repeals the 1 & 2 Vic. c. 113, exempting officers of coast-guard and revenue mounted guard in the service of the Customs in discharge of their public duty, and in their uniforms, from the payment of any turnpike-tolls.

Clergymen on Duty.—By the 3 Geo. 4, c. 126, s. 32, no toll shall be taken from any rector, vicar, or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish:—*Held*, that a clergyman acting as curate of a parish with the permission of the bishop, though without his license, was within the exemption, and that the exemption extended to a turnpike not in the parish to which he was going on parochial duty. *Temple v. Dickinson*, 5 Jur. N. S. 363; 28 L. J. M. C. 10: Q. B.

Volunteers.—24 & 25 Vic. c. 126, exempts the volunteer forces from payment of tolls.

A captain of volunteer infantry, dressed in his uniform, and having his arms and accoutrements, according to the regulations of his corps, passed through a turnpike-gate in a carriage hired for the purpose of returning from drill:—*Held*, exempt from toll by 3 Geo. 4, c. 126, s. 32. *Stephenson v. Taylor*, *Tunstall v. Lloyd*, 1 El. B. & S. 95; 7 Jur. N. S. 602; 30 L. J. M. C. 145; 9 W. R. 600; 4 L. T. (N. S.) 243.

An omnibus hired by volunteers especially to carry them to a place of exercise is exempt from toll by 3 Geo. 4, c. 126, s. 32, though some of them are not in uniform, or though a person not a volunteer is allowed to sit in it, not paying for his seat. (Id.)

13 & 14 Vic. c. 79, s. 3, empowers trustees to reduce or wholly take off tolls on lime used in agriculture for improvement of the land; and by 14 & 15 Vic. c. 38, s. 4, the words "implements of husbandry," in 3 Geo. 4, c. 126, s. 36, are to include thrashing-machines.

A cart drawn by horses laden with manure for the manuring of land is exempt from toll. *Rex v. Adams*, 6 M. & S. 52. *Harrison v. James*, 2 Chit. 547. So, uncrushed bones, which are taken through a turnpike to be there crushed, and part of them used as manure. *Pratt v. Brown*, 8 Car. & P. 244. See 2 *King v. Gough*, 2 Chit. 655.

A steam-engine passed through a turnpike-road gate in going to a farm, to be there employed to work a thrashing-machine, which had just preceded it through the gate: though capable of being used for other purposes, it was employed only for working the thrashing-machine:—*Held*, that by the 3 Geo. 4, c. 126, s. 32, and 14 & 15 Vic. c. 35, s. 4, the steam-engine was exempt from toll as an "implement of husbandry." *Reg. v. Matty*, 4 Jur. N. S. 238; 27 L. J. M. C. 59: Q. B. 8 E. & B. 712.

It would be so if it was going by itself to work a thrashing-machine. (Id.).—*Campbell, C. J.*

Sect. 32 of 3 Geo. 4, c. 126, exempts from toll any horse or carriage carrying or conveying "any hay, straw, fodder for cattle, and corn in the straw, which has grown on land in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes, or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be sold or disposed of:"—*Held*, that barley grown on C.'s farm, which was being conveyed to a mill to be ground into meal for feeding pigs upon the farm, and barley-meal ground at the mill from barley grown on C.'s farm, which was being conveyed back to be consumed by pigs on the farm, were within the exemption as "fodder for cattle." *Clements v. Smith*, 6 Jur. N. S. 1149; 30 L. J. M. C. 16; 9 W. R. 53; 3 L. T. (N. S.) 295: Q. B.

The legal meaning of the term "stage waggon," when made use of in an exempting clause in a turnpike-act, is a conveyance that carries goods or passengers for hire from one fixed point to another. *Reg. v. Roscoe*, 8 Ad. & E. 386; 3 Nev. & P. 428; 1 W. W. & H. 435, 2 Jur. 888.

A waggon returning from London loaded with dung is not liable to be weighed and charged for overweight under 13 Geo. 3, c. 84, or 14 Geo. 3, c. 82, by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day. *Chambers v. Eaves*, 2 Camp. 393. As to carriages not upon wheels see *Radnor Roads v. Evans*, 32 L. J. M. C. 100; 7 L. T. (N. S.) 677.

VII. Injuries to, and Nuisance and Annoyance connected with.[1]

Toll is not payable for passengers' luggage in an omnibus, or for a sheep and lamb in a basket on the omnibus; or for a man riding a horse, under an act imposing toll separately on carriages, on portmanteaus, trunks, &c., on passengers and travellers, or sheep, lambs, &c., and on horses ridden or not ridden. *Portsmouth Floating Bridge Co. v. Nance*, 6 Man. & G. 222; 6 Scott, N. R. 823.

The question of exemption from toll cannot be tried on an indictment against the turnpike-keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken. *Rex v. Hamlyn*, 4 Camp. 379: *Ellenborough, C. J.*

The term "stage waggon," we have noticed, when made use of in an excepting clause of a turnpike-act, is a conveyance that carries goods or passengers for hire from one fixed point to another, at stated intervals (*R. v. Roscoe, ante*, 601). This or any other ground of exemption, when claimed, must be expressly specified to the turnpike-gate keeper at the time the toll is demanded. *R. v. Hamlyn, supra.*

Uncrushed bones, which are taken through a turnpike-gate to a farm to be there crushed, and part of them used as a manure, and the residue to be afterwards sold, and to be used as manure at other places, are exempt from toll under this statute. *Pratt v. Brown*, 8 Car. & P. 244.

A local act exempted from toll carriages with manure for lands in the parishes where the roads were; a cart going with manure for lands in a parish not within the trust was held still exempted under this general clause. *R. v. Adams*, 6 M. & S. 53. See *Hickinbotham v. Perkins*, 3 Moore, 185; 8 Taunt. 185, S. C.

Under an exemption from toll in an act for carts carrying compost of any kind, or anything whatever used in the manuring of land, the carriage of lime (which is not considered compost or composition) is not exempt; the words "or anything whatever used in the manuring of land" being considered as only applying to the carriage of ploughs, harrows, and such-like instruments. *Ring v. Gough*, 2 Chit. Rep. 655.

As to "used in travelling," *see* sched. B. 44 Geo. 3, c. 38; a hiring for the purpose of riding from London to Richmond and back, and also a hiring for fourteen days to go a journey, are hirings to travel; but that a hiring to go many miles into the country for pleasure, no place being fixed, or an hiring to take an airing, or to go ten or twelve miles into the country and return in the evening, are not any of them a hiring to travel. *Ramsden v. Gibbs*, 1 B. & C. 319; 2 D. & R. 617, S. C.

Where the toll was on the horses, but the exempting clause enacts that if any person should have paid the toll for passing, the same person, on producing the ticket, should be permitted to pass free with the same cattle or carriages. It was held that the toll, having been paid by the coachman on passing, for horses drawing a stage-coach, a second toll could not be taken for the same horses repassing, through with a different coach and coachman, but belonging to the same proprietor. *Norris v. Poate*, 3 Bing. 41; 10 Moore, 293, S. C. See *Fearnley v. Morley*, 5 B. & C. 25. *Jackson v. Curwen*, id. 31. *Chambers v. Williams*, id. 36. *Niblett v. Pottow*, 1 Bing. N. S. 81.

All the local acts provide that a person who has paid a toll shall not be liable to a second on the same day, but the right to claim the exemption in general depends on the language of each particular act. *Louring v. Stone*, 2 B. & C, 515; 3 D. & R. 802. See *Fearnley v. Morley*, 5 B, & C. 25. *Norris v. Poate, supra.*

[1] By 3 Geo. 4, c. 126, s. 113, ditches, &c. to be made by occupiers of lands for keeping the roads dry. By sect. 114, watercourses and drains may be turned. By sect. 115, expenses of repairing drains, &c. in towns to be defrayed between trustees and inhabitants. An account of the expense of repair to be laid before two justices, who shall proportion the amount to be paid by the parties.

By 4 Geo. 4, c. 95, s. 67, surveyors may make drains, &c.

By 3 Geo. 4, c. 126, s. 116, owners of adjoining lands to cut the hedges and branches of trees obstructing the road. If neglected for ten days the surveyor may complain to a justice, who may order the same to be done, on pain of forfeiting two shillings for every twenty-four feet in length of the hedge. Hedges, &c. may be trimmed at the expense of the defaulter. By sect. 117, time of cutting hedges and trees. By sect. 118, persons making encroachments on roads by reducing breadth, or narrowing limits thereof, or making drains across, or otherwise injuring roads, or turning the plough on the ground within a certain distance of the road, shall forfeit forty shillings; encroachments to be removed; soil and slips, who owner of. By sect. 114, laying rubbish, &c., removal of, expenses of; penalty for a second offence, 5*l*. By sect. 125, gates to open inwards; gates opening outwards to be removed; owners to pay the expense of removal, and forfeit not exceeding 40*s*. By sect. 127, no windmill to be erected within two hundred yards.

By 4 Geo. 4, c. 95, s. 76, carriers' dogs to be fastened to the carriage. By sect. 75, cattle tethered or found straying on the roads to be impounded, until payment of a sum and expenses; limiting the extent of penalty; right of pasturage not taken away.

By 3 Geo 4, c. 126, s. 123, punishing persons guilty of pound breach.

By 7 & 8 Geo. 4, c. 24, s. 16, trailing or driving, &c. on footways.

By 3 Geo. 4, c. 126, s. 130, one driver

VIII. Railway Regulations affecting Turnpike-Roads.
(A) *Before May* 8, 1845.[1] (B) *After May* 8, 1845.[2]

U.

UBI aliquid conceditur, conceditur et id sine quo res ipsa esse non potest. *Where anything is granted, that also is granted without which the thing cannot exist.* Broom's *Max.* 364.

UBI cessat remedium ordinarium, ibi decurritur ad extraordinarium. *Where the ordinary remedy fails, recourse must be had to an extraordinary one.* 4 Co. 92, b. *Slade's case.*

may take charge of two carts, provided they are drawn only by one horse each; not to extend to carts within ten miles of London. By sect. 131, children not to drive carts, &c. on penalty of 10*s*. By sect. 132, drivers of waggons or carts not to ride thereon, unless some other person on foot guide the same. Drivers of any carriage causing hurt or damage to others, or quitting the road, or driving the carriage without owner's name, or not keeping the left or near side, or interrupting free passage, the driver, if not the owner, to forfeit 40*s*.; if he be the owner, 5*l*. penalty on driver not discovering his name.

By 4 Geo. 4, c. 95, s. 73, if driver offend against the provisions of any act, and abscond, the master to pay the penalty. By sect. 15, for discovery of offenders, names of owners to be painted on waggon, &c. in the manner herein mentioned; penalty 5*l*.; other provisions. By sect. 16, loaded carts used on railways and tramroads not to be drawn on turnpike-roads; penalty. By sect. 2, nails of the tires of wheels of waggons, &c. to be so countersunk as not to project beyond one quarter of an inch above surface of tires; penalty on using them contrary hereto.

By 3 Geo. 4, c. 126, s. 126, directing the using of skidpans or slippers; penalty on driver not using them, not exceeding 20*s*.

By 7 & 8 Geo. 4, c. 30, s. 14, destroying turnpike-gate, toll-house, &c. By 3 Geo. 4, c. 126, s. 119, destroying other things.

By 3 Geo. 4, c. 126, s. 121, penalty on persons committing nuisances by riding on footpaths, or damaging bridges, &c., by drawing timber, &c., by injuring the road, by slaughtering of cattle, by obstructing the passage of travellers.

By 4 Geo. 4, c. 95, s. 72, wilfully injuring table of tolls, posts, &c.; by gravel-pits, buildings, &c.; casting rubbish into drains; scrapings of road; obstructing of passengers; penalty, 40*s*.

[1] Loaded carts used on railways not to be drawn on turnpike-roads; penalty.

By 2 & 3 Vic. c. 45, s. 1, proprietors of railroads to maintain gates where any railroad crosses the highway, &c.; penalty of 5*l*. for each day's neglect.

By 5 & 6 Wm. 4, c. 50, s. 113, highway act does not apply to turnpike-roads. Gates at level crossings to be kept closed across the road; proviso for gates to be kept closed across the railway. By sect. 12, power of making track communications with railways, and of entering upon them with locomotive engines, to be regulated by the Board of Trade; defining a passenger railway. By sect. 13, alterations of dangerous level crossings.

[2] Operations of 8 Vic. c. 20, to railways constructed after its passing. By sect. 11, limiting deviation from datum line described on section, &c. without consent of trustees of roads, &c.; proviso for notice of petty sessions to consent to deviation; meaning of word "town" in this section. By sect. 12, public notice to be given previous to making greater deviations; power to the owners of adjoining lands to appeal to the Board of Trade against such deviation. By sect. 13, arches, tunnels, &c. to be made as marked on deposited plans. By sect. 14, limiting deviations from gradients, curves, &c. By sect. 15, lateral deviations. By sect. 7, errors and omissions in plans to be corrected by justices. By sect. 16, works to be executed; inclined planes, &c. on roads, &c.; alterations of course of rivers, &c.; diverting roads, &c.; drains, &c.; warehouses, &c.; alterations and repairs; general power; proviso as to damages. Sects. 46–62 relate to crossing of bridges, over and under railway. By sect. 63, screens for roads to be made if required by the Board of Trade. By sect. 64, penalty for failing to construct screens. By sect. 65, justices have power to order repairs of bridges. By sect. 66, Board of Trade empowered to modify the construction of certain roads, bridges, &c., where a strict compliance with the act is impossible or inconvenient. By sect. 68, authentication of certificate of the Board of Trade, service of notices, &c.

See *Fawcett v. York and North Midland Railway Co.* 20 L. J. Q. B. 222; 15 Jur. 173. *Ex-parte Exeter Road Trustees*, 16 Jur. 669; and *London and North-Western Railway Co.* 20 L. J. M. C. 243.

UBI factum nullum, ibi fortia nulla. *Where there is no fact there can be no force; where there is no principal fact or act done, there can be no accessory act.* 4 Co. 42, b. *Syser's case.*

UBI jus, ibi remedium. *Where there is a right there is a remedy.* Hale; 2 Ld. Raym. 953; Lord Ken.; 1 East. 220.

UBI lex est specialis et ratio ejus generalis, generaliter accipienda est. *Where a law is special, but the reason of it general, it is to be taken generally.* 2 Inst. 43.

UMPIRE. *See* Arbitration, vol. i. p. 479. Arbitrators under Public Health Act may appoint after the twenty-one days for making their award. *Holdsworth v. Bartham*, 11 W. R. 733.

UNCERTAINTY.[1]

UNDEFENDED Cause. *See* Trial, *ante*, p. 565.

UNDERLEASE.[2]

UNDERTAKING to Appear.[3]

UNDERWRITER.[4]

UNITY of Ownership.[5]

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[1] In pleading (see *ante*, p. 139), an agreement will not be enforced if the terms of it are uncertain. *Taylor v. Portington*, 7 D., M. & C. 20. A deed is void for uncertainty where it is totally uncertain on the face of it who is or are intended to be grantee or grantees. An instrument which is left blank in any material part is incapable of operation until such blank is filled up, although executed by the parties, and does not become effectual by the subsequent filling up the blank by a stranger in the absence of the parties, unless he is authorised to do so by deed. 3 Jarm. & Byth, by Sweet, 19. *See* 1 Wils. 215; 2 C. & M. 539; and Ambiguity, vol. i. p. 319.

[2] A lease granted by one who is himself a lessee for years for any less period than he himself holds. If the lessee pass all the estate or term, it is an assignment; but if it be for a less portion of time than the whole term, it is an underlease, and leaves a reversion in the termor. *See* vol. v. p. 349, n. 4. 1 Platt on Leases, 101.

[3] If an attorney undertake in writing to appear for a defendant, he must do so, otherwise the court will punish him by attachment. *See* R. M. 1654, K. B.; id. 1654, s. 13, C. P. *Mould v. Roberts*, 4 D. & R. 719. *Stratton v. Burgis*, 1 Stra. 114. *Morris v. James*, 6 Dowl. 514. *See* Reg. Gen. (H. T.) 1853, r. 23. But a previous request is necessary, and a refusal or neglect to comply with it must be shown before the court will grant the attachment (*Jacob v. Magnay*, 12 L. J. Q. B. 93); and he may, for such default, be ultimately struck off the roll (*Hudson v. Handley*, 1 C. & J. 373), as well as pay the costs of the application. See *Wilson v. Northorp*, 2 C., M. & R. 326. *Chilton v. Ellis*, 2 Dowl. P. C. 338. Such an undertaking, whether given by the attorney or by the defendant himself, upon sight of the writ or after the service, waives all irregularity in the writ itself, and in the copy left. *Anon.* 1 Chit. 129. An attorney who gives an undertaking of this nature must enter such an appearance as the plaintiff can act upon. Therefore, if the writ be against husband and wife, he must enter an appearance for both; if against an infant, he must appear by guardian, otherwise the appearance may be set aside. *Wigg v. Rook*, 6 Mod. 88.

[4] In insurance law an insurer, so called from his underwriting or subscribing the policy. The term is applied indiscriminately to corporations and individuals.

[5] When an easement or servitude has become extinct by reason of the ownership of the dominant and servient estates having become centered in the same person, and he again conveys away that estate to which the easement or servitude has belonged, the general rule is, if he merely grants such estate with the appurtenances the covenant is not revived unless it is a visible apparent easement, but if he grants it with all easements, &c. therewith used and enjoyed, that operates as a revival, and any other words clearly intended to have such an effect will operate in the same manner. If a right of way has become extinguished by unity of ownership of the dominant and servient tenements, and the messuage for which the right of way was anciently used is subsequently severed from the land over which the way passed, and is conveyed "with all ways, roads, rights of road, paths, and passages thereto belonging, or in anywise appertaining," the extinct right of way is not revived, and does not pass by the conveyance of the house unless it is a visible apparent way. *Barlow v. Rhodes*, 1 C. & M. 448; Add. Torts, 59. *Plant v. James*, 5 B. & Adol. 794. *James v. Plant*, 9 Ad. & E. 764. *Bradshaw v. Eyre*, Cro. Eliz. 570. *Leery v. Pigot*, Poph. 172; Palm. 444; *Popham, C. J., Lady Brown's case*, cited Palm. 446. *See* Add. on Torts, 59.

UNITY of Title. *See* Joint-Tenants, vol. v. p. 256.

UNIVERSITIES.[1]

[1] *See* 13 Eliz. c. 29; 17 & 18 Vic. c. 8; 18 & 19 Vic. c. 36; and as to Scotch universities, *see* 21 & 22 Vic. c. 83. Oxford and Cambridge, through their chancellors, are entitled to interpose a claim of conusance. *Thornton v. Ford*, 15 East, 634. *Williams v. Brickenden*, 11 id. 543. *Perrin v. West*, 1 Har. & W. 401, for Oxford; and *Brown v. Renourd*, 12 East, 12, where a resident of either of these universities is sued in another court, Gilb. C. P. 193. *Hayes v. Long*, 2 Wils. 310. *See* Conusance, vol. iii. p. 213.

The interpretation put by the universities on their own statutes is said to be conclusive. *R. v. the Chancellor of Cambridge*, 6 T. R. 89. *See* id. 107.

A member of the University of Oxford cannot be arrested by civil process out of the court of the chancellor of the university, unless such process issue in a suit commenced against him whilst resident within the precincts of the university. *Perrin v. West*, 5 Nev. & M. 291; 3 Ad. & E. 405; 1 Har. & W. 401; and see *Thornton v. Ford*, 15 East, 634.

Where an attorney, residing at Oxford, had caused a writ of summons to issue from the Queen's Bench, in a personal action, at the suit of another party, against a member of the university:—*Held*, that the chancellor's court of the university had not authority, on his refusing to obey a citation, to give judgment, requiring him to stop all proceedings and pay the costs, and to issue a warrant to imprison him till he should have paid them. *Reg. v. the Chancellor, &c. of the University of Oxford*, 11 L. J. Rep. Q. B. (N. S.) 37. S. C. *In re the Chancellor, &c. of the University of Oxford*, 1 Q. B. 952.

A *mandamus* is the proper mode of trying the validity of an election to a vacant fellowship (*R. v. Gregory*, 4 T. R. 240; *see* 5 Russ. Rep. pp. 65, 73, 85; 2 Russ. & Mylne, 590, 603), though, where necessary, an issue may be granted. *Sondys v. Sondys*, 1 Ad. & E. (N. S.) 316, n.

The appointment of a visitor may be collected from the general tenor of the statutes. *St. John's College, Cambridge, v. Toddington*, 1 Burr. 158; 1 Ld. Ken. 441. S. P. *Rex v. Bishop of Ely*, 1 W. Black. 71. If there be any exception to the power of a visitor, the jurisdiction devolves to the king's courts. (Id.) The visitor of an ancient college is visitor also of ingrafted foundations, unless a special visitor be appointed, notwithstanding a remedy by distress is also provided for by the new founder. (Id.) And a new visitor can only be appointed at the time of the new ingraftment, by the college accepting the donation under that condition. (Id.) A visitor's power may be limited by the founder. (Id.) Visitors, to certain times, may visit whenever called in. (Id.) But, acting within his jurisdiction, his acts are not controllable; but if he act out of it, they are void (*Rex v. Bishop of Chester*, 1 W. Black. 22); and he may visit whenever he pleases. (Id.) The power to interpret statutes constitutes a visitor. *Rex v. Bishop of Ely*, id. 71. Visitatorial power may be delegated generally or specially. (Id.) It is incidental to the office of visitors to hear complaints. (Id.) There is no appeal from a visitor. (Id.) A *mandamus* does not lie to a visitor, where he is clearly acting under a visitatorial authority. Id. 2 T. R. 290, 345. But, if the visitor of a college in one of the universities refuse to exercise his visitatorial power by receiving and hearing an appeal, the court will grant a *mandamus* to compel him. Id. 5 T. R. 475; and see *Rex v. Bishop of Lincoln*, 2 id. 338. *Phillips v. Bury*, id. 346. *Rex v. Bishop of Worcester*, 4 M. & S. 415.

The vice-chancellor and heads of the colleges in the University of Cambridge have authority to make a decree that every tradesman with whom every person *in statu pupillari* should contract a debt exceeding 5*l.* should require to send notice thereof at the end of every quarter to the college tutor of the person so indebted, on pain of being punished by discommoning or otherwise, as to the vice-chancellor and heads of colleges should seem fit. *Ex-parte Death*, 17 Jur. 112; 21 L. J. Q. B. 337.

By 21 & 22 Vic. c. 90, s. 4, the general council of medical education and registration is to consist of one person chosen from time to time by each of the several bodies therein named, and by the University of London:—*Held*, that the authority to choose such member is vested in the senate, consisting of the chancellor, vice-chancellor, and fellows for the time being, and not in the whole body of the graduates of the university. *Reg. v. Storrar*, 5 Jur. N. S. 1304; 28 L. J. Q. B. 326.

Where the University of Cambridge claimed conusance in the case of A., B., and C., alleged in the claim to have been summoned in an action of trespass at the suit of D., against the form of the privileges of the university, and the affidavit stated that B. and C. were servants of the university called "Proctor's men," and that the trespass was an act done by them in the discharge of their duty, in obedience to the order of a pro-proctor of the university:—*Held*, that an affidavit might be received in answer, showing that B. and C. were constables appointed under 6 Geo. 4, c. 97, and therefore, by sect. 1, liable to be sued at common law, notwithstanding any privilege of the university. *Turner v. Bates*, 10 Q. B. 292.

In an action by an indorsee against a maker of two promissory notes, with a count for interest, the defendant pleaded to the

UNLAWFUL Assembly. *See* Riot, *ante*, p. 346.

Combination and Confederation. *See* 39 Geo. 3, c. 7, s. 79; 57 Geo. 3, c. 19, s. 25.

Oaths. *See ante*, p. 19.

UNNATURAL Offence.[1]

UNO Flatu. *See* 3 Man. & G. 45.

USAGE.[2] *See* Custom, vol. iii. p. 532.

justification of the count that he was a member of the University of Oxford, and resident within the suburbs of the borough and city of Oxford and the University of Oxford, and a student and scholar thereof, and that the causes of action arose in respect of the promissory notes, which were made and given by the defendant within the borough and city of Oxford, and within the University of Oxford, as securities for money lent to the defendant within the borough and university, and that the cause of action in the third count arose in respect of interest which had become due in respect of the notes. The plea set out the charters granted to the University of Oxford in 28 Hen. 3 and 20 Edw. 3, with the stat. 13 Eliz.:—*Held*, on general demurrer, a bad plea. *Dormor v. Howard*, 9 Jur. 737, Ex.

A milliner residing in Cambridge was apprehended by the proctors while proceeding to a party given by a bachelor of arts of the university and his friends, and conveyed by them to the spinning-house, a gaol used by the university for confining women suspected of evil found within its precincts. Upon arriving at the gaol the vice-chancellor was sent for, and he heard the statements of the proctors and examined the woman, but not on oath, and finally committed her for imprisonment, but no warrant in writing was made out. An action of trespass was brought by her against the vice-chancellor:—*Held*, first, that as the charter, in express terms, invested the vice-chancellor with authority to punish by imprisonment or otherwise, as he should think fit, he thereby became invested with judicial authority as a judge of record, and entitled to all the protection attached by law to the judicial office. *Kemp* or *Ebon v. Neville*, 7 Jur. N. S. 913; 10 W. R. 6; 4 L. T. (N. S.) 640, C. P.; 10 C. B. 523; 31 L. J. C. P. 158:—*Held*, secondly, that as judges of a court of record have power to commit to the custody of their officer, *sedente curia*, by oral command, without any warrant made at the time, and that as the vice-chancellor was a judge of a court of record, therefore a warrant was not necessary, and a committal in the exercise of this peculiar jurisdiction, where no special method was directed by the charter, although it was not shown to be made under a warrant, gave no cause of action. (Id.):—*Held*, thirdly, that the hearing was legal, as there was no express provision in the charter which enabled him to administer an oath, and that it was not essential for the purpose that he should do so. (Id.):—*Held*, fourthly, that the place of confinement appeared to be the accustomed place used for that purpose by the university, and therefore that the usage must be presumed to be lawful till the contrary was shown. (Id.)

[1] By 24 & 25 Vic. c. 100, s. 161, "whosoever shall be convicted of the abominable crime of buggary, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than ten years. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour. Whenever upon the trial for any offence punishable under this act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only." *See* 9 Geo. 4, c. 31, s. 15; Arch. C. Pl. 619.

[2] Includes both custom and prescription, but is ordinarily applicable to trade, defining the habits, modes, and course of dealing which are generally observed, either in any particular branch of trade or in all mercantile transactions. 2 Grant, *Evid.* s. 248.

The office of an usage is strictly one of exposition, and it is allowable to be given in evidence as one means of arriving at the intention of the parties, and can never be received to contradict it when it is clearly and fully expressed.

In resorting to evidence of usage for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical and words which have two meanings; the one, common and universal; the other, technical, peculiar, or local. In either case, extrinsic evidence of usage will alike be admissible to define and explain the technical, peculiar, or local meaning of the language employed. *Shore v. Wilson*, 9 Clarke & Fin. 355–580: *per Lord Cottenham*. *See* also

Attorney-General v. Drummond, 1 Dru. & War. 353. The word "inhabitants," (*R. v. Mashiter*, 6 Ad. & E. 153. *R. v. Davie*, id. 386. *Level Glayton v. Gregson*, 5 id. 302), as understood by miners (*Smith v. Wilson*, 3 3 B. & Ad. 728), recognised by Williams, J. in *Shore v. Wilson*, 9 Clarke & Fin. 543; "thousand," as locally applied to rabbits in a warren; "weeks," as used in a theatrical contract (*Grant v. Maddox*, 16 L. J. Ex. (N. S.) 227); "day," as meaning working days in a bill of lading (*Cochrane v. Retberg*, 3 Esp. 121); *Astor v. Universal Ins. Co.* 7 Cowen, 202); "fur freight," (*Peisch v. Dickson*, 1 Mas. 11, 12. *Gibbon v. Young*, 2 Moore, 224. *Lewis v. Marshall*, 7 Man. & G. 729, 743, 744; 8 Scott, N. R. 477); and many other expressions, which *primâ facie* presented no ambiguity, have been interpreted by extrinsic evidence of usage. So the meaning of the phrase "duly honoured," when applied to a bill of exchange (*Lucas v. Groning*, 7 Taunt. 164), of the words "in turn to deliver," contained in a charter-party (*Robertson v. Jackson*, 2 C. B. 412), and of the expression, "in the month of October," as fixing the part of a month within which a vessel was to sail (*Chaurand v. Angerstein*, Peake, R. 43. *See* also *Robertson v. Jackson*, *supra*. *U. S. v. Breed*, 1 Saund. 159), has been ascertained by parol evidence of mercantile usage. So where a ship was warranted to depart with convoy, extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken, and to that place the parties were presumed to refer. *Lethulier's case*, 2 Salk. 443, recognized by Williams, J. in *Shore v. Wilson*, 9 Clarke & Fin. 543. *Taylor v. Briggs*, 2 C. & P. 525. *Bold v. Rayner*, 1 Mee & W. 343; Tyr. & Gr. 820. S. C.). So parol evidence has been admitted to show that, by usage in the hop trade, a sale of ten pockets of Kent hops at 5*l.* means 5*l.* per cwt. *Spicer v. Cooper*, 1 Q. B. 424; 1 Gale & D. 52, S. C.

Policies have been explained by evidence of the understood practice of making voyages in particular branches of trade. *See Trueman v. Loder*, 11 Ad. & E. 600; and *Milward v. Hibbert*, 3 Q. B. 136, 137. But though evidence of usage may be admissible to explain what is doubtful, it is not admissible to contradict or vary what is plain (*Blackett v. Roy. Ex. Ass. Co.*; 2 C. & J. 249, 250: *per Lord Lyndhurst*). Thus, if a word denoting weight, measure, or number, has had a definite meaning attached to it by the legislature, parties using that word in a written contract will be conclusively presumed to have used it in such sense, unless the contrary clearly appear from some part of the writing itself (*Smith v. Wilson*, 3 B. & Adol. 731, 734: *per Lord Tenterden, and Parke, J. Hockin v. Cooke*, 4 T. R. 314. *Attorney-General v. Cast-Plate Glass Co.* 1 Anst. 39. *Noble v. Durell*, 3 T. R. 271. *Stoeveer v. Whitman* 6 Bing. 417. Parol evidence of usage or custom is not confined to cases where the written instrument is expressed in ambiguous technical language, for it is certainly sometimes admissible "to annex incidents," as it is termed. For instance, though a bill of exchange or promissory note be silent as to any days of grace, parol evidence of the known and established usage of the country or place where the bill or note is payable, is admissible to show on what day the grace expired. *See* Table, Chit. Bill of Ex.; Taylor's Evid. 767.

The incident proposed to be annexed by parol must not be repugnant to or inconsistent with the contract, for otherwise it would not go to interpret and explain, but to contradict what is written. *Holding v. Pigott*, 7 Bing. 465, 474; 5 M. & P. 427, S. C. *Clarke v. Roystone*, 13 Mee & W. 752. *Yeats v. Bein*, Holt, N. P. R. 95, nom. *Yates v. Pym*, 6 Taunt. 446 S. C. *Trueman v. Loder*, 11 Ad. & E. 589; 3 Per. & D. 267, S. C.

It is not necessary that the usage should have been immemorial, or even established for a considerable period, or uniform, or capable of being defined with precision and accuracy. Thus, "the custom of the country," with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the land lies (*Legh v. Hewett*, 4 East, 154, 157; *per Lord Ellenborough*. *Dalby v. Hirst*, 1 B. & B. 224, 227, 228; 3 Moore, 536 S. C.), and the general usage of trade may be imported into a contract, though proof has been given of exceptions to such usage (*Vallance v. Dewar*, 1 Camp. 508: *per Lord Ellenborough*). Whenever evidence of usage is adduced, whether it be for the purpose of explaining the technical language of an instrument, or of annexing incidents to it, the party against whom it is offered is always at liberty to prove either, first, the non-existence of the usage; or secondly, its illegality or unreasonableness; or, thirdly, that in fact it formed no part of the agreement between the parties. *Bourne v. Gutliffe*, 3 Man. & G. 684: *per Alderson, B. Bottomley v. Forbes*, 5 Bing. N. C. 127, 128: *per Tindal, C. J. Bourne v. Gutliffe*, 3 Man. & G. 643; 3 Scott, N. C. 1. See *Trueman v. Loder*, 11 Ad. & E. 597; 2 Tay. Ev. 771.

The course of inquiry is to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or commerce under investigation (*Robertson v. Jackson*, 2 C. B. 412). It has been doubted whether the practice of admitting parol evidence in these cases has not been carried to an inconvenient length. See *Anderson v. Bilcher*, 2 B. & P. 168: *per Tindal, C. J.*, in *Whittaker v. Mason*, 2 N. C. 369, 370; and *per Curran*, in *Trueman v. Loder*, *supra*. The cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the par-

USANCE. *See* vol. ii. p. 470.

USE and Occupation. *See* also Attornment, vol. ii. p. 63; Double Rent, Double Value, vol. iv. p. 128; Landlord and Tenant, vol. v. p. 296; Lease, id. p. 338.

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I. Form of Action.[1]

ties, wherein the supposed usage or custom was not relied on. *Bourne v. Gutliffe*, 3 Man. & G. 643. See *Lucas v. Bristow*, 27 L. J. Q. B. 364. *Humfrey v. Dale*, id. 390.

[1] The 11 Geo. 2, c. 19, s. 14, was introduced by the legislature to obviate the frequent difficulties which occurred in the recovery of rent where the demise was not by specialty, which provides, that it shall be lawful for the landlord, in such a case, to recover a reasonable satisfaction for the lands, &c. occupied by the defendant, in an action on the case, for the use and occupation of what was so held and enjoyed; and if it shall appear that there was a parol demise, or an agreement (not by deed) whereon a certain rent was reserved, the plaintiff shall not, therefore, be nonsuited, but shall make use thereof as evidence of the *quantum* of damages to be recovered. And if a tenant for life die before or on the day on which any rent was made payable upon any lease, which determined on the death of such tenant for life, his executors may, in an action on the case, recover the whole or a proportion of such rent, according to the time when such tenant for life lived, of the last year, or quarter of a year, in which the said rent was growing due. This action being founded on a contract, express or implied (*Birch v. Wright*, 1 T. R. 378), it will not lie where the holding of the tenant is adverse and tortious (*Tew v. Jones*, 13 Mee. & W. 12), unless the plaintiff abstains from considering it as such by waiving the tort: hence an action of ejectment, and for use and occupation, if resorted to at the same time, would be incongruous and unsustainable.

If there be an agreement by deed to let a house, &c., by words not amounting to an actual demise, the plaintiff should sue for use and occupation (4 Esp. 59); and in cases where there is no specific rent agreed on, the action for use and occupation seems the only remedy. *Dunk v. Hunter*, 5 B. & A. 322; *see* 3 Bing. 361. And if a tenant hold over, the landlord may treat him as his tenant. 1 Camp. 360; 1 T. R. 162, 386. So where the plaintiff was entitled to a cottage after his mother's death, and the defendant had resided in it with the mother, rent free, until her death, and had since continued in possession, and had paid no rent, it was held that the plaintiff might recover in this action. *Hellier v. Sillcox*, 19 L. J. Q. B. 295. So where A., being seised in fee, mortgaged in fee to B., and then leased to defendant. D. purchased the legal estate from B., and also the equitable estate from a party who derived it from A., which party also joined in the conveyance of the legal estate:—*Held*, that that D., though he received rent from the defendant, was not bound by A.'s lease to him, but might sue for use and occupation after the payment and receipt of rent. *Doe v. Thompson*, 9 Q. B. 1037. *Pollock v. Stacey*, id. 1033.

In the case of a corporation, the law will imply not only a promise but an existing tenancy in those who hold the land of a corporation. *Stafford* (*Mayor, &c. of*) *v. Till*, 4 Bing. 75.

Where a corporation are the tenants, they are only liable for the period of actual occupation; and a continuous occupation for several years will not render the corporation tenants from year to year. *Finlay v. Bristol, &c. Railway Co.* 21 L. J. Ex. 117.

Debt also lies at common law for use and

II. Requisites to Sustain the Action.

(A) *The Contract between the Parties.*[1]

occupation of houses or land, &c., on a demise not under seal. *Eyler v. Marsden*, 5 Taunt. 25. *King v. Fraser*, 6 East, 348. *Gibson v. Kirk*, 1 Q. B. 850. And covenant or debt is the only remedy for rent due on a lease under seal. But an executory agreement under seal for a future lease will not prevent the lessor from suing in *assumpsit*. *Banister v. Usborne*, Peake, Ad. Ca. 76.

Where there has been an actual enjoyment, the action is maintainable for the rent of incorporeal hereditaments (*Carmarthen (Mayor of) v. Lewis*, 6 C. & P. 608), as for a fishery (*Holford v. Pritchard*, 3 Ex. 793), or a right of working mines. *Jones v. Reynolds*, 4 Ad. & E. 805. *Bird v. Higginson*, 2 id. 696. So it is sustainable though there were no demise by the plaintiff to defendant, and the title of the plaintiff accrued from the defendant's landlord pending the defendant's tenancy, and the defendant has not attorned as in case of mortgagee or trustee (*Moss v. Gallimore*, Dougl. 279 *Rennie v. Robinson*, 1 Bing. 147. *Burrough v. Grädin*, 1 D. & L. 218); but in the absence of privity, the plaintiff must show a legal title to the premises. *Stephens v. Lynn*, 8 C. & P. 389. *Cornish v. Searell*, 8 B. & C. 471.

A receiver of an estate in which the plaintiff had an equitable interest, under a settlement vesting it in trustees, let the defendant into possession under an agreement with himself, in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. The plaintiff declining to sanction any other than a yearly letting, a correspondence ensued between him and the defendant, in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, and he did leave before he had been six months in possession:—*Held*, that he was not liable to the plaintiff, either in trespass or for use and occupation; and, *semble*, that he was not liable at all. *Sloper v. Saunders*, 29 L. J. Ex. 275.

[1] The action is based upon a contract, express or implied. If it be in writing, it must invariably be produced duly stamped, and proved. If verbal, the witnesses present at the making should prove the terms. The contract may be implied from circumstances, and if it appear on the plaintiff's own showing, or on cross-examination of his witnesses, that there was a writing defining the terms of the tenancy, the plaintiff will, on *non-assumpsit*, be nonsuited. *Brewer v. Palmer*, 3 Esp. 213. See *post*, 613. If the written agreement should appear after the plaintiff had got through his case, it will be no ground of nonsuit, and the defendant cannot put it in without producing it stamped. *Fry v. Chapman*, 5 Dowl. 265. *Fielder v. Ray*, 6 Bing. 332. *Rex v. Padstow (Inhabitants of)*, 4 Ad. & E. 208. Where the defendant has entered into a contract of sale, which ultimately goes off, and his occupation has been a beneficial one, he is liable in this action on an implied contract. *Hearn v. Tomlin*, Peake, 192. *Howard v. Shaw*, 8 Mee. & W. 118. *Winterbottom v. Ingham*, 14 L. J. 2 B. 298; 7 Q. B. 611: *aliter* when the occupation has not been beneficial (id.); or when the plaintiff has derived an equivalent benefit from the contract, as where he retains the purchase-money during the whole time of the occupation. *Kirtland v. Pounsett*, 2 Taunt. 145. When the vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although a jury found that the occupation has been beneficial. *Winterbottom v. Ingham*, *supra*.

In an action for use and occupation, it was proved that one K., the superior landlord, had let the premises to the plaintiff, who underlet them to the defendant for the whole of his term, leaving no reversion in himself. There was evidence of the defendant having, upon the expiration of his tenancy, applied to K. for a fresh term, and of such application being refused by K., who referred the defendant to the plaintiff as being the tenant. The defendant having continued to occupy after the expiration of the term, the plaintiff sued him in respect of such occupation, and after action paid rent to K. for the time the defendant had so held over:—*Held*, that there was evidence from which a jury might infer a contract that the defendant should pay the plaintiff for the occupation of the premises. *Levy v. Lewis*, 5 Jur. N. S. 1408; 28 L. J. C. P. 304.

The defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of a township, an annual sum of 6*l*. 14*s*. 8*d*., expressed to be for rent for common lands. It was admitted that the defendant was in possession of the lands out of which the rent issued, but were not identified, and no evidence was given of their extent or value. The defendant would not produce his deeds:—*Held*, that there was evidence on which a jury might find for the plaintiff on a count for use and occupation. *Harden v. Hesketh*, 4 H. & N. 175; 28 L. J. Ex. 137.

An action for use and occupation cannot be maintained against a lessee of premises who has not entered. *Lowe v. Ross*, 19 L. J. Ex. 318; 5 Ex. Rep. 553. *Glen v. Dungey*, *post*, p. 610.

Where the plaintiff was entitled to a cottage after his mother's death, and the defendant had resided in it with the mother, rent free, until her death, and had since continued in possession, and had paid no rent, it was held that the plaintiff might recover in an action for use and occupation.

Hellier v. Sillcox, 19 L. J. Q. B. Rep. N. S. 295.

Use and occupation is not maintainable where the express agreement is void by reason of fraud, but the tenant, having paid the rent to the superior landlord, the count for money paid was supported. *Davy v. Cracknell*, 1 F. & F. 59.

The defendant agreed to rent a house, the landlord to put it in repair before the tenancy should commence. While the men employed by the landlord were at work, the defendant went on the premises and gave them some directions as to the colour of the staircase:—*Held*, no evidence of entry such as would support an action for use and occupation. *Towne v. D'Heinrich*, 13 C. B. 892; 17 Jur. 1102; 22 L. J. C. P. 219.

In *Hall v. Vaughan*, 6 Price, 157, a defendant was holden liable where he obtained possession under a false representation. Where A. and B. entered into an agreement to take premises of C. from a day certain at a yearly rent, the agreement was not signed by the plaintiff. In an action for use and occupation, B. suffered judgment by default, and the evidence showed only an entry by A.:—*Held*, to be evidence of a parol demise to A. & B. upon the terms of the agreement, and that his entry was, therefore, the entry of both, and justified the verdict for the plaintiff. *Glen v. Dungey*, 18 L. J. Ex. 359. The plaintiff, a co-director with defendant of a company, let some premises to the company; the plaintiff to recover must prove an express contract in writing, duly stamped: he cannot sue on an implied one. *Chadwick v. Clarke*, 1 C. B. 700.

An owner of premises let them, for a term, to the plaintiff, who afterwards underlet (reserving no reversion in himself) to the defendant. The term expires, and the defendant applies to the owner for a grant of a fresh term, but is refused by the owner, who in two several letters declines any further negotiation with the defendant unless the plaintiff should, by a given day, deliver the key to him; this is not done, and the defendant holds on, and the plaintiff pays rent to the owner in respect of these premises, though after action brought:—*Held*, that there was evidence in those facts to go to the jury to show that the defendant held under the plaintiff, so as to enable him to sue for use and occupation. *Levy v. Lewis*, 9 C.B. (N. S.) 872; 7 Jur. N. S. 759; 30 L. J. C. P. 141; 9 W. R. 388, Ex. Cham.

[1] Where an actual contract of tenancy between plaintiff and defendant exists, no evidence of title will be requisite, it being an established rule that a tenant cannot dispute his landlord's title (5 T. R. 5. *Phipps v. Sculthorpe*, 1 B. & A. 50; 7 Moo. 298; Holt, 491; 1 Wils. 314. *Cooke v. Loxley*, 5 T. R. 4); and it is not material that plaintiff should have the legal estate. *Hall v. Vaughan*, 6 Price, 157. And where defendant came in under plaintiff, he cannot even show that plaintiff's title has expired (4 T. R. 682; 3 M. & S. 516); unless defendant can also prove that he solemnly renounced such title at the time of the expiration, and attorned to the party having the title, by paying him rent or otherwise. *Cobb v. Carpenter*, 2 Camp. 13 (n.); 2 Stark. 230; 14 East, 488; 1 Bing. 360. Where the plaintiff has at any time distrained on the defendant for rent in arrear, and he does not replevy, it will afford strong evidence of the plaintiff's right. *Panton v. Jones*, 3 Camp. 372. So if defendant has ever paid rent to the plaintiff (*Hearn v. Tomlin*, Peake, 192. *Kirtland v. Pounsett*, 2 Taunt. 145; 2 Bing. 10); but the tenant might show that the payment was made under a misrepresentation. 1 Marsh. 514. *Rogers v. Pitcher*, 6 Taunt. 202; 7 Moo. 299; 3 Bing. 475; 1 B. & P. 326. And the payment of rent by a lessee to a lessor, after the title of the latter has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, unless, at the time of payment, it be proved the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title has expired. 9 Moo. 38; 2 Bing. 10; and *see* 3 Bing. 475. The effect of the payment of rent may be destroyed by the non-claim of rent for several years, and by showing a strong ground to suspect the title of the party to whom the attornment was made. 7 Moo. 289.

Tenants in common may join in suing, for use and occupation, a tenant holding under them. *Last v. Dinn*, 28 L. J. Ex. 94.

The assignee of the reversion may maintain this action (*Rennie v. Robinson*, 1 Bing. 147. *Standen v. Chrismas*, 10 Q. B. 135); but can only recover in respect of the use and occupation subsequent to the assignment to him. *Mortimer v. Preedy*, 3 Mee. & W. 602. So also the assignee of a mortgagor who has let a tenant into possession after the mortgage. *Hickman v. Machlin*, 28 L. J. Ex. 310. This action will also lie against the assignee of a tenancy created by simple contract who has occupied the premises. *How v. Rennett*, 3 Ad. & E. 659.

[2] The action is founded upon the use and occupation of premises by the defendant by the express or implied permission of the plaintiff. An implied promise may result from the mere fact of occupation (*Hellier v. Sillcox*, 19 L. J. Q. B. 295), and it may be sustained without proof of use and enjoyment, as where a tenant under a demise having entered and taken possession of the premises, has afterwards quitted before his term has expired, on the ground that the premises were dilapidated and untenantable, and the landlord would not repair

(D) *Premises used for Immoral or Illegal Purpose.*[1]

(E) „ *Untenantable or Uninhabitable.*[2]

(*Surplice v. Farnsworth*, 8 Scott, N. R. 307; 7 Man. & G. 579), or were burnt down, and the landlord would not rebuild. But see *Taylor v. Caldwell*, 32 L. J. Q. B. 164.

Evidence of an actual occupation by the defendant is not essential; proof of the contract or tenancy will suffice, and he need not prove that the defendant, in fact, entered and occupied the premises: it is sufficient if the defendant might have done so if he pleased, and was not prevented by the plaintiff. *Harland v. Bromley*, 1 Stark. 455. *Whitehead v. Clifford*, 5 Taunt. 519. *Pinero v. Hudson*, 6 Bing. 206. *How v. Kennett*, 3 Ad. & E. 663. *Woolley v. Watling*, 7 C. & P. 610. *Ward v. Mason*, 9 Price, 291. But a tenant who has agreed to take furnished lodgings, but has not entered, is not liable in this action (*Edge v. Strafford*, 1 C. & J. 391. *Woolley v. Watling, supra*); and it seems the assignees of a reversion cannot maintain the action for rent due before the assignment, there being then no occupation of plaintiff's property by defendant. *Mortimer v. Preedy*, 3 Mee. & W. 602.

The action is maintainable where no certain rent has been reserved, and there is, consequently, no right to distrain. *Waring v. King*, 8 Mee. & W. 574. *Hamerton v. Stead*, 5 D. & R. 211; 3 B. & C. 482. A lessor may, in this form of action, recover the rent or compensation reserved or agreed to be paid for the working of a mine (*Jones v. Reynolds*, 4 Ad. & E. 805), and compensation for the actual enjoyment of an incorporeal hereditament. *Holford v. Pritchard*, 3 Ex. 793. The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day, so long as the occupation lasts. *Packer v. Gibbins*, 1 Q. B. 421. Very slight circumstances, such as entry on the lands, the putting up a notice or advertisement, sending a woman to clean windows or rooms, or workmen to put up paper or do repairs, will suffice to establish the fact of entry and of actual occupation. *Sullivan v. Jones*, 3 C. & P. 579. *Smith v. Towart*, 2 M. & C. 481.

Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both, so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 C., M. & R. 172.

Where a person holds over and pays rent it is conclusive evidence of a tenancy. *Bishop v. Howard*, 2 B. & C. 100. *Freeman v. Jury*, M. & M. 19. *Jenner v. Clegg*, 1 M. & R. 215. See *Woodcock v. North*, 8 Bing. 170. But the holding over of one of two joint tenants will not charge the other with the rent. *Draper v. Crofts*, 15 Mee. & W. 166. An executor of a yearly tenant holding on and paying rent is liable. *Buckworth v. Simpson*, 1 C., M. & R. 834.

If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies and receives the profits of the land, he is liable in this form of action for a reasonable compensation, to be paid to the owner for the use and enjoyment of the property. *Mayor of Thetford v. Tyler*, 8 Q. B. 100. But if he take possession of property as a purchaser under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain consequently goes off, the purchaser is not, in general, bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property. *Kirtland v. Pounsett*, 2 Taunt. 145. *Winterbottom v. Ingham*, 7 Q. B. 611; 14 L. J. Q. B. 298. If, however, after a contract of purchase and sale has gone off, or been abandoned, the intended purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation to such party for the permissive use and occupation of the property. *Howard v. Shaw*, 8 Mee. & W. 123. So, if the vendor of a house continue to reside in it after he has sold it, he is not liable in respect of such subsequent residence in an action for use and occupation, unless it be shown that he was permitted to remain in possession upon the express or implied understanding that the occupation was to be paid for. *Tew v. Jones*, 13 Mee. & W. 12. If a lessor has agreed to complete a house demised by him, and the tenant enters and occupies, and the landlord neglects to fulfil his agreement, he is nevertheless entitled to recover a reasonable sum in respect of the use and occupation by the tenant of the incomplete house. *Smith v. Eldridge*, 23 L. J. (N. S.) 270. If the tenant or occupier has entered as a trespasser and wrongdoer, and has remained in possession, and used and occupied the land to the exclusion of the owner, it appears to be somewhat doubtful whether the latter may waive the tort and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property.

[1] The action cannot be sustained if the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose. *Crisp v. Churchill*, cited in 1 B. & P. 340. *Jennings v. Throgmorton*, 1 R. & M. 251. But this defence must now be pleaded specially.

[2] Noncompliance of the landlord with a covenant to do repairs, whereby the premises have become unfit for profitable occupation, and that the defendant had quitted them on that account, is no defence. *Surplice v. Farnsworth*, 7 Man. & G. 576. *Sutton*

(F) *Determination of Tenancy.*[1]

(G) *Eviction of Tenant.*[2]

III. Pleadings in Action for.

(A) *Declaration.*[3]

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v. Temple, 12 Mee. & W. 52. *Taylor v. Caldwell*, *ante* p. 611. But if ready-furnished lodgings become untenantable by reason of vermin, and were in that state when engaged, so that the plaintiff is obliged to leave them, it is a good defence. *Smith v. Marrable*, 11 M. & N. 5. "In case of a contract for the hire of a ready-furnished house," observes *Lord Abinger*, "the letting of the goods and chattels, as well as the house, implies that the party who lets the house so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use. See *Edwards v. Etherington*, R. & M. 268. *Izon v. Gordon*, 5 Bing. N. C. 501. *Collins v. Barrow*, 1 M. & Rob. 112.

[1] In prior parts of this work (vol. v. p. 553) it has been shown when and how a tenancy may be determined by a notice to quit. It may also be ended so as to absolve the tenant from further liability for rent in a variety of ways, as by assignment or surrender.

By the Statute of Frauds (29 Car. 2, c. 3, s. 3) a parol assignment, or license to quit, will be insufficient (*Botting v. Martin*, 1 Camp. 318); though the defendant has quitted accordingly (*Mollett v. Brayne*, 2 id. 103. See *Mathews v. Sawell*, 8 Taunt. 270. *Bessell v. Landsberg*, 7 Q. B. 638); or though the plaintiff has endeavoured to re-let the premises (2 Stark. Ev. 590. *Redpath v. Roberts*, 3 Esp. 225); or though the agreement between the parties be cancelled (6 East, 86; and see *Johnstone v. Huddlestone*, 4 B. & C. 922; 7 D. & R. 411); or even though the landlord have entered and done some repairs. *Bessell v. Landsberg*, *supra*.

The assignment or surrender may, however, by the words of the statute, be effectual by act and operation of law, though not made in writing; as, if the plaintiff gave a parol license, or notice to quit, in the middle of a quarter, and both parties acted upon it, that is, if the plaintiff himself took possession, the tenancy would thereby be legally determined. *Whitehead v. Clifford*, 5 Taunt. 518. *Peter v. Kendal*, 6 B. & C. 703. The defendant may show that the landlord had accepted another person as tenant, which would operate as a surrender of his term. *Thomas v. Cook*, 2 B. & A. 119. *Graham v. Whichelo*, 1 C. & M. 188. And where a yearly tenant, at a rent payable half-yearly, quitted without having given notice, and the landlord let the premises to another tenant before the expiration of the next half-year, it was held that he was not entitled to recover from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let them to the second tenant. *Hall v. Burgess*, 5 B. & C. 332. See *Wall v. Atcheson*, 3 Bing. 462. The defendant may show that the landlord has determined the occupation by accepting the key of the house, &c., even in the middle of a quarter, and then the landlord's remedy is gone as to the rent due to that time (*Grimman v. Legge*, 8 B. & C. 324. *Whitehead v. Clifford*, *supra*); but it must be clearly established that it was the landlord's intention to determine the tenancy by accepting the key, as it would be insufficient to show merely that the key was left at plaintiff's house, or delivered to his servant. *Harland v. Bromley*, 1 Stark. 455. And in all these cases the consent of all the parties to the change of the tenancy is necessary. *Thomas v. Cook*, 2 B. & A. 119; 1 id. 50. *Graham v. Whichelo*, 1 C. & M. 188. *Morrison v. Chadwick*, 7 C. B. 284.

The defendant was tenant of unfurnished apartments, by parol agreement, at a rent payable quarterly. By an accidental fire the apartments were totally consumed in the middle of the quarter:—*Held*, that the defendant was liable, in use and occupation, for the proportion of the quarter's rent which accrued up to the time of the fire. *Packer v. Gibbins*, 10 L. J. Rep. (N. S.) Q. B. 224; 1 Gale & D. 10.

If a tenant pay up to a certain time, and a third person afterwards comes into possession, who pays rent at irregular periods, a presumption arises that the landlord has accepted the latter as his tenant. *Woodcock v. Truth*, 8 Bing. 170.

[2] An eviction by the landlord himself of his tenant from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession; but there is no authority for holding that the tenancy is thereby determined. And after an eviction from part, if the defendant give up possession of the residue, he is entirely discharged. If, however, after eviction, he continue in possession of the residue, he would perhaps be liable, upon a *quantum meruit*, for such portion. *Smith v. Raleigh*, 3 Camp. 513, n. See *Reeve v. Bird*, 1 C., M. & R. 31. *Neale v. Mackenzie*, 2 id. 84. *Prentice v. Elliott*, 5 Mee. & W. 606. *Selby v. Browne*, 14 L. J. Q. B. 307. *See* also *Morrison v. Chadwick*, 7 C. B. 266.

Eviction before the rent became due may be shown under the general issue. *Prentice v. Elliott*, *supra*. A partial eviction may have the same operation as an eviction from the whole in suspending the rent. *Upton v. Townend*, 17 C. B. 30.

[3] The form is given by sched. B of 15 &

(B) *Pleas.*

(*a*) *Non-Assumpsit — Never Indebted.*[1]

(*b*) *Eviction.*[2]

(*c*) *Premises used for an Illegal or Immoral Purpose.*[3]

(*d*) *Statute of Limitations.*[4]

(*e*) *Payment — Set-Off.*[5]

(C) *Evidence.*[6] (D) *Damages.*[7]

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16 Vic. c. 76. "Money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's permission, of messuage and lands of the plaintiff." *See* other forms, B. & L. 115.

The common count for use and occupation will not lie against an executor or administrator in his representative capacity, in respect of occupation by him since the decease. In respect of such occupation he can be charged in this form of action in his own right only. *Wigley v. Ashton*, 3 B. & A. 101. *Atkins v. Humphrey*, 2 C. B. 654.

[1] Under these pleas the defendant may deny the relationship of landlord and tenant, the occupation, or dispute the amount claimed, or show a surrender or eviction before the rent accrued due.

In an action for use and occupation, under never indebted, the defendant may show that A. had recovered judgment in ejectment for the premises, and that he had attorned and paid the rent subsequently accruing due to A., to avoid being turned out of possession. *Newport v. Hurley*, 2 D. & L. 921; 10 Jur. 333; 14 L. J. Q. B. 242, B. C.: *Coleridge*. But with respect to rent previously due he cannot, under never indebted, set up as a defence that he has paid it to A. (Id.)

To an action for use and occupation of furnished rooms. *Plea*, that before the defendant held the rooms under the plaintiff he held the same under A. B., as tenant to A. B.; that while the defendant was such tenant of A. B., A. B. assigned to the plaintiff all her estate in the rooms; that the occupation in question was a continuance of the tenancy under A. B., and that the defendant paid the rent to A. B., without any notice of the assignment, nor did he ever expressly promise the plaintiff to pay him: —*Held*, that the words "nor did he ever expressly promise," made the plea amount to the general issue; but that the plea without those words was good. *Cooke v. Moylan* or *Moylon*, 1 Ex. 17; 5 D. & L. 101; 16 L. J. Ex. 253.

[2] This is sometimes pleaded, but when it applies to the whole of the premises it may then be proved under never indebted. *See* eviction from part of premises, *ante*, p. 612. *Morrison v. Chadwick*, 7 C. B. 266. *Newton v. Allen*, 1 Q. B. 518. *Williams v. Haywood*, 28 L. J. Q. B. 375.

[3] This should be pleaded.

[4] This is a good defence. *Leigh v. Thornton*, 1 B. & A. 625.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 of 3 & 4 Wm. 4, c. 27, the amount to be recovered is limited to six years. *Archbold v. Scully*, 9 H. L. C. 360.

The 24th sect. of 3 & 4 Wm. 4, c. 27, only bars equitable rights, so far as they would have been barred if they had been legal rights. (Id.)

[5] These, as in other actions of contract, must be pleaded specially.

[6] The necessary proofs are in effect pointed out under the previous divisions. The mere fact of the plaintiff's ownership of the land, &c. and of the occupation by the defendant, is sufficient *primâ facie* evidence of a contract to support this action. *Hillier v. Sillcox*, 19 L. J. Q. B. 295. *Churchward v. Ford*, 26 L. J. Ex. 354; 2 H. & N. 446. But the presumption from such evidence may be rebutted by showing that the occupation was adverse to the consent of the plaintiff, or that it was under a contract with a third party, a stranger to the plaintiff, or any circumstances which are inconsistent with a contract between the plaintiff and the defendant. *Churchward v. Ford*, *supra*. *Cox v. Knight*, 25 L. J. C. P. 314; 18 C. B. 645. *Turner v. Cameron Coal Co.* 5 Ex. 932.

A witness for the plaintiff, in an action for board and lodging, having stated that he had never heard of an agreement in writing respecting the board and lodging, the agreement was put into his hands, and he was asked by the defendant whether he had seen an agreement respecting the subject-matter of the action; he replied, "Never before I came into court:"— *Held*, that the defendant, if he wished the agreement read, must put it in as his own evidence. *Keys v. Harwood*, 15 L. J. C. P. 207; 2 C. B. 905.

In an action for use and occupation, one of the plaintiff's witnesses, on cross-examination, said that he had heard from the plaintiff's attorney that there was an agreement in writing:— *Held*, no evidence of the existence of an agreement, so as to render its production by the plaintiff necessary. *Watson v. King*, 3 C. B. 608.

[7] Where there is a stipulated rent, plaintiff will be entitled to recover that amount, though the lease is void (*De Medina v. Polson*, Holt, 47); in other cases, however, he must prove the value of the premises. *Tomlinson v. Day*, 2 B. & B. 680. Where the plaintiff is not the person who originally

USE of Patented Articles.

See Patents, vol. iv. p. 79.

USES and Trusts.[1]

let the premises to the defendant, he can only recover rent from the time he had the legal title in him, although he may have had the equitable estate long before (2 Camp. 13), or although he may have acknowledged the title. 3 Bing. 474. An entire contract cannot be apportioned. *See* Rent, *ante*, p. 328.

A tenant of premises at 47*l.* a year received notice to quit, and the landlord agreed with another party for a holding, to commence on the expiration of the current term, at 80*l.* a year. Before the term expired, the new tenant, by consent of all parties, was admitted in place of the outgoing tenant; and the rent was paid at the rate of 47*l.* to the end of the term. Disputes arising on the new agreement, it was abandoned; but the new tenant continued to occupy:—*Held*, that it was a question for the jury, in an action for use and occupation, what rent was fairly payable for the continual holding, no necessary inference arising under the circumstances from the former holding at 47*l.* *Thetford* (*Mayor, &c.*) *v. Tyler*, 8 Q. B. 95; 10 Jur. 68; 15 L. J. Q. B. 33.

Where a tenancy is continued beyond the time for which it was originally taken, and nothing is arranged respecting the amount to be paid on the new holding, the new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there are circumstances to show that such increased rent was expected by him in the event of holding over, and that the understanding was not repudiated by the tenant. *Elgar v. Watson*, Car. & M. 494.

[1] Originally the terms "uses and trusts" were identical; uses, at common law, being in general what trusts are at the present period. The terms "uses and trusts" are employed in the stat. 7 Hen. 8, c. 10 (the Statute of Uses), to indicate the same thing.

As to deeds operating under the Statute of Uses, &c., it would be beyond the scope of this undertaking to examine the history, provisions, or operation of that statute (*see* in general, Saunders on Uses and Trusts; Sugden; Gilb. Uses and Trusts; 1 Saund. 245, n. 6; 2 Saund, Index, Uses and Trusts; 2 Bl. Com. 328–40), it must suffice merely to state a few practical rules, showing when the legal estate and interest is transferred, or, as technically termed, executed and vested in the *cestui que trust*, who is also in general beneficially interested; or when the legal estate remains, or is only partially executed, and is vested in a person who has no beneficial interest, but is merely a trustee for another. All conveyances to uses in general are to be construed the same as a common-law conveyance. Willes, 180.

With repect to what uses are executed by the statute of 7 Hen. 8, c. 10, so as vest the legal interest in a party beneficially interested, or what is a trust estate where the use is not executed, there are several rules.

1st. The statute does not affect estates of copyhold tenure, because it is against the nature of that tenure that any person should be introduced or interposed without the consent of the lord. Gilb. Ten. 170.

2ndly. The statute, speaking only of persons seised, does not extend to leases or terms for years; as where A., possessed of a lease for years, assigns it to B. to the use of C., the statute does not affect this use, and the legal estate will remain vested in B., and C. will only have an equitable interest; and if a term of 1000 years be limited to A. for the use of or in trust for B., the statute does not execute this use, but leaves it as at common law. Poph. 76; Dyer, 369; 2 T. R. 448; 2 Bl. Com. 336; 2 Inst. 671.

3rdly. When a use is limited upon a use it is not executed, but the legal estate is vested in him to whom the first use is limited, and no further. Dyer, 155. As where an estate is conveyed to another in these words, "to A. and his heirs, to the use of him and his heirs, in trust for or to the use of B. and his heirs," the use is not executed in B., but in A., and the legal estate is vested in A. as a trustee. Cas. T. Talbot, 138, 139, 164; 2 P. Wms. 146; 1 Saund. Uses and Trusts, 153. So where an estate was limited to A., to the use of A., to the use of B., it was held that A. took the legal estate, and that although he took it by the common law, and not by force of the Statute of Uses, yet the second use could not be executed by the statute. *Doe v. Passingham*, 6 B. & C. 305. *See* the rule stated 1 Saund. 153, that a use cannot be limited to arise out of the estate of a *cestui que use*, taking the legal estate at the common law.

4thly. When something is to continue to be done by the trustees, which renders it necessary or expedient for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of a testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. 3 B. & P. 178; 2 T. R. 444; 6 id. 213; 8 East, 248; 9 id. 1; 12 id. 455; 4 Taunt. 772. *See* instances 2 Bl. Com. 335, n. 60.

In general the distinction under the latter rule is, that where the limitation is to trustees and their heirs, in trust for them to receive and pay over the profits, the legal estate is vested and continues in them, so as to enable them effectually to perform the declared object; but that where the trust is to permit and suffer the party beneficially interested to receive for his use, then the legal estate may be executed and vested in the latter. 2 Taunt. 109; 5 East, 163; 7 T. R.

USURY.[1] Before and since the 16th August, 1854.

433; 8 id. 597. And *see* other cases, 2 Bl. Com. 336, n. 60; 2 Saund. Uses and Trusts, 206. Where, however, the person beneficially interested is a married woman, then, to prevent loss from the interference of the husband, the construction of the terms of the trust is in general in favour of the trustees retaining the legal interest. 7 T. R. 652.

The following general rules are laid down by a very eminent conveyancer concerning equitable estates:—1st. The *cestui que trust* is the beneficial owner in equity, and has an equitable estate. 2ndly. This estate gives the like power of alienation in equity, as may be rightfully exercised at law by the owner of a like legal estate. 3rdly. The like limitations may be made of the equitable as may be made of the legal ownership. 4thly. The limitations of trust or equitable estates receive the like construction as if they were limitations of the legal estate. 5thly. Whenever a limitation of an use would be good by the rules of law, a like limitation of the trust or equitable ownership will be valid in equity. 6thly. Any limitations which, as tending to a perpetuity, would be void if it were of an use, will be void if it be of the trust or equitable ownership. 7thly. Of equitable estates there cannot, in a technical sense, be any disseisin; and, therefore, notwithstanding adverse possession, there may be transfers or dispositions by the equitable owner, either by deed or will. 1 Prest. Abr. 144.

The several deeds operating and having their principal legal efficacy under the statute, are these—1stly, a covenant to stand seised to uses; 2ndly, a bargain and sale; 3rdly, a lease and release; and which, especially the latter, have long become and continue to be the principal modes of conveyance, where the grantor has a freehold interest. *See* 4 Vic. c. 21, ss. 1, 2.

[1] The law concerning which, so far as it remains in force, is regulated by 12 Anne, stat. 2, c. 16, which enacts, that no person shall take, either directly or indirectly, for loan of any monies, wares, merchandizes or commodities, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate, &c., and that all bonds, contracts, and assurances for the payment of more shall be void, and that any person receiving more shall forfeit the treble value of the loan. In declaring for the penalty given by this statute, the precise day of the usurious contract must formerly have been stated in the declaration and proved as laid. See *Fox v. Keeling*, 2 Ad. & E. 670. See further on this act the elaborate notes to *Ferrall v. Shaen*, 1 Wms. Saund. 295.

By the recent statute 17 & 18 Vic. c. 90, all laws against usury are repealed from the 10th of August, 1854, but it is provided (s. 2) that nothing contained in that statute shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of that statute, and that where interest was then payable upon any contract, express or implied, for the payment of the legal or current rate of interest, or where upon any debt or sum of money interest was then payable by any rule of law, the same rate of interest should (s. 3) be recoverable as if that act had never been passed; and it is provided (s. 4) that nothing therein contained shall extend, or be construed to extend, to repeal or affect any statute relating to pawnbrokers, but that all laws concerning pawnbrokers should remain in full force and effect. All contracts, therefore, entered into before the 10th of August, 1854, are governed by the laws against usury which were in force at the time of the making of those contracts. By 2 & 3 Vic. c. 37, s. 1, and 13 & 14 Vic. c. 56, it was enacted, that no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10*l.* should be void by reason of any interest taken thereon or secured thereby; nor should the liability of any party thereto, nor the liability of any person borrowing money as aforesaid, be affected by any schedule or law in force for the prevention of usury. But it was provided that nothing therein contained should extend to the loan or forbearance of money upon security of any lands, tenements, or hereditaments, or any estate or interest therein, or affect or alter the acts concerning pawnbrokers.

The usury laws are now comparatively of little importance, and only very few of the leading cases will be referred to.

Usury, within the meaning of the act of Anne, is constituted either by a direct loan and receipt of interest at more than five per cent, or some device for the purpose of concealing such excess. *Barclay v. Walmsley*, 4 East, 55. See *Parker v. Ramsbottom*, 3 B. & C. 257. *Meago v. Simmons*, M. & M. 121; *Gilpin v. Enderbey*, 5 B. & A. 954. A loan of stock was usurious if it was to be repaid at the option of the lender by replacing the stock, or by the produce, with five per cent interest. *White v. Wright*, 3 B. & C. 273. *Chippendale v. Thurston*, M. & M. 411. See *Parker v. Ramsbottom*, *supra*; and see 7 Ves. 44, *Maddock v. Rumball*, 8 East, 304, where such a transaction was upheld. So, if the discounter of a bill stipulated for a premium to be paid to the agent employed by the holder to discount, if such premium, making with the discount, were more than five per cent. *Meago v. Simmons*, M. & M. 121. See *Lolarte v. Melville*, 7 B. & C. 430. So, too, a sum taken under the name of commission might, in reality, be a mere cloak for usury. *Carstairs v. Stein*, 4 M. & S. 192; *Derry v. Tolls*, 8 Ex. 741. See *Doe v. Gooch*, 3 B. & A. 664. *Flight v. Reed*, 8 L. T. (N. S.) Ex. 638. So might a contract for an

V.

VACCINATION.[1]

annuity, by which the principal of the grantee was never put in jeopardy (*Fereday v. Wightwick*, 1 R. & M. 50; see *Ferguson v. Sprang*, 1 Ad. & E. 576), though, generally speaking, annuity transactions are not within the usury law. *Flight v. Chaplin*, 2 B. & Adol. 112. In all cases of this sort the *bona fides* of the transaction were the point in question, and so it continues to be in cases to which the recent acts do not extend. Thus, where a note was discounted at five per cent by the lender of a sum of money, who also took a mortgage of land as a collateral security, the transaction, being found by the jury to be *bonâ fide*, was held valid, although the more recent acts did not extend to loans secured by mortgages of real property. *Doe d. Haughton v. King*, 11 Mee. & W. 333; and see *Ex-parte Warrington*, 22 L. J. Bank. 33. A fresh contract made in continuation of a former usurious one was void (*Preston v. Jackson*, 2 Stark. 237), unless, indeed, it left out the part which made the former one usurious (*Barnes v. Hedley*, 2 Taunt. 184. *Wright v. Wheeler*, 1 Camp. 165 n.); or was made with a party not privy to the former usury (*Cuthbert v. Haley*, 8 T. R. 390; *Pickering v. Banks*, Forrest, 72); the new contract was good, though the original was void. *Parker v. Ramsbottom*, 3 B. & C. 257. See *Gray v. Fowler*, 1 H. Black. 462. Where a loan was contracted on the security of a mortgage or charge on land, it was held that the mere taking of a bond, or personal undertaking, from the borrower for the repayment of the money, would not render the usurious transaction less invalid (*Follett v. Moore*, 4 Ex. 415. *Hodgkinson v. Wyatt*, 4 Q. B. 749. *Berrington v. Collis*, 7 Scott, 302), for the court will "strip off the external covering to get at the real import of the transaction, and if that is tainted with usury, the contract will be void." *Floyer v. Edwards*, Cowp. 114, 115. *Sinclair v. Stevenson*, 10 Moore, 54; 2 Bing. 514. If the contract was valid at the time it was made, it will not be invalidated by subsequent usurious transactions between the parties. *Bell v. Coleman*, 2 C. B. 284; 15 L. J. C. P. 3. If a deed of bargain and sale of an estate, or any grant, assignment, or conveyance of realty, made in consideration of money paid by the grantee, contained a proviso for the redemption of the property granted or sold, or was accompanied by a separate instrument, conceding to the vendor or grantor a right to repurchase the estate, or to have a re-conveyance thereof made to him upon certain terms and conditions (*Roberts v. Trenayne*, Cro. Jac. 507), the transaction was held to be, in principle, a loan of money upon security of landed property (*Doe v. Chambers*, 4 Camp. 4), and tantamount to a mortgage. It is a question of fact, however, for a jury to determine, whether the parties intended to effect a *bonâ fide* purchase and sale, or whether they intended to effect a loan of money (*Doe v. Gooch*, 3 B. & A. 664. *Doe v. Brown*, Holt, N. P. C. 295). A court of common law will not, however, it seems, take judicial notice of the contract being usurious on the face of it, but will leave it as a question of fact for a jury to determine whether it amounted to a fair and *bonâ fide* purchase of an annuity, or whether it was a mere cloak or device to cover an usurious loan to be charged on realty.

The effect of the repeal of these statutes is to remove the restrictions imposing on solicitors and others a limitation as to amount of procuration money to be charged. The whole of the annuity acts are now repealed.

The defendant must plead usury specially, and the court will not otherwise take notice of the fact, even on demurrer to a declaration which sets out the contract. *Ferguson v. Sprang*, 1 Ad. & E. 576. It must show the terms of the usurious contract, the time of forbearance, and the sum lent and forborne. *Hill v. Montague*, 2 M. & S. 377.

Where the defendant pleads usury in the contract, the plaintiff may reply that the contract was made upon a good and legal consideration, and not upon the supposed unlawful consideration mentioned in the plea. (Com. Dig. Pleader, 2 W. 23; 2 T. R. 439.) Where plaintiff denies that the note was given in pursuance of the usurious contract he would admit the previous usury. *Carter v. James*, 13 Mee. & W. 137. When defendant, by his plea, brings his case clearly within the operation of the statute of Anne, plaintiff must show that the contract was entered into after the passing of the statute of Victoria, and that it did not relate to land. *Washbourne v. Burrows*, 1 Ex. 115; 16 L. J. Ex. 266.

[1] By 3 & 4 Vic. c. 29, amended by 4 & 5 Vic. c. 32, guardians of unions were authorised to contract with medical practitioners for vaccination of parties resident in their unions and parishes. See *Anon.* 5 Nev. & M. 12; 3 Ad. & E. 552. The 16 & 17 Vic. c. 100, makes vaccination compulsory. The 21 & 22 Vic. c. 25, s. 7, repeals so much of 16 & 17 Vic. c. 100, as enacts that vaccination forms shall be furnished to registrars, and delivered by them to medical officers and practitioners, and provides that registrars shall deliver books, &c., to medical officers, &c., without requiring payment for the same.

The 21 & 22 Vic. c. 64, makes provision for the practice of vaccination in Ireland. The 24 & 25 Vic. c. 59, facilitates proceedings before justices under the acts relating

VAGRANT.

I. Who shall be deemed Idle and Disorderly.[1]
II. „ a Rogue and a Vagabond.[2]
III. „ an Incorrigible Rogue.[3]

to vaccination; the 26 & 27 Vic. c. 52, makes compulsory the practice of vaccination in Ireland; and the 26 & 27 Vic. c. 108, makes it compulsory in Scotland.

[1] "The Vagrant Act," 5 Geo. 4, c. 83, amended by 1 & 2 Vic. c. 38, repeals all the provisions previously enacted relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues, and other vagrants. *See* also 11 & 12 Vic. c. 110, s. 10.

By 5 Geo. 4, c. 83, s. 3, every person being able, wholly or partly, to maintain himself or family by work or other means, and neglecting so to do, whereby they become chargeable to the parish; every person returning to and becoming chargeable to any parish from whence he shall have been legally removed, unless he produce a certificate from the churchwarden and overseer acknowledging him to be settled there; every petty hawker or pedler wandering abroad and trading without being duly licensed; every common prostitute wandering in the public streets or common highways, or in any place of public resort, and behaving in a riotous or indecent manner; and, lastly, every person wandering abroad, or placing himself in any public place, court, or passage, to beg, or causing any child so to do: all these are deemed idle and disorderly persons within the meaning of the act, and a justice of the peace may commit the offender, by the evidence of one credible witness, to the house of correction, to be kept to hard labour for any time not exceeding one calendar month. A private house in which a sale by public auction is held is, for the time, a place of "public resort" within the meaning of "The Vagrant Act." *Sewell v. Taylor*, 29 L. J. M. C. 50. A husband who offers to take his wife back to his own house and support her there, although he may have ill-treated her, but refuses to allow her anything while separate from him, is not guilty of neglecting to maintain her within this section. *Flannagan v. Overseers, &c. of Bishopwearmouth*, 27 L. J. M. C. 46.

[2] By 5 Geo. 4, c. 83, s. 4, every person committing any of the offences mentioned in the last clause a second time; every person pretending to palmistry, or to tell fortunes; every person lodging in any outhouse, or in the open air, not having any visible means of subsistence, and not giving a good account of himself; every person exposing himself in any street or public place, or to view thereof, with intent to insult any female; every person endeavouring, by the exposure of wounds and deformities, to obtain alms; every person going about to collect alms or charitable contributions under a fraudulent pretence; every person running away, and leaving his wife or children chargeable to the parish; every person playing or betting in any street, or other open and public place, at or with any table or instrument of gaming, or at any game or pretended game of chance; any person having in his pocket any picklock or other implement, with intent feloniously to break open any house or building, or being armed with any gun or offensive weapon, with intent to commit any felonious act; every person found in or upon any house or building or in any enclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief frequenting any river or navigable stream, dock, basin, wharf, quay, warehouse, or any street or way adjacent, with intent to commit felony; and lastly, every person apprehended as idle and disorderly, and violently resisting such apprehension, and being subsequently convicted of being idle and disorderly; all these are rogues and vagabonds, and a justice of peace may commit such offenders to the house of correction for any time not exceeding three calendar months.

The above section applies to legitimate and not illegitimate children (*R. v. Maude*, 2 Dowl. N. S. 58; and a mother who, having obtained an order for the admission of herself and two children into the union workhouse, takes and leaves her children at the gate with the order in their hands, and returns to her usual residence, which is in the borough where the workhouse is situate, is not a person who runs away leaving her children chargeable to the parish within the meaning of the 5 Geo. 4, c. 83, s. 4. *Guardians of Cambridge Union v. Parr*, 30 L. J. M. C. 241. In the above section the words "place adjacent," must be referred to "street or highway," immediately preceding them; and it is an offence within the meaning of the clause to be in any "street or highway" to commit felony. *Ex-parte* Brown, 17 Q. B. 833; 21 L. J. M. C. 113. But see *In re* Jones, 7 Ex. 586; 21 L. J. M. C. 116. As to being in a dwelling-house for an unlawful purpose, see *Rukin v. Jinken*, 32 L. J. M. C. 140.

A wife who has left her husband and committed adultery is not within this clause, even though the husband have also committed adultery since her departure. *Rex v. Flintan*, 1 B. & Adol. 227. A conviction under this section alleges, "that the defendant being a suspected person on, &c., at the railway station in the parish, &c. the same being at the time a place of public resort, did frequent the plat form of the said station with intent to commit felony:"— *Held*, that it sufficiently appeared that the platform was a place of public resort. *Ex parte Davis*, 26 L. J. M. C. 178; *see* also *Sewell v. Taylor*, *supra*.

[3] By Geo. 4, c. 83, s. 5, "every person

VARIANCE. *See* Amendment, vol. i. p. 323.

VENDITIONI Exponas. *See* Fieri Facias, vol. iv. p. 462.

VENDORS and Purchasers. *See* Abstract of Title, vol. i. p. 63; Auction, vol. ii. p. 63; Auctioneer, id. p. 65; Contracts, vol. iii. p. 193; Deceit, id. p. 560; Fraud, vol. iv. p. 528; Frauds, Statute of, id. p. 535, 538, 540; Goods Bargained and Sold, id. p. 605; Goods Sold and Delivered, id. p. 606; Infant, vol. v. p. 135; Lunacy, id. p. 408; Market Overt, id. p. 442; Set-Off, *ante*, p. 376; Stoppage in Transitu, *ante*, p. 504; Warranty, *post*, p. 637.

I. Sale of Lands and Tenements, p. 619.

(A) *Who may Purchase. See* Contracts, vol. iii. p. 193.

(B) *Of the Original Sufficiency of the Consideration. See* id. pp. 196, 197; Consideration, id. p. 177.

(C) *Conditions of Sale; Effect of Error in*, p. 619.

(D) *As to Purchase of several Lots. See* Auction, vol. ii. p. 64.

(E) *What Title must be shown. See* Abstract of Title, vol. i. p. 63; Auction, vol. ii. p. 64.

(F) *Puffers vitiate Sale. See* Auction, id.

(G) *Stamps on Sales. See* Stamps, *ante*, p. 477.

(H) *Statute of Frauds, how it affects Sale of Lands, &c. See* Frauds, Statute of, vol. iv. pp. 538, 540, 543, 549.

(I) *Specific Performance*, p. 620.

(J) *Enforcement in Equity, where Part-Performance*, p. 620.

(K) *Recovery of Deposit*, p. 620.

(L) *Rights of Vendor*, p. 620.

(*a*) *Action by for Breach of Contract*, p. 620.

(*b*) *To Interest on Purchase-Money, when*, p. 621.

(*c*) *To Lien on Estate for Purchase-Money*, p. 621.

I. Sale of Lands, &c. (*continued.*)

(M) *Liabilities of Vendor*, p. 621.

(*a*) *On his Covenant for Title. See* Covenant, vol. iii. p. 482.

(*b*) *On his Covenant for Quiet Enjoyment. See* id. p. 483.

(*c*) *On his Account for further Assurance. See* id. p. 486.

(*d*) *To Action at Law for Damages. See post*, Rights of Purchaser at Law, p. 621.

(N) *Rights of Purchaser*, p. 621.

(*a*) *Entitled to Estate in Equity from Time of Contract*, p. 621.

(*b*) *Action against Vendor for not Completing*, p. 621.

(*c*) *May Sue an Auctioneer for Deposit, when. See* Auctioneer, vol. ii. p. 66.

(*d*) *On what Title he may Insist*, p. 622.

(*e*) *Entitled to Abstract of Title. See* Abstract of Title, vol. i. p. 65.

(*f*) *Entitled to an Assignment of Outstanding Terms*, p. 622.

(*g*) *Entitled to Attested Copies of Deeds*, p. 622.

(*h*) *Covenant for Title. See* Abstract of Title, vol. i. p. 74; Covenant, vol. iii. p. 482.

(O) *Duties and Liabilities of Purchaser*, p. 622.

(*a*) *To Search for Incumbrances*, p. 622.

escaping out of confinement before the expiration of the time for which he has been committed under this act; every person committing any offence which shall subject him a second time to be convicted as a rogue and vagabond; and, lastly, every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed an incorrigible rogue within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender who shall be so committed to the house of correction shall be there kept to hard labour during the period of his or her imprisonment."

Expense of Prosecution.—A superintendent constable, appointed for a division comprehending the parish of C., under 2 & 3 Vic. c. 93, and 3 & 4 Vic. c. 88, expended money in fees to the justice's clerk in respect of vagrants apprehended in the parish of C. The parish, for many years before these statutes passed, had defrayed such expenses when incurred by the parish constables:—*Held*, that the parish was liable for the expenses. *Reg. v. Chelmsford* (*Churchwardens*), 5 Q. B. 66.

I. Sale of Lands, &c. (*continued.*)
(*b*) *Liability to Incumbrances*, p. 623.
(*c*) *To see to the Application of the Purchase-Money*, p. 623.
(*d*) *To Pay Interest on Purchase-Money. See* p. 621.
(*e*) *To Action for Damages for Non-Completion. See* id. p. 621.

II. Of Personal Goods and Chattels, p. 623.
(A) *Of the Consideration. See* Consideration, vol. iii. p. 177; Contracts, id. p. 196, 197; Guarantee, vol. iv. p. 614.
(B) *Construction of Contracts. See* Contracts, vol. iii. p. 200; Covenant, id. p. 464; Deeds, vol. iv. pp. 23, 24.
(C) *What Contracts within Statute of Frauds. See* Frauds, Statute of, vol. iv. p. 546.

II. Of Personal Goods, &c. (*continued.*)
(D) *Vendor's Lien on the Goods for the Price. See* Lien, vol. v. p. 382.
(E) *Right to Stop in Transitu. See* Stoppage in Transitu, *ante*, p. 504.
(F) *Right to Specific Performance. See* p. 620.
(G) *Right to Action by Vendor for Non-performance*, p. 623.
(H) *Action by Purchaser for Non-Performance*, p. 623.
(I) *Provisions of "Mercantile Amendment Act*, 1856," 19 & 20 *Vic. c.* 97, *s.* 2, *as to Actions for Breach of Contract to deliver Specific Goods*, p. 624.
(J) *Sales in Market Overt. See* Market Overt, vol. v. p. 442.
(K) *Of the Title to Goods and Chattels*, p. 624.

I. Sale of Lands and Tenements.

(C) *Conditions of Sale; Effect of Error in.*[1]

[1] A substantial and material misdescription in the conditions of sale, though not introduced through fraud, or although it be obvious on an inspection of the premises, will avoid the sale (*Flight v. Booth*, 1 Scott, 190, 202. *Dobell v. Hutchinson*, 3 Ad. & E. 355. *White v. Cuddon*, 8 Clark & Fin. 766), and if it be provided in the conditions themselves that any error or mis-statement shall not vitiate the sale, but shall be made the subject of compensation, such condition will only extend to unintentional mis-statements and errors in matters of detail (*Duke of Norfolk v. Worthy*, 1 Camp. 337. *Robinson v. Musgrove*, 2 M. & Ry. 92), and even an unintentional error will vitiate the sale, notwithstanding this condition, where no calculation can be made as to the amount of compensation which should be allowed or paid to the purchaser. *White v. Cuddon, supra. Sherwood v. Robins*, 3 C. & P. 339.

As instances of a substantial mis-description, it has been held that if an estate be subject to a right of shooting, common, digging mines, &c., and the purchaser contract in ignorance of such facts, he may refuse to complete (*Shackleton v. Sutcliffe*, 12 Jur. 199); and if a man contract for the purchase of a house and wharf, he may refuse to take the house without the wharf, and *vice versâ* (*Peters v. Lambert*, 7 Beav. 546. *Poole v. Shergold*, 2 Bro. C. C. 118. *Dykes v. Blake*, 4 Bing. N. C. 477. *Chambers v. Griffiths*, 1 Esp. 151), and the Court of Chancery or a jury will determine the question, "Would he or not have taken one, had he not reckoned also on having the other?" (*Casamajor v. Strode*, 2 Mylne & K. 730). If a man has contracted for the purchase of a freehold he is not bound to accept a copyhold. *Hick v. Phillips*, Pr. Ch. 575), nor a leasehold, however long its duration (*Drew v. Corp*, 9 Ves. 368. *Collier v. Jenkins*, 1 You. 295. If also he have bargained for a lease, he need not complete if there be a substantial difference in the duration of the term (*Farrar v. Nightingal*, 2 Esp. 639), but otherwise if the difference be slight (*Bilworth v. Hassell*, 4 Camp. 140. *Halsey v. Grant*, 13 Ves. 77; 10 Ves. 305); and if the purchaser has never seen the estate, but relies solely on the representations made to him by the vendor, and there is any great or material difference between the actual and represented quality, the purchaser will not then be bound to complete his purchase. The words "more or less," or "thereabouts," will only cover a moderate excess or deficiency, and will never be suffered to be the instrument of fraud (*Day v. Finn*, Owen, 133. *Winch v. Winchester*, 1 Ves. & B. 377). A public-house described as a "free house," when holden on terms to take beer from a particular brewer, is a substantial misdescription (*Jones v. Edney*, 3 Camp. 285); so a redeemable annuity, described simply as "an annuity" (*Coverley v. Burrill*, 5 B. & A. 257. *Ballard v. Way*, 1 Mee & W. 520); so leases described as containing particular covenants on the part of the lessees, where no such covenants existed (*Warny v. Hoggart*, R. & M. 39), or as being renewable by custom when there was no such custom (*Newby v. Painton*, 17 Jur. 683, and *see* also *Flight v. Booth*, 1 Bing. N. C. 377. *Sherwood v. Robins*, 3 C. & P. 339. *Dobell v. Hutchinson*, 3 Ad. & E. 356. *Lachlan v.*

(I) *Specific Performance.*[1]

(J) *Enforcement in Equity, where Part-Performance.*[2]

(K) *Recovery of Deposit.*[3]

(L) *Rights of Vendor at Law.*

(*a*) *Action by for Breach of Contract.*[4]

Reynolds, 23 L. J. Ch. 8). But if the thing tendered substantially corresponds with the description, though there be some defect measurable by a pecuniary standard; or if the purchaser could not have been misled; or if he proceeds with the treaty after being aware of the misdescription and makes no objection, so that he can be deemed to have waived his right to object; such misdescription will not invalidate the contract; and so if the misdescription does not affect the value or enjoyment of the property. *White v. Cuddon*, 8 Clark & Fin. 785. *See* also Auction, vol. ii. 63.

[1] With regard to agreements for the disposition of property, courts of equity consider that what is effectually contracted to be done is to be deemed as done. 1 P. Wms. 713; 3 id. 215; 1 Atk. 572; 3 id. 534; 1 Ves. 494; 13 id. 472); and thereupon hold that such contracts are for the most part equivalent in equity to actual conveyances in law. 1 Ves. 220; 1 P. Wms. 62, 176; 3 Atk. 256; 2 Ves. 633. Thus, for example, upon an agreement for the sale of real estate, although for want of the legal formalities it cannot be adjudged to be actually transferred, the vendor, as between him and the vendee (3 Atk. 273), is from the time of the contract regarded in equity as a trustee for the purchaser, and the latter from the same period a trustee of the purchase-money for the former. 1 Atk. 573; 3 id. 273; 13 Ves. 472. And the Court of Chancery will in all ordinary cases decree a specific performance by the vendor of all such acts as are necessary to be done by him to transfer the legal estate to the purchaser. *Nicholson v. Wordsworth*, 2 Swanst. 369. It is a general principle, however, of courts of equity, to grant the decree only in those cases where there is a mutuality of obligation, and where the remedy is mutual. *Flight v. Bolland*, 4 Russ. 331. *Wills v. Croll*, 5 Phil. 62. And specific performance will not be decreed in favour of a person who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period over his rights. *Alley v. Deschamps*, 13 Ves. 225. *Southcomb v. Bishop of Exeter*, 16 L. J. Ch. 378. *See* Sugden's *Vendors and Purchasers;* Dart's id.

[2] In some cases where there has been a concluded agreement, although it be void within the Statute of Frauds, a court of equity will take it out of the statute, provided it has been partly executed; as where possession has been delivered and taken thereunder, or the like. *Thynne v. East Glengall*, 2 H. L. C. 131, 158. *Mundy v. Jolliffe*, 5 Mylne & C. 166, 177. *Butcher v. Stapeley*, 1 Vern. 364. *Reynolds v. Waring*, 1 Younge, 352. But the mere transfer of possession is not of itself sufficient to cause a court of equity to enforce an oral contract for its purchase. To induce them to interfere, the acts done in performance must be such as could have been done with no other view or design than to fulfil the particular contract sought to be enforced. *Gunter v. Halsey*, Ambl. 586. *Frame v. Dawson*, 14 Ves. 388. *O'Reilly v. Thompson*, 2 Cox, 273. *Coles v. Trecotheck*, 9 Ves. jun. 234. *Wall v. Evans*, 4 You. & C. 579. *Sutherland v. Briggs*, 1 Hare, 26.

[3] Where the contract is rescinded, the purchaser may recover the deposit on a count for money received. *Symmons v. Haseltine*, 23 L. J. Q. P. 129. And so if neither party be ready by the appointed time, and both are in default, the contract is at law *ipso facto* dissolved, and the deposit is recoverable, unless the time has been prolonged by consent. *Clarke v. King*, 1 R. & M. 394; 2 C. & P. 286. *Blackburn v. Smith*, 2 Ex. 783); but not so if the purchaser himself makes default, and by the terms of the contract it is to be forfeited. *Bevan v. M'Donnell*, 9 Ex. 309. *See* also Auction, vol. ii. p. 64. *Davis v. Nisbett*, 31 L. J. C. P. 6.

[4] The plaintiff, in order to sustain an action against a purchaser, must be prepared to show that he has performed all the acts required to be done by him under the contract. *Glazebrook v. Woodrow*, 8 T. R. 366; 1 Saund. 320, a; 2 id. 352, l. n. And where he is bound by the contract to deliver an abstract of his title, it is not sufficient to cause the title-deeds to be handed to the purchaser for perusal. *Horn v. Wingfield*, 3 Man. & G. 33; 3 Scott, N. R. 330. *See* vol. i. p. 63. And so where the contract of purchase is conditional, as on obtaining the sanction of a third party, the vendor cannot enforce such contract without showing the performance of the condition. *Porcher v. Gardner*, 8 C. B. 461. *See* also *Davis v. Nisbett*, *supra*. In the absence of an express stipulation, the purchaser is bound to prepare and tender a conveyance. *Baxter v. Lewis*, Ex., Forrest, 61. *Poole v. Hill*, 6 Mee. & W. 835. *Porcher v. Gardner*, *supra*. *Laird v. Pym*, 7 Mee. & W. 474. *Wilmot v. Wilkinson*, 6 B. & C. 506; 1 Saund. 320, a.

Where the estate remains the property of the vendor he is not entitled to claim the purchase-money, but the measure of damages is the loss sustained by him from the breach of contract, in the costs incurred, and the diminution in value of the land. *Laird v. Pym*, *supra*.

(*b*) *To Interest on Purchase-Money, when.*[1]

(*c*) „ *Lien on Estate for Purchase-Money.*[2]

(N) *Rights of Purchasers at Law.*

(*a*) *Entitled to Estate in Equity from Time of Contract.*[3]

(*b*) *Action against Vendor for not Completing.*[4]

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[1] If the purchaser takes possession of the estate, and receives the rents and profits, he will generally be compelled to pay interest on the purchase-money from the time that he became possessed of the property. *Ex-parte Hunter*, 6 Ves. 94.

[2] Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be (*Chapman v. Tanner*, 1 Vern. 267. *Pollexfen v. Moore*, 3 Atk. 272; and *see* 1 Bro. C. C. 302, 424; 6 Ves. jun. 483), or be not (*Smith v. Hibbard*, 2 Dick. 730. *Charles v. Andrews*, 9 Mod. 152) conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the lands for the money; so, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced. *Lacon v. Mertins*, 3 Atk. 1.

A person who sells an equitable life interest in lands, in consideration of the payment of an annuity, has a lien upon the land for the annuity as against the purchaser. *Matthews v. Bowler*, 16 L. J. Ch. 239.

Where lands were sold, and it was agreed that the purchase-money should remain unpaid, and be a charge thereon, and advances were made by the vendor to the purchasers, to enable them to build, it was held that the vendor's lien extended to those advances. *Ex-parte Linden*, 1 Mont., D. & De Gex, 428. And this equitable lien prevails against the purchaser and his heir, and all persons claiming under him, with notice, although for valuable consideration. *Hearn v. Botelers*, Cary's Ch. Rep. 25. *Walker v. Preswick*, 2 Ves. 622. *Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682, notes c to d. *Elliot v. Edwards*, 3 B. & P. 181. But it, of course, would not prevail against a *bonâ fide* purchaser without notice, and the mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him, for that does not show it was not paid for. 1 Bro. C. C. 302.

[3] In equity, when a contract is made for the sale of an estate, the court considers the vendor as a trustee for the purchaser of the estate sold (*Atcherley v. Vernon*, 10 Mod. 518. *Davie v. Beardsham*, 1 Ch. Ca. 39. *Lady Fohain's case*, cited id.; and *see* 1 T. R. 601. *Green v. Smith*, 1 Atk. 572); and the purchaser as a trustee of the purchase-money for the vendor. (Id.) *Pollexfen v. Moore*, *supra*. Therefore, the contract will not be discharged by the bankruptcy of either the vendor (*Orlebar v. Fletcher*, 1 P. Wms. 737) or vendee. 3 Ves. jun. 255. *Bowles v. Rogers*, 6 id. 25, n. So, the death of the vendor or vendee before the conveyance (*Paul v. Wilkins*, Poth. 106), or surrender (*Barker v. Hill*, 2 Ch. Rep. 113); or even before the time agreed upon for completing the contract, is in equity immaterial. *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32, pl. 43.

If the vendor die before payment of the purchase-money it will go to his executors, and form part of his assets. *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28. *Baden v. Earl of Pembroke*, 2 Vern. 213. *Bubb's case*, 2 Freem. 38. *Smith v. Hibbard*, 2 Dick. 712. *Foley v. Percival*, 4 Bro. C. C. 419.

[4] The vendee may maintain an action, if the vendor is not prepared to make out a good title on the day on which the purchase is to be completed. *Cornish v. Rawley*, 1 Selw. N. P. 179. But though the original time cannot be extended by parol, as it would amount to a contravention of the Statute of Frauds (*Stowell v. Robinson*, 3 Bing. N. C. 937. *Goss v. Lord Nugent*, 2 Nev. & M. 35), yet the performance on the exact day may be waived by the conduct of the parties, and by the contract being treated and acted upon as a continuing contract after the appointed period. *Carpenter v. Blandford*, 8 B. & C. 575. In such action against the vendor, vendee may recover the deposit and interest, with the expenses incurred in preparing and entering into the agreement, investigating the title, and endeavouring to procure a good title. *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492. *Hanslip v. Padwick*, 5 Ex. 615; 19 L. J. Ex. 372. And it is sufficient if these costs have been incurred, though not paid before action. *Richardson v. Chasen*, 10 Q. B. 756. *Pritchet v. Boevey*, 1 C. & M. 775. He cannot claim the costs of raising the purchase-money in readiness for payment, nor the interest on it while lying idle (*Hanslip v. Padwick, supra*); but as to this interest, see *Sherry v. Oke*, 3 Dowl. 349. He cannot claim the costs of a chancery suit brought by him against the defendant for a specific performance, and dismissed for defect of the defendant's title (*Malden v. Tyson*, 11 Q. B. 292); nor the extra costs of a chancery suit brought against him by the defendant, and dismissed with costs. *Hodges v. Earl of Litchfield, supra*. Expenses incurred before entering into the contract cannot be claimed (Id.); nor the expense of preparing the conveyances, after the refusal to complete, on account of the non-production of title-deeds, &c. *Jarmain v. Egelstone*, 5 C. & P. 172. See *Steer v. Crowley*, 32 L. J. C. P. 191.

(*d*) *On what Title he may Insist.*[1]
(*f*) *Entitled to an Assignment of Outstanding Terms.*[2]
(*g*) „ *to Attested Copies of Deeds.*[3]

(O) *Duties and Liabilities of Purchaser.*
(*a*) *To Search for Incumbrances.*[4]

Where the vendor is, without fraud on his part, unable to make out a title, the purchaser, it would seem, is not entitled to recover damages for the loss of the bargain beyond the money he has paid, with interest and expenses. *Flureau v. Thornhill*, 2 Black. 1078. *Pounsett v. Fuller*, 17 C. D. 660; 25 L. J. C. P. 145. *Sykes v. Wild*, 30 L. J. Q. B. 325. But if the vendor knew at the time the contract was entered into that he had no title, the purchaser may, in an action for breach of such contract, recover beyond his expenses damages for the loss of his bargain. *Robinson v. Hardman*, 1 Ex. 850. *Hopkins v. Grazebrook*, 6 B. & C. 31. So also if he fails to complete from any other cause than defect of title. *Symons v. Patchett*, 7 E. & B. 568. *See* Abstract of Title, vol. i. p. 78.

[1] An agreement to make out a good title is implied in every sale of realty. *Hall v. Betty*, 4 Man. & G. 410); and the title offered to the purchaser must be a good legal title, and not merely an equitable one. *Hartling v. Pekall*, Peake, 131.

In *Boyman v. Gutch* (7 Bing. 379) it was held that the capacity of the vendor to make a good title depended upon whether he had a legal title to convey, and not upon whether a court of equity would compel the purchaser to take the title. But in *Jeakes v. White* (6 Ex. 873), in which *Boyman v. Gutch*, was not cited, it was held that a "good title" meant such a title as a court of equity would adopt as sufficient ground for compelling specific performance; and in that case a title which depended on a doubtful fact respecting heirship was held bad. In *Simmons v. Heseltine*, 5 C. B. (N. S.) 554; 28 L.J.C.P. 129, a title depending on a doubtful question of fact has been held unavailing, and the plaintiff recovered his deposit and expenses. *Stevens v. Austen*, 30 L.J. Q.B. 212.

[2] The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on purchasers. If a purchaser have no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also take an assignment of a term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession; or, if he has lost his possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance. *Willoughby v. Willoughby*, 1 T. R. 763.

The expense of the assignment of terms of years which a purchaser can require to be assigned to attend the inheritance must be borne by the purchaser himself, but the title to them must of course be deduced at the expense of the vendor; and if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

[3] If a purchaser cannot obtain the title-deeds he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary (*Dare v. Tucker*, 6 Ves. jun. 460. *Berry v. Young*, 2 Eq. Ca. 640, n.); and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose. *Berry v. Young*, *supra*. *See* Abstract of Title, vol. i. p. 75.

[4] There are few cases in which judgments should not be searched for on the part of the purchaser, and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty, although if any judgments should be entered up after the purchase-money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance, the vendor being in equity only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien, on the land; and this equity prevails whether the judgment-creditor had or had not notice of the contract. Nels. Ch. Rep. 184. *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; 10 Mod. 418.

It is not usual for conveyancing counsel upon private purchases to direct a search for more than judgments, annuities, crown debts and accountantships, and *lis pendens*, and also a general search in the county register, if any, and in the customary court rolls, if the property is copyhold. The Insolvent Court should also be searched, if there be reason to suspect that the vendor has been insolvent, or in embarrassed circumstances. *See* Dart on Vendors and Purchasers, 301. It may also be observed in connexion with the above head, that a purchaser suspecting a third person has a claim on the estate, should (Sugd. 9; *Ibbotson v.*

(*b*) *Liability to Incumbrances.*[1]

II. Of Personal Goods and Chattels.

(G) *Action by Vendor for Non-Performance.*[2]

(H) „ *Purchaser for Non-Performance.*[3]

Rhodes, 2 Vern. 554), in the presence of witnesses, who may take notes of what passes (*Doe v. Perkins*, 3 T. R. 749. *Burrough v. Martin*, 2 Camp. 112. *Wood v. Cooper*, 1 C. & Kir. 645), inquire of him whether such be the fact, and the amount of the claim, at the same time stating his own intention to purchase (2 Vern. 554); and if such person deny the existence of the claim, or assert that it is confined to a particular sum, he will, in equity, be bound by his denial or assertion (*Pearson v. Morgan*, 2 Bro. C. C. 388; 6 Ves. 183; and 3 id. 111); but although bound to answer truly, if at all, a mortgagee, it would appear, may decline to answer, unless the intending purchaser offer to redeem his claim. *Bugden v. Bignold*, 2 You. & C., C. C. 390. Dart's *Vendors and Purchasers*, 60.

[1] It is sometimes stated in general terms, that by the contract the purchaser becomes, in equity, the owner of the property; but "this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interest of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." *Tasker v. Small*, 3 M. & C. 70. *Wall v. Bright*, 1 Jac. & W. 501. So, notice of an incumbrance given to the purchaser, before the execution of the conveyance, is effectual, although the purchase-money be actually paid (*Wigg v. Wigg*, 1 Atk. 384); and the purchaser, although he may then have, or subsequently acquire, the legal estate, can, it is conceived, use it against the incumbrancer only to the extent of securing such purchase-money.

[2] The measure of damages in an action for not accepting goods under a contract of sale, is the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted. *Boorman v. Nash*, 9 B. & C. 145. *Philpotts v. Evans*, 5 Mee. & W. 475. And the purchaser cannot anticipate the claim for damages by giving previous notice of his intention not to accept the goods unless the vendor assents to such notice. *Philpotts v. Evans, supra. Ripley v. M'Clure*, 4 Ex. 345; and see *Leigh v. Patterson*, 8 Taunt. 540. If there is no difference proved between the contract price and the market price, only nominal damages can be recovered. *Valpy v. Oakley*, 16 Q. B. 941; and *see* Contract, vol. iii. p. 206; Goods Bargained and Sold, vol. iv. p. 605; Goods Sold and Delivered, id. p. 606; Frauds, Statute of, id. p. 545.

[3] In an action for not delivering goods under a contract of sale, the measure of damages is the difference between the contract price and the market price at the time appointed for delivery. *Gainsford v. Carroll*, 2 B. & C. 625. *Startup v. Cortazzi*, 2 C., M. & R. 165. *Barrow v. Arnaud*, 8 Q. B. 595, 609. *Joslin v. Irvine*, 30 L. J. Ex. 78; 6 H. & N. 512; and see *Leigh v. Patterson*, 8 Taunt. 540. *Philpotts v. Evans*, 5 Mee. & W. 475. And where there is no difference between the contract price and the market price the damages are only nominal. *Valpy v. Oakley*, 16 Q. B. 941. But if the goods are ordered in England by a merchant abroad, for the purpose of being exported and resold in a foreign market, and the order is accepted, and the vendor undertakes to forward the goods, but neglects so to do, the measure of damages is not the difference between the agreed price and the marketable value of goods in England, but between the price and the marketable value of the goods at the place where they would have been resold by the purchaser. *Bridge v. Wain*, 1 Stark. 504. The purchaser cannot recover as special damage the loss of anticipated profits, but if he has resold the goods at a profit he is entitled to recover such profit (*Dunlop v. Higgins*, 1 H. L. C. 403), although the subcontract is not in writing, and could not be enforced by reason of the Statute of Frauds. *Waters v. Towers*, 8 Ex. 401. As to the recovery of any special damage arising from the non-delivery of the goods, *see* Damages, vol. iii. p. 549. *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179. *Portman v. Middleton*, 27 L. J. C. P. 231. *Smeed v. Foord*, 28 L. J. Q. B. 178. *Dingle v. Hare*, 29 L. J. C. P. 143.

Where the property in the goods has passed under the contract, but the price has not been paid, and the vendor has wrongfully converted and disposed of the goods, so as to preclude himself from delivering them and recovering the price, the vendee can only recover the difference between the value of the goods and the contract price, and cannot recover the full value by suing for the conversion of the goods, instead of for the breach of contract (*Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180); but otherwise if the vendor wrongfully retakes the goods after delivery. *Gillard v. Brittan*, 8 Mee. & W. 575. *Stephens v. Wilkinson*, 2 B. & Adol. 320.

Where goods were paid for by bill, and after a breach of contract by the vendor in not delivering the goods the bill was dishonoured, the purchaser was held entitled to recover only nominal damages. *Griffiths v. Perry*, 1 El. & El. 680; 28 L. J. Q. B. 204. And *see* Contracts, vol. iii. p. 206.

(I) *Provisions of "Mercantile Amendment Act*, 1856," 19 *&* 20 *Vic. c.* 97, *s.* 2, *as to Action for Breach of Contract to deliver Specific Goods.*[1]

(J) *Of the Title to Goods and Chattels.*[2]

VENUE.

I. What it is.[3]

II. Where Local and where Transitory; how laid.[4]

III. Omission of.[5]

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[1] By the Mercantile Law Amendment Act, 1856, 19 & 20 Vic. c. 97, s. 2, it is provided, "that in actions for breach of contract to deliver specific goods for a price in money, the jury shall, on the application of the plaintiff and by leave of the judge, find what the goods to be delivered are, what the plaintiff would have to pay for them, what damages he would have sustained if they should be delivered under execution, and what damages if not so delivered; and that the court or a judge shall have power to order execution to issue for the delivery, on payment of the price found by the jury, of the goods, without giving the defendant the option of retaining the same upon paying the damages assessed," &c. This section is to be first taken advantage of at the trial, and its provisions do not affect the form of the declaration. *See* Trover, *ante*, p. 576.

[2] The title to goods and chattels rests not on title-deeds and documentary evidence, but upon visible possession and apparent ownership, as there are usually no other means of knowing who is the owner of a chattel but by observing who has the visible dominion and power over it. *Heron v. Mill*, 13 Ves. 122. *Edwards v. Harben*, 2 T. R. 589, 750. But by the common law possession is only *primâ facie* evidence of title, and no purchaser can be secure of a safe title to the goods he buys unless the purchase has been effected in market overt (*see* Market Overt, vol. v. p. 442); nor even then if they should happen to have been stolen. For by 7 & 8 Geo. 4, c. 29, the property in all chattels which have been stolen and afterwards sold in market overt revests, on conviction of the thief, in the original owner from whom they were stolen, so as to entitle him to maintain an action against the purchaser of the goods, or the value of them, without obtaining an order of restitution. *Scattergood v. Sylvester*, 15 Q. B. 510; 19 L. J. Q. B. 447; and *see* Larceny, vol. v. p. 334. The rule of law, that a person from whom goods have been stolen cannot bring an action against the thief for damages until after he has prosecuted him for the felony, does not prevent him from recovering from a third innocent person property which has been stolen from him and sold to the latter out of market overt. *Lee v. Bayes*, 18 C. B. 602; 25 L. J. C. P. 249. *White v. Spettigue*, 13 Mee. & W. 605. *Stone v. Marsh*, 6 B. & C. 551. But the rule of law that a vendee out of market overt can take no better title than his vendor, though true when the vendor has obtained possession of them by a criminal act (*Kingsford v. Merry*, 1 H. & N. 513; 26 L. J. Ex. 83), is not so when the vendor has obtained them by virtue of a contract. *White v. Gorden*, 10 C. B. 919; 20 L. J. C. P. 167. As to vendor being estopped from disputing right in party claiming under a vendee, *see* 32 L. J. Ex. 185.

[3] By r. 4, T. T. 1853, "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration or any subsequent pleading; provided that, in cases where local description is now required, such local description shall be given." Where the place of the happening of a fact is material, the venue in the margin sufficiently states it. *Cooke v. Swift*, 14 Mee. & W. 235. *Boydell v. Harkness*, 3 C. B. 168.

[4] Actions are either *local* or *transitory*. As a rule, actions for wrongs in respect of real property are *local*, and other actions are *transitory*: also actions are sometimes made local by statute. In local actions the venue must be laid truly in the county in which the cause of action arose; in transitory actions it may be laid in any county, at the option of the plaintiff, subject to an application by the defendant to change it. And by the Common-Law Procedure Act, 1852, s. 41, "where two or more causes of action joined are local, and rise in different counties, the venue may be laid in either of such counties, but the court or a judge shall have power to prevent the trial of different causes of action together if such trial would be inexpedient; and in such case such court or judge may order separate records to be made up, and separate trials to be had."

[5] The omission of a venue was formerly ground for a demurrer. *Remington v. Taylor*, 1 Lutw. 84. So if a wrong venue be stated in a local action, and the error appear on the record. *Mayor of Berwick-on-Tweed v. Shanks*, 3 Bing. 459. *Symmons v. Lillystone*, 8 Ex. 431; 22 L. J. Ex. 217. But if such error do not appear on the record the matter must be specially pleaded. *Richards v. Easte*, 15 Mee. & W. 244. *Bayes v. Hewitson*, 2 Bing. N. C. 575. If not pleaded the defect would be cured after verdict. 1 Saund. 229. *Tremeere v. Morrison*, 1 Bing. N. C. 97.

IV. Change of Venue.[1]
V. „ „ on Special Grounds.[2]

VERDICT.

I. General Verdict.[3] II. Special Verdict.[4]

[1] By r. 18, H. T. 1853, "no venue shall be changed without a special order of the court or a judge, unless by consent of the parties."

The committee of judges, to whom the question was referred as to the practice to be adopted in consequence of the above rule, have reported:—1st. "That in their opinion it is more convenient, as a general rule, that the application to change the venue by rule or summons may be made before issue joined, provided that this shall not prejudice either party from applying, after issue is joined, to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county." 2d. "That a defendant, on his affidavit to obtain the rule *nisi* to change the venue, or in support of a summons for that purpose before issue joined, shall state all the circumstances on which he means to rely as the ground for the change of venue, but that he may, if he pleases, rely only on the fact, that the cause of action arose in the county to which he seeks to have the venue changed; which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed." *De Rothschild v. Shilston*, 22 L. J. Ex. 279. Though these suggestions have been usually acted on, they can hardly be considered as binding. *Jackson v. Kidd*, 29 L. J. C. P. 221; 8 C. B. (N. S.) 354. The venue may now be changed in a transitory action at the instance of the defendant, on an affidavit called the *common affidavit*, stating that the cause of action arose in the county to which it is sought to be changed, and not elsewhere, to the county where the cause of action arose, unless the plaintiff shows that the cause may be more conveniently tried in the county in which the venue was originally laid, or other good reason why it should not be changed. *Smith v. O'Brian*, 26 L. J. Ex. 30. *De Rothschild v. Shilston*, *supra*. *Clulee v. Bradley*, 13 C. B. 604. But where the *common affidavit* has been answered by the plaintiff on special grounds, it is in the discretion of the court, under all the circumstances, to determine where it is most convenient for the trial to take place. *Ross v. Napier*, 30 L. J. Ex. 2. *Durie v. Hopwood*, 7 C. B. (N. S.) 835.

Until the 3 & 4 Wm. 4, c. 42, s. 22, the court had no power to change the venue in local actions, but by that section "a local action may be tried in another county than that stated in the venue by a judge's order, a suggestion of which is to be entered upon the record." A penal action is a local action within this section. *Greenhaw and another v. Parker*, 31 L. J. Ex. 4.

[2] Where the *common affidavit* cannot be made, the grounds must be very special to make the court interfere with the right of the plaintiff in transitory actions to lay his venue where he pleases. *Bucknell v. Phillips*, 7 Scott, 274. *Atkinson v. Sadler*, 2 Chit. Rep. 419. The application should be supported by an affidavit stating the nature of the cause of action, and of the defence thereto, and the grounds for the application. *Ladbury v. Richards*, 7 Moore, 82. *Johnson v. Beresford*, 2 C. & M. 222. It should show specific facts and materials to satisfy the court or judge that justice requires their interference. *Thornhill v. Oastler*, 7 Scott, 272. Where the ground is the extra expense of witnesses, it will not in general suffice for the defendant to swear that all his witnesses reside in the county to which he seeks to have the venue changed (*Tonks v. Fisher*, 2 Dowl. 22); he must show how many witnesses he will probably call, and where they reside (*Smallcombe v. Williams*, 7 C. B. 77. *Evans v. Weaver*, 1 B. & P. 20. *Ladbury v. Richards*, *supra*. *Parmeter v. Otway*, 3 Dowl. 66. *Clifton v. Sayer*, 7 Jur. Ex. 1139), and that it will be necessary to call them. *Compton v. Stewart*, 1 Dowl. 567; 2 C. & J. 473. *Tonks v. Fisher*, *supra*. And if, on the other hand, it appears that the plaintiff has many witnesses residing in the county where the venue is, and who are material to support his case, the court will not, in general, grant the application. *Flecke v. Godfrey*, 1 T. R. 782. *Jenkins v. Halton*, 7 Moore, 520. *Holmes v. Wainwright*, 3 East, 329. *Higgins v. Housman*, 3 Dowl. 549. See *Channon v. Parkhouse*, 13 C. B. n. s. 341.

[3] A general verdict is where the jury find the point in issue generally. *Davies v. Lowndes*, 1 Scott, N. R. 336. And in all cases they may give this verdict if they please. *Mayor of Devizes v. Clark*, 3 Ad. & E. 506. But it must be on all the issues (*Miller v. Tretts*, 1 Ld. Raym. 324. *Cattle v. Andrews*, 3 Salk. 372), unless the jury are discharged from giving it. *See* Jury, vol. v. p. 284. They may find some of the issues for the plaintiff, and some for the defendant; and where a plea can be construed distributively, a portion for plaintiff and the rest for defendant.

The judge in a civil or criminal court may refuse to receive an incorrect verdict, and require the jury to reconsider it. *R. v. Meany*, 7 L. T. (N. S.) 393; 32 L. J. M. C. 24.

Where leave is given at the trial to enter a verdict, the court has power to draw inferences from the facts. *Allen v. Smith*, 11 W. R. Ex. 440.

[4] The facts may be found specially by the jury, so that the conclusion of law to be derived therefrom may be found by the court;

III. Verdict subject to Special Case. *See* Special Case, *ante*, pp. 470, 471.

IV. Verdict subject to a Reference. *See* Arbitration, vol. i. p. 461.

V. Setting aside Verdict. *See* Trial, *ante*, p. 651.

VI. Amendment of Verdict. *See* Amendment, vol. i. p. 335.

VESTRY. *See* Churchwardens, vol. iii. p. 114; Overseers, *ante*, p. 32; Parish, id. p. 47.

I. Statutes by which Regulated.[1] II. Constitution of.[2]

and this is done by a special verdict. In general, however, the jury only do this by direction of the judge, at the request of either party. The special verdict is drawn and settled by the junior counsel after the trial, and afterwards set down for argument.

In a special verdict the court will intend nothing but what is found by the jury. *Duncombe v. Wingfield*, Hob. 262. *Doe v. Crisp*, 8 Ad. & E. 779. *Tancred v. Christy*, 12 Mee. & W. 316. *Witham v. Earl of Derby*, Wils. 55), and it will endeavour so to construe it as to give it effect. *Lynch v. Spencer*, Cro. Eliz. 515. *Sharp v. Sharp*, id. 482. A special case is now usually adopted instead of a special verdict.

[1] *Select Vestry.*—The acts relating to vestries are the 58 Geo. 3, c. 69, "An Act for the Regulation of Parish Vestries;" the 1 & 2 Wm. 4, c. 60 (Hobhouse's Act, repealed as to metropolitan parishes by 18 & 19 Vic. c. 120), "An Act for the better Regulation of Vestries, and for the Appointment of Auditors of Accounts in certain Parishes of England and Wales;" the 13 & 14 Vic. c. 57, "An Act to prevent the Holding of Vestry or other Meetings in Churches, and for Regulating the Appointment of Vestry Clerks;" the 16 & 17 Vic. c. 65, "An Act to Amend the Acts for the Regulation of Parish Vestries;" the 18 & 19 Vic. c. 120, "An Act for the better Local Management of the Metropolis," repeals 1 & 2 Wm. 4, c. 60, as to parishes mentioned in schedules A and B, and is itself amended by the 19 & 20 Vic. c. 112, "An Act to Amend the Act of the last Session of Parliament (c. 120) for the better Local Management of the Metropolis."

[2] A vestry, properly speaking, is the assembly of the whole parish, met together in some convenient place for the despatch of the affairs and business of the parish; and this meeting, being commonly held in the vestry adjoining to or belonging to the church, it thence takes the name of "vestry," as the place itself doth from the priest's vestments, which are usually deposited and kept there. Shaw's *Par. Law*, c. 17. By the common and general law, all the parishioners who pay scot and lot have a right to be of the vestry; but by immemorial custom this right may be restrained to a select number, usually termed a select vestry. *Berry v. Banner*, Peake, 160. These select vestries originated from the practice of choosing a certain number of persons yearly, to manage the concerns of the parish for that year, which by degrees became a fixed method, and the parishioners lost not only their right to concur in the public management, but also the right of electing the managers, and such a custom has been adjudged valid. Gibs. Cod. 219. And even a custom for the select vestry to choose one another has been supported. 4 Burn's *Ecc. Law*, 10. *See* some instances in which select vestries by custom have been established, *Butt v. Watkinson*, Lutw. 1027; and *Golding v. Fenn*, 7 B. & C. 765. A select vestry for the management of parochial affairs, existing by ancient custom, cannot select another vestry for the management of the poor, within the statute of 59 Geo. 3, c. 12. *Rex v. Woodman*, 4 B. & A. 507. *Rex v. Churchwardens of St. Bartholomew-the-Great*, 2 B. & Ad. 506. *Rex v. Churchwardens of St. Martin-in-the-Fields*, id. 907. *Cockburn v. Harvey*, id. 797. *Gibbs v. Flight*, 3 C. B. 581.

An ancient parish was divided, by acts of parliament, into two parishes, St. Giles-in-the-Fields and St. George Bloomsbury, which were made separate and distinct for all purposes, except as to church, highway, and poor-rates, and separate vestrymen were appointed for the new parishes. By a subsequent act for regulating the affairs of the joint and separate parishes of St. Giles and St. George, the vestry of each parish was to be composed of forty-two persons (besides the rector and churchwardens), elected by the vestrymen duly qualified. Each vestry was to appoint its own churchwardens and auditors, and make its own church-rates, and to manage some other affairs of the separate parish; and the vestrymen of the two parishes were to be the joint vestry of the parishes, and to appoint overseers and directors, and other officers, to manage the poor of the joint parish, to make its poor-rates, and to exercise other powers relative to the poor, and concerning the parishes jointly. Questions before the joint vestry were to be decided by a majority of the vestrymen present:—*Held*, that the parishioners of one of the parishes could not adopt separately the provisions of the 1 & 2 Wm. 4, c. 60, for the election of their own vestry. *R. v. Basset*, 17 Q. B. 332.

In parishes which have adopted the 1 & 2 Wm. 4, c. 60, s. 24, the number of vestrymen to be lotted out at the first election of the vestrymen under it is one-third of those vestrymen who, at the time of the election, were in actual existence, and not one-third of a complete vestry, deducting from such third the number of the vacancies. *Rex v. St. Pancras*, 1 Ad. & E. 80; 3 Nev. & M. 425. And *see* Burial, vol. iii. p. 13.

III. Place of Holding Meetings.[1]
IV. Notice of Meetings.[2]
V. Who to be Chairman.[3]
VI. Proceedings at Vestry.[4]

[1] By 13 & 14 Vic. c. 57, the holding of vestry or other parochial meetings in parish churches or chapels, or vestry-rooms attached thereto, is prohibited. It seems that a vestry may be held in any other place in the parish, even although the place fixed on be private property, provided the parishioners have free access to it. *Baker v. Wood*, 1 Curt. 507. *R. v. Archdeacon of Chester*, 1 Ad. & E. 342; 1 & 2 Wm. 4, c. 60, s. 29; 13 & 14 Vic. c. 57, ss. 2, 3.

[2] The meetings of the vestry are usually held as the exigencies of the parish require; and notice should be given of the specific purpose for which the vestry is called. And by 58 Geo. 3, c. 69, s. 1, this notice must be given publicly three days at the least before the meeting, by publication in church, and affixing the same on the church door. *See* also 1 & 2 Wm. 4, c. 60, s. 42.

By 19 & 20 Vic. c. 112, s. 9, every meeting of any vestry constituted by 18 & 19 Vic. c. 120, may be convened by transmitting the notice through the post, or otherwise, signed by the vestry clerk.

A notice was affixed by the churchwardens and overseers to the door of a parish church on Sunday, the 25th March, 1846, appointing a vestry meeting to be held on the succeeding Wednesday, to nominate officers of the parish for the ensuing year. A vestry was held in pursuance of the notice, and the parish, after nominating the overseers, proceeded to elect two persons as surveyors of the highways:—*Held*, that this appointment of the surveyors was invalid under 58 Geo. 3, c. 61, s. 1, the notice of the meeting not having been given three days at least before the meeting was held. *R. v. Best*, 2 New Sess. Ca. 655; 2 C. B. Rep. 90; 16 L. J. M. C. 338.

Where notice was given on a Friday for a vestry meeting to elect churchwardens on the following Tuesday; the vestry met and elected two churchwardens, but in consequence of doubts as to the notice convening the vestry being in accordance with the provisions of the 58 Geo. 3, c. 69, s. 1, another notice was given on the next Sunday, calling a vestry meeting for the same purpose on the following Thursday, on which day the inhabitants again met and elected the same churchwardens, who entered upon the office and performed its duties. Upon a rule for a *mandamus* to the inhabitants to elect churchwardens, on the ground that both elections were invalid:—*Held*, without deciding which of the two was the valid election, the assuming the first to be bad, the second was good. *Reg. v. St. Faith*, 2 Jur. N. S. 212; 25 L. J. Q. B. 168.

[3] The minister has a right to preside at all vestry meetings. *Baker v. Wood*, 1 Curt. 522. *R. v. D'Oyly*, 12 Ad. & E. 139. *Wilson v. M'Math*, 3 B. & A. 247. But he is not an essential part of the vestry. *Mawley v. Barbet*, 2 Esp. 687.

By 1 & 2 Wm. 4, c. 60, s. 30, in the absence of the minister, the meeting is to elect a chairman.

[4] Where notice of the purpose of a vestry meeting has been duly given, and that meeting has begun, but not completed, a certain business, and the meeting is regularly adjourned, such business may be lawfully completed at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it is summoned. *Scadding v. Lorant*, 3 H. L. C. 418; 15 Jur. 955; S. C. in court below, 13 Q. B. 706, affirmed.

An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. *Gosling v. Veley*, 4 H. L. C. 479; 1 C. L. R. 950; 17 Jur. 939.

Where, upon a vacancy arising in the office of organist to a church, the vestry unanimously resolved that the course followed at the antecedent election should be pursued, and in pursuance of this intention appointed a committee to reduce the number of candidates to six, each of whom should take the service on a particular Sunday, and at a subsequent vestry this resolution was unanimously confirmed, and the committee selected six out of sixty candidates who presented themselves; and at the time of the election a motion was made and seconded that A., a candidate who had not been thus selected, should be eligible, but this was negatived on a division; and where, afterwards, a poll having been demanded, a greater number of votes was tendered, and received as tendered only, on behalf of A. than on behalf of any other candidate:—*Held*, that, it not having been objected to at the previous meetings that the votes given for A. were lost or thrown away, this was a reasonable mode of conducting the election. *Ex-parte Lecren*, or *Reg. v. St. Stephens, Coleman Street* (*Vicar, &c.*) 2 D. & L. 571; 9 Jur. 255; 14 L. J. Q. B. 34.

The acts of one vestry are not absolutely binding on a succeeding vestry, and they may be confirmed or rescinded by such succeeding vestry; but the confirmation of the succeeding vestry is not necessary to make the acts of a preceding one valid. *Mawley v. Barbet*, *supra*.

Where it appeared to be the custom of the parish so to do, *Lord Stowell* said it was highly proper to give the orders of vestry a second consideration. *Groves & Wright v. Rector of Hornsey*, 1 Hagg. Rep. 190.

Although the right of adjourning the business in progress at a vestry meeting is in the meeting at large, and not in the chairman, yet, where the adjournment forms part of the original notice of the meeting, such adjournment will be legal. *Rex v. Archdeacon of Chester*, 1 Ad. & E. 342; 3 Nev. & M. 413. *Baker v. Wood*, 1 Curt. 507. And *see* further on this subject, Rogers on Ec.

VII. Right of Voting.[1]
VIII. Mode of Voting.[2]
IX. What is a Majority.[3]
X. Liability of Vestrymen.[4]

Law, 874. *Rex v. Churchwardens of St. Mary, Lambeth*, 1 Ad. & E. 346. *Reg. v. St. Margaret, Leicester*, 8 id. 889.

[1] The effect of 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, is to make rating to the poor-rate the exclusive qualification of voting in all parish vestries. *Richardson v. Gladwin*, 27 L. J. M. C. 192; E. B. & E. 138.

In the election of a surveyor of highways under 5 & 6 Wm. 4, c. 50, s. 6, an inhabitant occupying property liable to be assessed to the highway-rate is entitled to vote, although he has never been actually rated to the highway-rate. *R. v. Kershaw*, 6 E. & B. 999; 26 L. J. M. C. 19.

The chairman has a casting vote in addition to his other vote. 58 Geo. 3, c. 69, s. 11.

By 16 & 17 Vic. c. 65, no person shall be required, in order to be entitled to vote or be present at any vestry meeting under the provisions of the 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, to have paid any rate for the relief of the poor of the parish in which such meeting shall be held, which shall have been made or become due within three calendar months immediately preceding such vestry meeting.

As to the votes of owners of property and ratepayers in the election of guardians, *see* 4 & 5 Wm. 4, c. 76, s. 4, amended by 7 & 8 Vic. c. 101, ss. 13–16.

[2] The mode of voting may affect the validity of the proceedings. Generally a poll is demandable as of right, if for a legal purpose. *Rex v. St. Saviour's*, 1 Ad. & E. 380. *Reg. v. St. Mary's, Newington*, 2 B. & C. 303; 6 D. & L. 162; 12 Jur. 918; 17 L. J. Q. B. 220. The president of the meeting is the person to grant it. *Reg. v. D'Oyly*, 12 Ad. & E. 139. *Campbell v. Maund*, 5 id. 865. *Beechey v. Quentery*, 10 Mee. & W. 65. In the absence of other business, the poll should be taken immediately. *Reg. v. D'Oyly, supra.* The decision of the chairman on a show of hands is not conclusive, but he is bound on a requisition to take steps to ascertain the numbers. *Reg. v. St. Pancras*, 11 Ad. & E. 15. At an election of parish officers, a poll demanded upon a show of hands must be taken of the ratepayers generally, and the election is a nullity if the poll is confined to persons present when the poll is demanded. *Reg. v. St. Mary's, Lambeth*, 8 id. 356; 3 Nev. & P. 416. *R. v. St. Mary's, Newington*, 6 D. & L. 162.

A burial board, appointed under the 15 & 16 Vic. c. 85, laid before the vestry of the parish a proposal that the board should be authorised to borrow any sums of money not exceeding 20,000*l.* for their purpose. This proposal was not put to the vote by a show of hands, but was met by an amendment that the matter should be referred back to the board to be reconsidered; and a show of hands being taken on this amendment, it was carried by a majority. A division was then demanded, whereupon the chairman said that there should be a poll upon the original proposal and the amendment together, and that the votes must be affirmatively for one or the other, and not negatively as to either, and that no further amendment could afterwards be received. A majority of affirmative votes was given for the original resolution:—*Held*, that the proceeding was too informal to authorise the burial board to borrow the money, for that no show of hands having been taken upon the original resolution, it could not properly be put to the poll, having regard to the provisions of the special act regulating the proceedings of this particular vestry. *Elt v. St. Mary's, Islington, Burial Board*, 1 Kay, 449. As to putting an amendment, see *R. v. Roberts*, 32 L. J. M. C. 153.

[3] Where a statute requires a majority consisting of a proportion of the votes of persons present at a meeting to render valid an act, there must be the specified proportion of those present actually voting for the act, and those who refuse to take any part in the proceedings cannot be considered as absent. *In re Eynsham*, 3 New Sess. Ca. 507; 12 Q. B. 398; 18 L. J. Q. B. 210.

A local act of parliament empowered the vestrymen of a parish, or the major part of them, to remove the poor-law collector of the parish from his office:—*Held* (affirming the decision of the Queen's Bench, 3 Jur. N. S. 537; 26 L. J. M. C. 68), that the majority must be an actual majority of the vestrymen assembled, and that it was not sufficient at a meeting of thirty-five vestrymen for sixteen to vote for the removal and eleven against it, the remaining eight abstaining from voting altogether. *Reg. v. Christ Church (Overseers)*, 7 El. & Bl. 409; 3 Jur. N. S. 1074; 27 L. J. M. C. 23.

[4] Vestrymen incur no separate or individual responsibility for anything which may be done in pursuance of a resolution of vestry signed by them. Thus it has been determined that vestrymen who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were not to be responsible for the payment of the attorney employed by the surveyor (*Sprott v. Powell*, 3 Bing. 478); for in signing this resolution they act merely as vestrymen, without any intention of becoming individually responsible (*Lancaster v. Tricker*, 1 Bing. 201; 8 Moore, 20. *Lancaster v. Frewer*, 2 Bing. 361; 9 Moore, 688), unless indeed the resolution guarantee the payment of expenses, in which case they have been held to be personally liable. *Hendebourck v. Langton*, 3 Car. & P. 566.

A vestry elected under the Metropolitan Local Management Act, 18 & 19 Vic. c. 120, which requires such vestry to execute the office of surveyor of highways within the parish, is not responsible for an injury occasioned to a passenger by the negligence of workmen employed by the surveyor of such vestry in paving a street in such parish,

VESTRY-Clerk.[1]

VEXATIOUS Indictments for Misdemeanors.[c]

VIEW. *See* Jury, vol. v. p. 282.

I. In what Cases View Obtained.[3]

II. View to be by Rule without Writ.[4]

III. Rule for View, how Obtained.[5]

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when the vestry has not given any direction for doing the work. *Holliday v. the Vestry of St. Leonard's, Shoreditch*, 11 C. B. (N.S.) 192; 30 L. J. C. P. 361. *See* vol. v. p. 522.

[1] The 13 & 14 Vic. c. 57, regulates the appointment, duties, and salary of the vestry-clerk. A *mandamus* will not lie to admit a vestry-clerk to his office. *R. v. Croydon*, 5 T. R. 13.

Where a vestry-clerk of a parish, upon his appointment (by the vestry) to the office, was told that it would be part of his duty to collect the church-rate and poor-rate, and to apply them as his predecessor had done. In pursuance of these instructions, and in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry-clerk applied a portion of the money arising from a church-rate made in the plaintiffs' year of office as churchwardens to the payment of certain parochial charges not legally payable out of the church-rate:—*Held*, that inasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of, he having previously filled the office of overseer, and also of auditor of the parish accounts, and did not object, the two were precluded from suing the vestry-clerk for this misapplication of the rate. *Cooper v. Law*, 5 C. B. 502.

[2] By 22 and 23 Vic. c. 17, s. 1, no indictment for perjury, conspiracy, obtaining property by false pretence, keeping gambling or disorderly house, and for indecent assault, until prosecutor has been bound over to prosecute, or the accused be committed or bound by recognisances to appear, or consent in writing of a judge or law officers. By sect. 2, if prosecutor desires to indict, justices may bind him to prosecute. See *Queen v. Bray*, 32 L. J. M. C. 11.

[3] By the 6 Geo. 4, c. 50, s. 23, where it shall appear to the court, or a judge in vacation, that it will be proper and necessary that some of the jurors shall have view of the place in question, in order to the better understanding of the evidence, a rule for a view may be ordered. An action for work and labour as a bricklayer is not a case in which a rule for a view would be granted under this act. *Stones v. Menhem*, 2 Ex. 382. The court cannot, even by consent, order a view in one county by a sheriff of another; neither can it compel a jury to go out of the limits of a county for such a purpose. *Malins v. Lord Dunraven*, 9 Jur. 600, Q. B.

[4] By the C. L. P. Act, 1852, s. 114, "a writ of view shall not be necessary or used; but, whether the view is to be had by a common or special jury, it shall be sufficient to obtain a rule of the court, on judge's order, directing a view to be had; and the proceedings upon the rule for a view shall be the same as the proceedings heretofore had under a writ of view; and the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the associate, for the purpose of their being called as jurymen upon the trial."

By sect. 115, "the jurors contained in such panels as aforesaid shall be the jurors to try the causes at the assizes and sittings for which they shall be summoned respectively; and all such proceedings may be had and taken before such juries, in like manner, and with the like consequences in all respects, as before any jury summoned in pursuance of any writ or writs of *venire facias juratores*, *distringas juratores*, or *habeas corpora juratorum*, before this act."

[5] By r. 48, H. T. 1853, "the rule for a view may in all cases be drawn up by the officer of the court, on application of the party, without a motion for that purpose." The names of the showers should be inserted in the rule or order, and the time and place of meeting. *Taylor v. Thompson*, 7 Bing. 403; 1 Dowl. 218. *Stones v. Menhem*, *supra*.

By r. 49, H. T. 1853, "upon any application for a view there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff; and the sum to be deposited in the hand of the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay the expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff; and the under-sheriff

VISITOR. *See* Charities, Commissioners of, vol. iii. p. 78; Universities, *ante*, p. 605.

I. Appointment of.[1] II. Jurisdiction of.[2]

shall pay and account for the money so deposited, according to the scale following; (that is to say,)

	£	s.	d.
For travelling expenses to the under-sheriff, showers, and jurymen, expenses actually paid, *if reasonable.*			
Fee to the under-sheriff when the distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of	1	1	0
Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each common juryman, per diem	0	5	0
For each special juryman, per diem	1	1	0
Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common or special, each per diem	0	5	0
To the bailiff for summoning each juryman whose residence is not more than five miles distant from the office of the under-sheriff. .	0	2	6
And to each whose residence does exceed five miles of such distance	0	5	0

[1] The nomination of a visitor is by the patron or founder of a corporation (*Bury v. Philips*, 2 T. R. 352), and cannot be implied. *Case of Ravensworth Hospital*, 8 East, 221. Whoever founds a charity, whether he be the sovereign or a subject, has the right to nominate visitors of the same; and in case no such persons be appointed, he and his heirs will have by implication the superintendence of the institution. If, in the case of a subject having been the founder, there is not any one who can act as visitor in consequence of incapacity of the person, or a failure of heirs, the duties of that office devolve upon the queen, which it then becomes the duty of the Court of Chancery to execute for her majesty, in the same manner as if it had been a mere royal foundation.

If a visitor be appointed by the founder of a college, and charities are given to that college afterwards, they are not subject to the control of that visitor. *Rex v. Jennings*, 5 Mod. 422.

The visitatorial power of the Crown does not remove the jurisdiction of the court, or prevent it from exercising its functions in respect of an existing trust. *Daugaors v. Rivaz*, 29 L. J. Ch. 685.

[2] If the power of the visitor is to be under restriction or limitation it must be expressed (*Rex v. Bishop of Worcester*, 4 M. & S. 415); but he cannot act in his own cause. *Rex v. Bishop of Ely*, 2 T. R. 290.

In some instances the power of the visitor is regulated by statutes or ordinances imposed by the founder; in others he is without control. In those of the former kind, if he should not abide by the rules laid down, his acts, except under certain circumstances where the queen is visitor, are without authority, and *nul* in those of the latter, he having no guide but his own discretion, with which no person has any right to interfere: his power is arbitrary.

A visitor has power, *eo nomine*, to hear appeals. 4 Mod. 109; S. C. 1 Ld. Raym. 8. A visitor may deprive without the concurrence of any other person. 4 Mod. 110; 1 Ld. Raym. 58; Holt, 715; Skin. 407.

If a visitor has no authority by the founder to determine offences, yet it is incident to his office. *Rex v. St. John's, Cambridge*, 4 Mod. 238. Royal foundations are not visitable by bishops. *Dean of Dublin v. Archbishop of Dublin*, Fort. 329. The bishops can visit but once in three years. *Phillips v. Bury*, Skin. 478.

Though a visitor be by the constitutions of the college restrained from visiting *ex officio* above once in five years, yet he has a constant standing authority to hear complaints and redress grievances. Skin. 478. The visitor in his citation must pursue his authority. *Bentley v. Bishop of Ely*, 2 Stra. 913. Where the visitor is disturbed and hindered, that cannot be called a visitation. *Phillips v. Bury*, Holt, 720, 721.

The power of a visitor cannot be controlled, because it is absolute; S. C. Holt, 722. Corporation acts are examinable by the visitor. Fort. 299. *Bentley v. Bishop of Ely*, 2 Stra. 793.

The chancellor is visitor of all the king's free chapels, and all the colleges of the king's foundation. 1 Mod. 85.

The visitor shall determine all that relates to persons who are of the foundation. *Rex and Reg. v. St. John's College, Oxon*, Holt, 437; Com. 238.

Where the Crown has appointed a general visitor it cannot afterwards enlarge his powers. *Bentley v. Bishop of Ely*, Fort. 300. Contumacy is a good cause of deprivation. *Phillips v. Bury*, Skin. 489, 490. The visitor may punish one man for an act by him done jointly with others. *Bentley v. Bishop of Ely*, Stra. 913.

Where a visitor has authority to deprive, and does so in pursuance of that power, the justice or sufficiency of his sentence, as to the cause of it, is not examinable in the common-law courts: *per Holt, C. J.*, *Phillips v. Bury*, Skin. 482, 500. But *see* Ecclesiastical Persons, vol. iv. p. 166.

III. Judgment of.[1]
IV. Mandamus connected with.[2]
V. Of the Successor.[3]
VI. „ a Visitation.[4]

VOLUNTARY Conveyance.

I. As against Creditors. *See* Bankruptcy, vol. ii. pp. 201, 232; Bill of Sale, id. p. 494; Fraud, vol. iv. p. 528.
II. As against Purchasers.[5]

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[1] From an act done by a visitor ordinarily an appeal lies to his superior, but if as patron no appeal lies. *Rex v. Bishop of Ely*, 2 T. R. 290. The visitatorial power is an appointment not of ecclesiastical origin. Where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incorporated, there the law raises a visitatorial power in the founder and his heirs, unless the founder have appointed some other person. *Bury v. Phillips*, 2 T. R. 354.

No appeal lies from his sentence, for he is *fidei commissarius*, especially in the case of a fellow of a college, which is a thing of a private design, and does not concern the public. *Mr. Parkinson's case*, 3 Mod. 365. His determinations are not examinable in any other courts; 1 Ld. Raym. 8; Skin. 13, 498, 513. If the fellow of a college be deprived according to the statutes of the founder, the appeal must be to the visitor, and then to the delegates. 1 Mod. 85. The court will not grant a *mandamus* to restore the fellow of a college who has been deprived by the visitor appointed by the founder. *Appleford's case*, 1 Mod. 82, 83. When a visitation is made by the archbishop, all acts of the bishop are suspended by an inhibition. 3 Salk. 201.

[2] A *mandamus* lies to compel a visitor to do his duty (*Rex v. Bishop of Lincoln*, 2 T. R. 338); but the court refused to grant a *mandamus* requiring the visitors named in the charter of the college of Doctors' Commons to inquire into the mode in which the college, under 20 & 21 Vic. c. 77, ss. 116, 117, had exercised their discretion as to the surrender of their charter and the disposition of their property. See *Ex-parte* ———, E. B. & E. 863.

[3] In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the Crown, to be exercised by the great seal (*Rex v. St. Katherine's Hall, Cambridge*, 4 T. R. 233), and the appointment of a bishop without his christian name to be visitor extends to his successors (*Bentley v. Bishop of Ely*, 2 Stra. 913): so the heirs of the founders are visitors of eleemosynary corporations in default of appointment (*Phillips v. Bury*, 1 Ld. Raym. 8 Skin. 433; Holt, 724); but not in ecclesiastical corporations. Skin. 495.

[4] Administering an oath, and hearing and redressing complaints, is a visitation (*Phillips v. Bury*, 2 T. R. 346); but where the visitor is disturbed and hindered, that cannot be called a visitation. (Id.)

[5] The general rule is, that a voluntary conveyance by deed is good both at law and equity against the party himself. Fonbl. T. Eq. b. i. c. 5, s. 2. But a voluntary settlement of lands, made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase-money was paid or the deeds executed, and though the settlor had other property at the time of the prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case upon construction of the statute 27 Eliz. c. 4. *Doe d. Otley v. Manning*, 9 East, 59. *Chapman v. Emery*, Cowp. 278.

That statute of Elizabeth enacts, in sect. 2, "that every conveyance, grant, charge, lease, estate, and limitation of use in or out of any *lands, tenements, or other hereditaments* whatever, for the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall *purchase* the said lands, &c., or any rent, profit, or commodity, in or out of the same, shall be deemed and taken only against that person or persons, bodies politic, &c., and his or their heirs, successors, executors, administrators and assigns, and against every one lawfully claiming under them, who shall so purchase for money, or any good consideration, the said lands, &c., or any rent, &c., to be *wholly void, frustrate, and of none effect.*" It appears from the cases, that the very execution of the subsequent conveyance sufficiently evinces the fraudulent intent of the former one. *See* also *Goodright v. Moses*, 1 Bl. 1019. *Evelyn v. Templar*, 1 Bro. R. 148. *Cormick v. Trapaud*, 8 Dowl. 60. But if the purchase has been made at such an undervalue as to evidence fraud, it will not invalidate the previous voluntary conveyance. *Doe v. Routledge*, Cowp. 705. *Metcalf v. Palvertoft*, 1 Ves. & B. 184. *Doe v. James*, 16 East, 212.

As to who is a Purchaser within the above section.—A mortgagee is a purchaser (*Chapman v. Emery, supra*); so a lessee at a rack-rent (*Goodright v. Moses, supra*); so a person who releases a contested right in consideration of the conveyance to him (*Hill v. Bishop of Exeter*, 2 Taunt. 69. *See* also Marriage Settlement, vol. v. 459). There may be cases in which, on account of the inadequacy of the price, a question may arise

W.

WAGER.[1] *See* Gaming, vol. iv. p. 596; Horse-Racing, vol. v. p. 52; Insurance, Fire, id. p. 174; Insurance, Life, id. p. 177; Insurance, Marine, id. p. 189; Stakeholder, *ante*, p. 476.

WAGES. *See* Master and Servant, vol. v. p. 404.

WAIF. *See* Estray, vol. iv. p. 288.

WAR.[2]

WAREHOUSEMAN. *See* Bailment, vol. ii. p. 114; Lien, vol. v. p. 382.

WARRANT.

I. The Warrant.[3]

whether a subsequent conveyance, though some value passed, be not in effect voluntary, and a mere trick for the purpose of invalidating a former one (*Doe v. James*, 16 East, 212). A lessee without fine or rent is not a purchaser within the statute (*Upton v. Bassett*, Cro. Eliz. 444. *Twynne's case*, 3 Coke, 80); nor is a judgment creditor. *Beavan v. Earl of Oxford*, 6 De Gex, M. & G. 507.

A will is a voluntary conveyance (*Villiers v. Beaumont*, 1 Ves. 100. *Boughton v. Boughton*, 1 Atkins, 625); so is a settlement by a tenant in fee for the maintenance of herself and children for her life, to raise portions for younger children, and the surplus to her heir-at-law, she having then many sons and daughters (*Goodright v. Moses*, 2 Bl. 1019); so a conveyance for the payment of debts generally, to which no creditor is fraudulent against purchasers within this statute. *Leech v. Leech*, 1 Ch. Ca. 249. *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & Mylne, 451. But see *Brown v. Cavendish*, 1 J. & L. 607.

A *bonâ fide* purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute. *Doe d. Newman v. Ratham*, 17 Q. B. 723. *Parker v. Carter*, 4 Hare, 409. *See* also *Richards v. Lewis*, 11 C. B. 1035.

The fifth section of the same statute enacts, "that if any person shall make any conveyance of lands, with a clause of revocation at his will and pleasure of such conveyance, and after such conveyance shall bargain, sell, grant, demise, convey or charge the same land to any person or persons, for money or other good consideration, the said first conveyance not being revoked, that the said first conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. See *Twynne's case*, 3 Coke, 80. A power to mortgage to any extent is a power of revocation within the meaning of this section (*Tarback v. Marbury*, 2 Vern. 511); but a power to charge with a particular sum is, if no fraud be found, not so (*Jenkins v. Keymis*, 1 Lev. 152). A power to lease for any number of years, with or without rent, is also a power of revocation within this section; for both that and the mortgage power enable the party exercising them to defeat the estate in substance. *Lavender v. Blackstone*, 2 Lev. 146. But see *Buller v. Waterhouse*, 2 Show. 246.

In the 4th section of the above statute there is a proviso in favour of *bonâ fide* purchasers. Persons taking under instruments made *bonâ fide* and for a valuable consideration are such (*Roe v. Mitton*, 2 Wils. 356). As to those taking under marriage settlements, *see* vol. v. p. 459. So also are persons who, between the voluntary settlement and the purchase, have acquired as purchasers under the voluntary settlement any legal or equitable right. *Prodgers v. Langham*, 1 Sid. 133. *George v. Milbanke*, 9 Ves. 193. *Parr v. Eliason*, 1 East, 95. *Payne v. Mortimer*, 28 L. J. Ch. 716.

[1] Wagers at common law were valid, unless prohibited by statute, or against public policy. *Murray v. Kilby*, Selw. N. P. 1341. *Jones v. Randall*, Cowp. 37. *Kent v. Bird*, id. 583. *Allen v. Hearn*, 1 T. R. 56. *Hartley v. Rice*, 10 East, 22. But *see* Gaming, vol. iv. p. 596.

[2] The courts will judicially notice the existence of war with a foreign state (*R. v. De Berenger*, 3 M. & S. 67); and of the articles of war printed by the queen's printer. *Bradley v. Arthur*, 4 B. & C. 304. A declaration of war transmitted from a foreign state by the British ambassador is evidence of the time of commencement of hostilities. *Thelusson v. Cosling*, 4 Esp. 266.

[3] When the party suspected of having committed an offence is at large, he may, in some cases, before an indictment has been found, be apprehended without a warrant by a constable or a private individual. But though this course is sometimes necessary when the utmost promptitude is required, yet, whenever the case will admit, it is more prudent to obtain the authority of a magistrate to give greater security to the persons

II. Form of.[1] III. Backing Warrant.[2]

by whom the arrest is to be effected, because, if the justice grant his warrant erroneously, no action lies against the party obtaining it, or the officer who executes it.

When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended as the preferable process to procure his attendance, and this seems necessary where there is no oath of the offence having been committed. 2 T. R. 225; Comb. 359; Dick, J., Warrant, 11; 2 Barnard, 34, 77, 101. But where there is an accusation on oath of an offence of a higher nature, as treason or felony, it is proper to issue a warrant in the first instance, if there appear any reasonable ground for the charge.

A magistrate ought, unless he commits upon view of the offence, to examine upon oath the party requiring a warrant, as well to ascertain that a felony or other crime has actually been committed, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. 1 Hale, 582; 2 id. 110, 111; 4 Bl. Com. 290; Hawk. b. 2, c. 13, s. 18; 2 T. R. 225; Comb. 359; Dick, J., Warrant, 1. And it is the duty of the magistrate well to consider all the circumstances sworn to, and not to grant any warrant groundlessly or maliciously, without such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty. Hawk. b. 2, c. 13, s. 18; Dick, J., 428, 459. He may issue such warrant in any case where he has jurisdiction over the offence, on the ground that the law, by giving him such jurisdiction, impliedly gives him such power (*Rutt v. Conant*, 1 B. & B. 548; 4 Moore, 195; 2 Hawk. c. 13); and also in all treasons, felonies, and breaches of the peace, in which the party is punishable with corporal punishment within his jurisdiction (1 Hale, 579; 2 id. 107; 12 Co. 131; Hawk. b. 2, c. 13, ss. 15, 16; 4 Bl. Com. 290); but not in cases of perjury (*R. v. Bartlett*, 1 D. & L. 95); nor can he issue a warrant to apprehend a person refusing to attend and give evidence before him. *Evans v. Rees*, 12 Ad. & E. 55. *See* also *Bessell v. Wilson*, 1 E. & B. 489; 22 L. J. Q. B. 94.

The practice of granting "bench warrants" on the finding of an indictment is superseded by 22 & 23 Vic. c. 17, ss. 1, 2, the act for preventing the vexatious preferring of indictments.

Before a justice of the peace grants a warrant, he must himself examine the person requiring such warrant, or his witnesses, on oath. 2 Barnard, 34, 77, 101. *Caudle v. Seymour*, 1 Gale & D. 454; 1 Ad. & E. (N. S.) 892. A warrant of apprehension may also be granted by the privy council or secretaries of state (Fortescue, 140. *R. v. Kendall*, Ld. Raym. 65; 1 Salk. 34), and by the Speaker of the House of Commons (14 East, 1, 163), or Lords (8 T. R. 314); by justices of gaol delivery (1 Leach, 116), or oyer and terminer (1 Hale, 579; 2 id. 106); justices at sessions (1 id. 579); or by a judge of the court of Queen's Bench (id. 578; 2 id. 5, 6; 2 Barnard, 28; 48 Geo. 3, c. 58, s. 1); but warrants are most usually issued by a single justice of the peace. 4 Bl. Com. 290; 1 Hale, 579.

[1] The warrant of a judge extends all over England, and is tested England; but that of a magistrate is tested of the particular county or precinct over which his jurisdiction extends. 4 Bl. Com. 291; Fortescue, 143. *See* 48 Geo. 3, c. 58, s. 1.

It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name who is no officer, for the justice may authorise any one to act for him. But it is usually directed to the constable of the district generally, without naming him, *and to all other officers of the peace within the said county*. *R. v. Weir*, 1 B. & C. 288; 2 Hawk. c. 13, s. 27; Dalt. c. 169; 2 Hale, 110.

If an act of parliament direct that a justice shall grant a warrant, and do not say to whom it shall be directed, it must be directed to the constable and not to the sheriff, unless such power be given by the act. *Reg. v. Wyatt*, 2 Ld. Raym. 1192; 1 Salk. 382. But see *Blatcher v. Kemp*, 1 H. Black. 15.

The name of the party to be taken should be inserted, and must not be left uncertain (2 Hale, 114; Dalt. 169. *R. v. Hood*, 1 Ry. & M. 281); but if his name be unknown, the best description of him which the nature of the case will admit of may be inserted. 1 Hale, 577.

A general warrant upon a complaint of robbery to apprehend *all persons suspected*, and to bring them before a justice, hath been ruled void; and false imprisonment lies against him that issues such a warrant. 1 Hale, 580; 2 id. 112. So, a general warrant to apprehend the authors, printers, and publishers of a libel, without naming them, is illegal. *Money v. Leach*, 1 Bl. Rep. 555; 19 Howell's St. Tr. 1002. General warrants to take up loose, idle, and disorderly people (*Money v. Leach*, 3 Burr. 1766), and search-warrants (2 Hawk, c. 13, s. 11), are perhaps the only exceptions to this rule.

Where a married woman has committed an offence without her husband, the warrant should be only against her. 3 Burr. 1681.

It does not seem to be requisite *to set out the charge or offence*, or evidence, in a warrant to apprehend; and cases may occur in which it might be imprudent to let even the peace-officer know the crime of which the party to be arrested is accused. 2 Wils. 158. It is, however, advisable to do so, especially if the warrant be for the peace or good behaviour, to set forth the special cause upon which it is granted, in order that the party may be provided at once, before the justice, with sufficient sureties. Toone, 449.

[2] It is said that formerly there ought, in

strictness, to have been a fresh warrant in every fresh county, but the practice of backing warrants has long been observed, and was at last sanctioned by 23 Geo. 2, c. 26, s. 2; 11 & 12 Vic. c. 24, s. 11. The last of these acts, repealing the former, provides that a justice of the peace of the county or place where the person may be shall, upon proof being made upon oath of the handwriting of the justice granting the warrant, indorse and sign the same in the form prescribed by the act, upon which the offender may be apprehended, and taken before the justice so indorsing the warrant, and if the offence be bailable, he is to bail the party, and take the examination, or confession, and all proceedings, as in ordinary cases.

[1] The officer to whom the warrant is directed should, as soon as he conveniently can, proceed with secrecy to find out and actually arrest the party; and if he refuse or neglect to execute the warrant, he will be punishable for his disobedience or neglect (Hale, 581); but at some of the police-offices it is the practice to deliver the warrants for common assault to one of the constables, who goes round to the parties accused, and states the time when they must go before a magistrate, in order that they may be provided with sureties. With respect to the person who may execute the warrant, it seems that if it be directed to the sheriff he may authorise others to execute it; but that, if it be given to an inferior officer, he must personally put it in force, though any one may lawfully assist him. 2 Hale, 115; Bac. Abr. Constable, D. And if a warrant be generally directed to all constables, no one can act under it out of his own precinct, and if he do he will be a trespasser. 1 H. Black. 15.

A warrant directed to several may be executed by one (1 East, P. C. 320); but it is said that if it direct four jointly, and not severally, to arrest, then they must all be present. 2 Taunt. 161. When the officer employs others to assist him, he must be so near as to be acting in the arrest, in order to render it legal. Cowp. 66; Dick, J., Arrest, II. And he may not only demand the assistance of subjects in general, but may, if the warrant cannot otherwise be executed, engage the assistance of the military. 14 East, 190. We have already seen that the warrant must be executed within the jurisdiction of the justice who issued or backed it. 5 East, 233. The arrest may be made in the night. 1 East, P. C. 324; 3 Taunt. 14. And though by 29 Car. 2, c. 7, arrests in general are prohibited on a Sunday in case of treason, felony and breach of the peace are excepted (29 Car. 2, c. 7, s. 6; 1 East, P. C. 324); and in the construction of this statute it has been decided that a person may be apprehended on a Sunday on an attachment for a rescue. Willes, 459; 1 T. R. 265. It may be executed anywhere within the jurisdiction of the magistrates granting or backing it (*Milton v. Green*, 5 East, 233; 5 Geo. 4, c. 18, s. 6); and at any time while it is in force (*Mackalley's case*, 6 Rep. 65; 1 East, P. C. 324. *Lawrence v. Hedger*, 3 Taunt. 14); and as no time is usually prescribed in the warrant, it continues in force until fully executed, though it were even seven years after its date, during the lifetime of the magistrate by whom it was originally granted; and a person may be twice apprehended under it, if the purposes of justice have not been effected. Peake, Rep. 234. The officer must carefully observe the directions of the warrant, or he will be liable to an action. Com. Dig. Imprisonment, B; 2 Hawk, c. 13, s. 31. *Price v. Messenger*, 2 B. & P. 162. *Bell v. Oakley*, 2 M. & S. 261.

No one can justify breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 Hawk. c. 14, s. 1. *Launock v. Brown*, 2 B. & A. 592. *Burdett v. Abbott*, 14 East, 163. But when a person authorised in a criminal case, by a warrant of a justice, to arrest another who is sheltered in the house, is refused to enter quietly, in order to take him he may justify breaking the doors open. 1 Hale, 580, 583; 2 id. 117. *Semayne's case*, 5 Rep. 92, a; Dalt. 169; 2 Hawk. c. 14, s. 5. But such is not allowable on a general warrant (1 Hale, 583); nor on a warrant not granted on a precedent offence. 2 Hawk. c. 14, s. 11; 12 Rep. 131.

If there be a warrant to arrest a person for treason or felony, and he fly or defend himself with stones or weapons, and will not yield to the arrest, or, being taken, make his escape, so that the officer must give over his pursuit, or cannot take him without killing him, if he kill him it is no felony (2 Hale, 118; 1 East, P. C. 302); and this though the person be really innocent. 1 Hawk. c. 28, s. 12); but it is otherwise in the case of a misdemeanor. 2 Hale, 117; 1 East, P. C. 302.

The party arrested should not be treated with any harshness beyond what is actually necessary for his safe custody; and therefore it has been held that a constable has no right to handcuff a person whom he has apprehended on a suspicion of felony, unless he have attempted to escape, or it be necessary to prevent him from escaping. *Wright v. Court*, 4 B. & C. 596; 6 D. & R. 623; 2 C. & P. 232, S. C.

[2] If the arrest be by virtue of a warrant, when the officer has made the arrest he is forthwith (see *Wright v. Court*, *supra*) to bring the party according to the direction of the warrant. If it be to bring the party be-

VI. Search Warrant.[1]

VII. Distress Warrant. *See* Distress, vol. iv. p. 106.

VIII. Warrant of Commitment. *See* Commitment, vol. iii. p. 143.

WARRANT of Attorney. *See* Cognovit, vol. iii. p. 128.

I. What it is.[2]

II. Stamp on.[3]

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fore the justice who granted the warrant specially, then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county, then it is in the election of the officer to bring him before what justice he thinks fit, and not in the election of the prisoner. *Foster's case*, 5 Rep. 59, b; 1 Hale, 582; 2 id. 112. But if the time be unreasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in some proper place till the next day, or such time as it may be reasonable to bring him. 2 Hale, 120. See *Wright v. Court*, 4 B. & C. 596. And when he hath brought him to the justice, he is in law still in the officer's custody till the justice discharge, or bail, or commit him. (Id.)

[1] By 24 & 25 Vic. c. 96, s. 103, "if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever in, or with respect to which any offence punishable, either upon indictment or upon summary conviction by virtue of this act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised, and if in his power, is required to apprehend, and forthwith to take before a justice of the peace, the party offering the same, together with such property, to be dealt with according to law."

This warrant ought to be addressed to a constable or other public officer, and not to any private person, though it is fit that the party complaining should be present, and assist in identifying the goods. 2 Hale, 150; 11 St. Tr. 321. It should direct the search to be made in the daytime (2 Hale, 113, 150; 22 Geo. 3, c. 58, s. 1), though it is said that, where there is more than probable suspicion, the process may be executed in the night. Dick, J.; Burn, J., Bail; Williams, J., Search-Warrant. It should also command that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs. 2 Hale, 150, 151. With respect to the mode of executing this warrant, if the door be shut, and upon demand not opened, it may be broken open; and so may boxes, after the keys have been demanded; and though the goods be not found, the officer will be excused (2 Hale, 157; Dougl. 359; 2 Wils. 284; 3 B. & P. 228); though if the party obtaining the warrant acted maliciously, he is liable to a special action on the case, but not to an action of trespass. 2 Hale, 151; Hawk. b. 2, c. 13, s. 17, n. 6; 3 Esp. Rep. 135. If, on the return of the warrant before the justice, it appear that the goods were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed, by indicting and convicting the offender, and have restitution. It is the duty of the officer to whom the warrant is addressed or delivered to execute it within his district, without fee or reward; and if he neglect or refuse, he would be punishable by indictment.

[2] A warrant of attorney is not in itself strictly a security, but is an authority addressed to one or more attorneys therein mentioned, authorising them to appear in either of the courts at Westminster, and to confess a judgment in favour of some particular person in an action of debt, and usually contains a stipulation not to bring any writ of error, or to file a bill in equity, so as to delay him. If the warrant merely authorises the confession of judgment, it need not be under seal; but it must be so if it contain an authority to release errors, for a release of errors must be by deed. *Kinnersley v. Mussen*, 5 Taunt. 264. *Brutton v. Burton*, 1 Chit. 707. This clause does not apply to errors after judgment, the object being to secure to the plaintiff a valid judgment. *Solomon v. Graham*, 24 L. J. Q. B. 332. An action will not lie on such a document. *Sherborn v. Lord Huntingtower*, 11 W. R. C. P. 145, 344.

[3] By 13 & 14 Vic. c. 97, a warrant of attorney must be stamped as follows:—

III. Who may give it.[1] IV. The Defeasance.[2]
V. Filing of.[3]
VI. Attestation. *See* Cognovit, vol. iii. p. 129.
VII. How affected by Bankruptcy. *See* vol. ii. p. 236.
VIII. „ far Revocable.[4]

Warrant of Attorney, with or without a release of record, to confess and enter up a judgment in any of her majesty's courts at Westminster, or in Ireland, or in any of the courts of the counties palatine of Lancaster and Durham, or in any other court of record holding pleas, where the debt or damage amounts to 40*s.*, which shall be given as a security for the payment of any sum or sums of money, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the governor and company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South-Sea Company, or of any other company or corporation . . . } *The same duty as on a Bond for like purpose.*

Save and except where such payment or transfer shall be already secured by a bond, mortgage, or other security, which shall have paid the proper *ad valorem* duty on bonds or mortgages imposed by law at the date thereof, exceeding in amount the sum of 5*s.*; and also except where the warrant of attorney shall be given for securing any sum or sums of money exceeding 200*l.*, for which the person giving the same shall then be in actual custody under an arrest on mesne process, or in execution, and in those excepted cases a duty of . . . . . *s.* 5 *d.* 0

See Bond, vol. ii. p. 529.

[1] The warrant must be given by a person capable of appointing an attorney. It cannot be given by an infant (*Saunderson v. Marr*, 1 H. Black. 75; 3 Taunt. 261); nor by a married woman (Id.), even though a sole trader of the city of London (*Read v. Jewson*, 4 T. R. 362); nor a born idiot, though it may by a person who becomes *non compos*. Bac. Abr. Idiot, G.; and see *Baxter v. Earl of Portsmouth*, 5 B. & C. 170. *Brown v. Joddrell*, M. & M. 105. One partner cannot give it for his co-partner without his direct authority (*Brutton v. Mills*, 1 Ch. 707. *Hunter v. Parker*, 7 Mee. & W. 322); nor one executor for his co-executor. *Elwell v. Quash*, Stra. 20. It may be given by a corporation (Com. Dig. Franch. Corporation), and by the public officer of a banking company. *Bosanquet v. Bridges*, 7 Jur. 831.

[2] The warrant of attorney is usually made subject to be defeated in its operation on the performance of certain conditions, and the instrument which contains the terms upon which it is to be so defeated is called the "defeasance." By r. 27, H. T. 1853, "every attorney or other person who shall prepare any warrant of attorney to confess judgment which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant containing the substance and effect of such defeasance. *Barber v. Barber*, 3 Taunt. 465. The omission to comply with this rule does not, in general, make the warrant void, though it makes the attorney answerable. *Shaw v. Evans*, 14 East, 576. *Partridge v. Fraser*, 7 Taunt. 307. *See* Bankruptcy, vol. ii. pp. 236, 237. The defeasance usually contains a clause dispensing with a writ of revivor, and that judgment may be entered up after a year. *Tripp v. Stanley*, 17 L. J. Q. B. 19. Whenever it is necessary to insert the defeasance, it must specify the amount of the debt, all the collateral securities given for it, and the terms and contingencies upon which judgment is to be entered up and execution issued. *Morell v. Dubost*, 3 Taunt. 235. The construction of the defeasance must be fair and reasonable. *Biddlecombe v. Bond*, 5 Nev. & M. 621. *Duke v. Watchorn*, 1 Dowl. N. S. 265; 11 L. J. Q. B. 53.

[3] By P. R. H. T. 1853, "no judgment shall be signed upon any cognovit or any warrant of attorney without such cognovit or warrant being delivered to and filed by the master, who is hereby ordered to file the same in the order in which it is received." The original warrant is here meant. *James v. Hawood*, 3 Q. B. 948; and *see* Bankruptcy, vol. ii. p. 236.

[4] A warrant of attorney cannot be revoked by the act of the party himself. *Oders v. Woodwood*, 2 Ld. Raym. 766; 1 Salk. 87.

The *death* of either party is, in general, a revocation (*Heath v. Brindlay*, 2 Ad. & E. 365); and in the case of the death of a sole defendant this is always so, even though the warrant expressly authorises a judgment against his executors. (Id.) *Horden v. Forsyth*, 1 Q. B. 177. If the warrant be by two, and one die, the plaintiff cannot afterwards obtain leave to enter up the judgment against both, as judgments have relation only to the day on which they are signed; nor against the survivor alone, as such judgment would not pursue the authority. *Gee v. Lane*, 15 East, 592. *Gainsborough v. Follyard*, 2 Stra. 1121. But if the warrant be to enter up judgment against "us or either of us," judgment may be entered against the survivor. *Jordan v. Farr*, 2 Ad. & E. 437; and see *Gladwin v. Scott*, Barnes, 53.

In the case of the death of a sole plain-

IX. In what Cases Set Aside.[1] X. Signing Judgment.[2]
IX. Execution on.[3]

WARRANTY.

See Deceit, vol. iii. p. 566; Insurance, Fire, vol. v. p. 175; Insurance, Life, id. p. 177; Insurance, Marine, id. p. 205; *ante*, Vendors and Purchasers, p. 618.

WASTE.

I. What it is.[4] II. In respect of Houses.[5]

tiff, however, if the warrant in its terms expressly authorises the judgment to be entered up by the plaintiff's representatives, the court or a judge may allow them to enter it up: for instance, if it be to enter up judgment "at the suit of A., his heirs, executors, or administrators," or the like. *Coles v. Haden*, Barnes, 44. *Balwin v. Atkin*, 2 Dowl. 591. *Edwards v. Holiday*, 9 Dowl. 1023. But otherwise where there is no mention of "executors." *Henshall v. Mathew*, 7 Bing. 337. *Manville v. Manville*, 1 Dowl. 544. If the warrant be given to two or more, and one die, the survivor may obtain leave to enter up judgment at his suit. *Findall v. May*, 2 M. & S. 76. *Johnson v. Jenkins*, 1 Dowl. 367.

The marriage of a *feme sole* by or to whom a warrant has been given, is no revocation, and the court will allow judgment to be entered up by or against the husband and wife. *Staples v. Purser*, 2 Dowl. 764. *Higginbotham v. Higginbotham*, 8 id. 126. *Read v. Jewson*, 4 T. R. 362. *Anon.* 1 Salk. 117. *Dolling v. White*, 22 L. J. Q. B. 327. *Anon.* 7 Mod. 53.

[1] The court will set aside the warrant if it have been given through fraud (6 Jur. 952) or duress (*Duncan v. Thomas*, 1 Dougl. 196. *Harrod v. Benton*, 8 B. & C. 217. *Sharpe v. Thomas*, 6 Bing. 416. *Turner v. Shaw*, 2 Dowl. 244. See *Thompson v. Holland*, 11 W. R. 260); or if it be against public policy (*Kirwan v. Goodman*, 9 Dowl. 330. *Poole v. Bousfield*, 1 Camp. 55); or given for an illegal consideration (*Berrington v. Collis*, 5 Bing. N. C. 332. *George v. Stanley*, 4 Taunt. 683); or for an immoral consideration. 1 H. Black. 75. If, however, part of the consideration be good, and severable from the bad, the court will only destroy the effect of the bad part. *Holdsworth v. Wakeman*, 1 Dowl. 532. *Collins v. Benton*, 9 id. 905. And if the fact of the consideration be doubtful and fairly contested, the court will not at once grant the application, but will direct an issue to try it, and enlarge the rule in the meantime (*Cook v. Jones*, 2 Cowp. 727. *Harrod v. Benton, supra*); or dismiss the application. *Flight v. Chaplin*, 2 B. & Adol. 112. *Ex-parte Nash*, 4 M. & P. 793. *Webb v. Taylor*, 1 D. & L. 676; 13 L. J. Q. B. 24. *See* Cognovit, vol. iii. p. 131.

The court will also set aside the warrant if there have been after execution a material alteration without the consent of the defendant. Com. Dig. Fait. F. 1; and see *Bailey v. Bellamy*, 9 Dowl. 507. *Hartley v. Manson*, 1 Dowl. N. S. 711. *Coke v. Brummell*, 1 Taunt. 439.

It is no ground for setting aside a warrant that the blank for the date had been filled up since execution, the true date having been inserted. *Keane v. Smallbone*, 25 L. J. C. P. 72; 17 Com. Bl. 179.

[2] See Cognovit, vol. iii. p. 130. Judgment should be signed within a year and a day, otherwise leave of the court must be obtained. *Lushington v. Waller*, 1 H. Black. 94. And by r. 26, H. T. 1853, "leave to enter up judgment on a warrant of attorney above one and under ten years old, is to be obtained by order of a judge made *ex-parte*, and if ten years old or more, upon a summons to show cause." On signing judgment, the authority given by the warrant must be strictly pursued. *Paris v. Wilkinson*, 8 T. R. 153. *See* Judgment, vol. v. p. 262.

[3] Executions on warrants of attorney will, for the most part, be similar to other executions. *See* Execution, vol. iv. p. 344.

[4] Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee-simple or fee-tail. Co. Litt. 53. Waste is either voluntary, which is an act of commission, as by pulling down a house; or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. 4 Co. 64.

[5] Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters or other timber of the house become rotten; but barely suffering them to be uncovered, without rotting the timber, is not waste: or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down, although it would be otherwise if the tenant were to pull it down. If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste. Co. Litt. 53. Removing wainscoats, floors, or other things, once fixed to the freehold of the house, is waste (Id. n. a.; 4 Co. 63, b); although fixed by the lessee himself with nails and screws. R. a. Co. 64, a; Moore, 177. But as to what fixtures a tenant may remove during his tenancy, *see* Fixtures, vol. iv. pp. 477–480. Suffering glass windows to be

III. In respect of Parsonages, &c.[1]
IV. „ Lands.[2]
V. „ Gardens.[3]
VI. „ Woods.[4]
VII. Action of Waste. *See* Fixtures, vol. iv. p. 484.

broken or carried away is waste. Co. Litt. 53, a. So, pulling down a house demised and rebuilding it smaller than it was before (2 Roll. 815, g. 33), or rebuilding it larger to the prejudice of the lessor, who may therefore be at greater charge in repairing it (Id. l. 35); or altering the house to the prejudice of the lessor (Keilw. 39; 2 Roll. 815, l. 31) is waste; and see *Morris v. Morris*, 28 L. J. Ch. 329; 3 De Gex & J. 323.

[1] Dilapidations are a species of ecclesiastical waste. *See* Churches and Chapels, vol. iii. p. 106. The incumbents are bound to repair and keep in a good and sufficient state the house, chancel of the church, glebe (*see* 2 Ad. & E. 781), woods, or other inheritances, and so transmit them to their successors; and the bishop may compel them to keep the parsonage in repair. 1 & 2 Vic. c. 106, s. 41.

[2] If the lessee, &c. suffer the sea, &c. to surround arable, meadow, or pasture land, it is waste (2 Roll. 816, l. 40), if it happen by his default (Moore, 62, 73); but otherwise, if it be occasioned by the violence of a tempest. So, if he suffer a wall or bank against the sea or river, &c. to be ruinous, whereby the water surrounds a meadow, &c., and renders it useless, it is waste. Co. Litt. 534, b; Moore, 69. So, if he dig up the surface of the land, and carry it away, it is waste. R. 2 Roll. 816, l. 15. So, if he convert wood to arable land, or arable to wood (Co. Litt. 53, b; Moore, 101; 2 Roll. 815, l. 4; 814, l. 50); or pasture (2 Roll. 814, l. 50; 1 Chit. Rep. 106, 116); or meadow to orchard or hop-garden, although it be thereby meliorated (2 Leon. 134); or convert a hop-garden to tillage (Owen, 63); in all these cases the tenant is guilty of waste. But if pasture be converted to tillage for the improvement of the soil (2 Roll. 814, l. 47); or if the land were sometimes pasture and sometimes arable (Id.); or if it were stocked with conies, it not being a warren by charter or prescription (R. 2 Roll. 815, l. 15; 816, l. 15; and *see* Owen, 66), it is no waste. But it is not waste, either wilful or permissive, to leave the land uncultivated. *Hutton v. Warren*, 1 Mee. & W. 472; 2 Roll. 814, l. 35. So, if trenches are dug in a meadow to draw off the water it is not waste. R. 2 Roll. 820, l. 23; 2 Leon. 134. But if lessee for life or years opens mines in the land where there is no mention of mines in the lease, it is waste. Co. Litt. 53, b; R. 5 Co. 12; R. 2 Mod. 193. So, if he dig for gravel, lime, clay, brick-earth, stone, &c., in pits not already open, it is waste (Co. Litt. 53, B.; Moore, 101); or stop up the holes of a dove-cot (Owen, 66); or throw down the banks, &c., of a fish-pond, lake, &c., it is waste (Id. 67): if, however, he merely destroy some doves, and yet if he leave a sufficient stock remaining, it is no waste. 2 Leon. 322; Com. Dig. Waste, A. 3; and *see* Bac. Abr. Waste, c. 4.

[3] An incoming tenant by ploughing up strawberry-beds, though paid for on valuation, commits waste. *Watherell v. Hawells*, 1 Camp. 227.

Waste may be committed in a garden or orchard. 2 Roll. 817, l. 33. As if the lessee cut down pear-trees, apple-trees, or other fruit-trees (Co. Litt. 53; 2 Roll. 817, l. 30); or if they be thrown down by tempest, and the lessee afterwards root them up, or cut down the germens growing, without planting new ones. 2 Roll. 887, l. 35.

[4] A lessee, by cutting timber, commits waste. *Martyn v. Knowleys*, 8 T. R. 145. A tenant who is answerable for waste only may cut down trees for the purpose of separation without committing waste, either where the damage has accrued during the time of his being in possession in the ordinary course of decay, or where the premises were ruinous at the time he entered; but if the decay happened by his default, to cut down trees to do the repairs would be waste, and so if he sell them. Co. Litt. 200. *Simmons v. Norton*, 7 Bing. 640. And the tenant may not cut timber for repairs which his lessor has covenanted to do. Com. Dig. Pleader, 3 O. 14. It will not be waste, however, if the trees be cut down for the repair of things useful, though not absolutely necessary; as for water-troughs to be fixed in the ground for his cattle (2 Roll. 823, c. 22; Com. Dig. Waste, E. 5). It is necessary also to mention, that if the trees be excepted out of the demise, the tenant, if he take them wrongfully, is not punishable as for waste (8 East, 19; *see* Bac. Abr. Waste, c. 2); oak, ash, and elm, are timber after the age of 20 years, throughout the realm (Co. Litt. 53, a; Dy. 65, b; 8 T. R. 145); and beech, willow, hornbeam, &c., where they are scarce, may be accounted timber by the custom of the country. Co. Litt. 53, a; Moore, 812. So, if it be found by verdict that the tenant cut down black-thorn *existent arbores maheremiales*, it is waste (2 Roll. 819, l. 52; 2 Cro. Car. 531); or if he cut down white-thorn, where it is in a large quantity, or made wood by the custom of the country, it is waste (2 Roll. 813, c. 12; 2 Cro. 126); or if he destroy the germens of oaks, &c., it is waste. Co. Litt. 53, a. So if a lessee do an act on which the timber-trees decay, as if he lop and top them, it is waste (Dy. 65, a; Co. Litt. 53, a.) But it is not waste to cut down

VIII. Who may Commit Waste at Common Law.[1]

IX. "Without Impeachment of Waste;" Effect of.[2]

X. Remedies for Waste.[3]

WASTE Lands.[4]

WATERCOURSE. *See* Drainage, vol. iv. pp. 142, 143; Easements, id. p. 149.

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trees which are not timber, unless they are growing for shelter of the house. Co. Litt. 53, a; and *see* Hob. 219. So, it is not waste to cut down timber trees that are dead, *nec fructum, nec folia portantes.* Co. Litt. 53, a; 2 Roll. 814, c. 17. *See* also F. N. B. 59; Godb. 4. *See* Trees, *ante*, p. 542.

[1] A tenant in tail may commit every kind of waste. In Cru. Dig. tit. 2, c. 1, s. 32, it is said, "that a tenant in tail having an estate of inheritance has a right to commit every kind of waste, by felling timber, pulling down houses, &c., but the power must be exercised during life for at the instant of his death it ceases. If, therefore, a tenant in tail sell trees growing on the lands, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as part of the inheritance." Plowd. 259. *Liford's case*, 11 Co. 50, a. *Williams v. Williams*, 12 East, 209. Under a devise of an estate to A. in fee, subject to an executory devise over, in the event of his dying without leaving issue, to B. for life, remainder to C. in fee: — *Held*, that A. was entitled to commit *legal* waste, but no equitable waste. *Turner v. Wright*, 29 L. J. Ch. 598. Equitable waste is that which a prudent man would not do in the management of his own property. (Id.)

A tenant for life, or for any less estate, unless expressly exempted by limitations, cannot commit any kind of waste. Cru. Dig. 3, c. 2, s. 13. Although entitled to reasonable estovers, yet he is prohibited from destroying those things which are not included in the temporary profits of the land, because that would tend to the permanent and lasting loss of the person entitled to the inheritance. Com. Dig. tit. 3, c. 2, s. 1.

[2] To prevent parties subject to waste from suffering by the ordinary common-law liability, it is not unusual to insert a clause by which they are not to be subject to impeachment for waste. The intention of this clause is to enable the tenant to do many things, such as cutting down trees or opening new mines, which would, by the construction of the common law, amount to waste; but it does not extend to allow destructive or malicious waste, such as cutting down timber which serves for the shelter or ornament of the estate. *Packington's case*, 3 Atk. 215. The privilege thus given by the words "without impeachment of waste," is annexed to the privity of estate; so that if the person to whom that privilege is given changes his estate, he loses the privilege. Co. Litt. 220, n. 1; 3 Wood. 399. A tenant for life "without impeachment of waste," has as full power to cut down trees and open new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others (*Pyne v. Dor*, 1 T. R. 54); but the words "without impeachment of waste" will not permit a tenant for life to unlead a house and pull down the tiles. *Vane v. Lord Barnard*, 1 T. R. 56 n; 2 Vern. 738. *See* also, as to this, *Gent v. Harrison*, Johns. 517; 29 L. J. Ch. 68. *Morris v. Morris*, 3 De Gex & J. 323. *Field v. Brown*, 27 Beav. 90. *Micklethwait v. Micklethwait*, 1 De Gex & J. 504; 26 L. J. Ch. 721. *Vincent v. Spicer*, 22 Beav. 380; 25 L. J. Ch. 589.

[3] An action on the case in the nature of waste is now a common remedy for waste, the old action of waste being by 3 & 4 Wm. 4, c. 27, s. 36, abolished; and where a tenant does not hold by deed, assumpsit will often lie on the express or implied promise to use and keep the premises in a tenant-like manner. *See* also Action of Waste, vol. iv. p. 484. Besides this action at law, the party to whom the reversion belongs may apply to the Court of Chancery for an injunction against *commissive* waste. *Earl Talbot v. Scott*, 4 Kay & J. 96; 27 L. J. Ch. 273. *Marshall v. Watson*, 25 Beav. 501. But courts of equity have no means of interfering in cases of *permissive* waste by tenant for life. *Powys v. Blagrove*, 1 Kay, 495; 24 L. J. Ch. 142. The patron is the proper person to institute a suit for the purpose of restraining waste by the incumbent. *Holden v. Weeks*, 30 L. J. Ch. 35; 9 W. R. 94.

[4] All *waste land abutting on the sea-shore*, and situate above the high-water mark of ordinary spring tides, belongs *primâ facie* to the owner of the adjoining property, although it is covered with beach and seaweed, and overwhelmed with the waves at extraordinary spring tides. *Lowe v. Govett*, 3 B. & Ad. 869. Hale, *De Jure Maris*, c. 4, p. 12; and *see* Sea-shore, *ante*, p. 363.

Waste land extending along a public highway is presumed to belong to the owner of the adjoining land, and not to the lord of the manor. *Doe v. Pearsey*, 7 B. & C. 304. But this presumption may be rebutted by positive evidence. *Doe v. Hampson*, 4 C. B. 273. *Deady v. Simpson*, 18 C. B. 831. *Grose v. West*, 7 Taunt. 42. As to the origin of the presumption, see *Steele v. Prickett*, 2 Stark. 469. *Doe v. Kemp*, 2 Bing. N. C. 102. *See* Common, vol. iii. p. 147; Highway, vol. v. pp. 33, 34.

I. Rights to a Natural Watercourse.[1]
II. „ „ Stream in Artificial Channel.[2]
III. „ Subterranean Water.[3]
IV. „ Water not in Streams, whether on the Surface or Underground.[4]
V. „ Artificial Watercourse.[5]

[1] Running water is originally *publici juris*, and an individual can in general only acquire an exclusive right to it, enabling him to sue for an obstruction or injurious interference with the stream to his prejudice, by applying so much of it as he requires for a beneficial purpose. *See* 1 Tyr. & G. 398; 1 Sim. & Stu. 190. Each owner of land on the banks of a river or stream has a right to the enjoyment of the water flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below: he cannot, however, acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from such proprietor, or an enjoyment uninterruptedly for *twenty* years; and the right of appropriation to particular purposes cannot be acquired as against the owners of lands on the banks of the stream by an user for a less period. *Mason v. Hill*, 5 B. & Adol. 1; 3 id. 304. *Williams v. Morland*, 2 B. & C. 910. This right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes: but is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and, consequently, it is only for an unreasonable and unauthorised use of this common benefit that any action will lie. *Embrey v. Owen*, 6 Ex. 353; 20 L. J. Ex. 212. *Dickenson v. Grand Junction Canal Company*, 7 Ex. 299. *Sampson v. Hoddinott*, 26 L. J. C. P. 148; 1 C. B. (N. S.) 590. Such rights are within the Prescription Act, 2 & 3 Wm. 4, c. 71, s. 2. *See* Easement, vol. iv. p. 154.

The right of the possessor of land through which a natural stream flows to use the water of the stream for irrigation and for manufacturing purposes depends on the particular circumstances of each case, upon the volume of the stream, the extent of the loss of water, and the amount of injury inflicted thereby upon other riparian proprietors. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. *Embrey v. Owen, supra.*

[2] A natural stream of water flowing in an artificial channel is, in general, subject to the same rules of law as the natural stream in the natural channel. *Beeston v. Weate*, 25 L. J. Q. B. 115; 5 E. & B. 986. See *Sutcliffe v. Booth, infra. R. v. Metropolitan Board of Works*, 32 L. J. Q. B. 105.

[3] The right to the enjoyment of the water of a stream flowing in its natural course over the surface of land, and the right to underground water and springs beneath the surface, are not governed by the same rules of law. It has been held that a landowner has a right to sink a well in his own land, and get as much water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land, to enable him to get back the water. *Chasemore v. Richards*, 26 L. J. Ex. 401; 33 L. T. 350; H. L. 5; 5 Jur. H. L. (N. S.) 878. A landowner who has sunk a well in his own land, and thereby enjoyed the benefit of underground water, has no right of action against a neighbouring proprietor who, in sinking for and getting coals for his soil in the usual and proper manner, causes the well to become dry. *Acton v. Blundell*, 12 Mee. & W. 324. It would seem, however, that well-defined streams of water flowing underground are subject to the same rules as streams on the surface. *Chasemore v. Richards, supra.* *See* also on this subject *Dickenson v. the Grand Junction Canal Co.* 7 Ex. 282; 21 L. J. Ex. 241. *Balston v. Berstead*, 1 Camp. 463. *Hodgkinson v. Ennor*, 8 L. T. (N. S.) 451, Q. B.

[4] With respect to water, whether on the surface or underground, not running in defined streams, it is the absolute property of the owner of the soil of which it forms part. *Rawstron v. Taylor*, 25 L. J. Ex. 33; 11 Ex. 369. *Broadbent v. Ramsbotham*, 25 L. J. Ex. 115; 11 Ex. 602. *Chasemore v. Richards, supra.*

[5] The right to artificial watercourses, as regards the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed, so as to confer a right to the use of the water, if proved to have been artificial, is quite indefensible; but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from the enjoyment in the same, whether they be natural or artificial, cannot possibly be sustained. *Wood v. Waud*, 3 Ex. 779; 18 L. J. Ex. 305. *Sutcliffe v. Booth*, 32 L. J. Q. B. 136. *Mayor v. Chadwick*, 11 Ad. & E. 585. And in the case of an artificial stream, no right to compel the continuance of its flow is necessarily acquired by riparian proprietors against the person discharging it. *Arkwright v. Gell*, 5 Mee.

VI. Right to Discharge Water on Another's Land.[1]

VII. Of the Action for Injuries to Rights of Water.[2]

VIII. Right, how alleged in Pleading.[3]

IX. Defence to Action.[4]

WATERMAN'S Act.[5]

WATERWORKS.

I. Public Statute relating to.[6]

& W. 203. *Greatrex v. Hayward*, 22 L. J. Ex. 137; 8 Ex. 291); nor against the proprietors through whose land it flows. *Wood v. Waud*, 3 Ex. 779.

[1] A proprietor of land having acquired a right to discharge pure water into his neighbour's land, has no right to discharge water in a polluted state, and would be liable to an action for so doing. *Wood v. Waud*, 3 Ex. 748. *Magor v. Chadwick*, 11 Ad. & E. 571. Under this head may be included the right to discharge water and drainage through channels, gutters, and drains, on the adjacent property, as in *Thomas v. Thomas*, 2 C., M. & R. 35 (see *Hodyson v. Ennor*, 8 L. T. (N. S.) 451); also the right to discharge the rain water from the eaves of buildings, as in *Bathishill v. Reed*, 25 L. J. C. P. 290. *See* also Drainage, vol. iv. pp. 143, 144. If a right of watercourse is granted, with certain limitations and restrictions, and the grantee exceeds his limited right, and refuses to conform to the restrictions and conditions, he loses his right altogether, until he makes his enjoyment of it conformable to the conditions of the grant. *Cawkwell v. Russell*, 26 L. J. Ex. 34. *Duncan v. Louch*, 6 Q. B. 904.

[2] An action will lie for any injury to these natural or acquired rights: as, for diverting a stream (*Northam v. Harley*, 1 E. & B. 665. *Attorney-General v. Bristol Waterworks Co.* 10 Ex. 884); turning back the water (*Saunders v. Newman*, 1 B. & A. 258); causing the stream to flow with unusual violence (*Williams v. Morland*, 2 B. & C. 910); diminishing the force of the stream (*Blagrave v. Bristol Waterworks Co.* 26 L. J. Ex. 57; 1 H. & N. 369); taking more water than defendant is entitled to take (*Penarth Harbour Co. v. Cardiff Waterworks Co.* 29 L. J. C. P. 230; 7 C. B. (N. S.) 816); fouling the water (*Moore v. Webb*, 1 C. B. (N. S.) 673. *Hodykinson v. Ennor*, 32 L. J. Q. B. 231); for diverting the water from a mill (*Dudden v. Clutton Union*, 26 L. J. Ex. 146; 1 H. & N. 627); for throwing cinders, ashes, &c. into the stream, which floated into plaintiff's mill-pond, and obstructed the working of his mill (*Murgatroyd v. Robinson*, 26 L. J. Q. B. 233; 7 E. & B. 391. *Carlyon v. Lovering*, 26 L. J. Ex. 251; 1 H. & N. 784); for obstructing plaintiff's right to use the water for irrigation (*Beeston v. Wente*, 5 E. & B. 986; 25 L. J. Q. B. 115); and the like.

[3] In declaring on or justifying under a right of this kind, the right may be alleged generally, without setting forth the nature of the title. 2 & 3 Wm. 4, c. 71, s. 5. But if the title be set forth, it must be stated accurately. *Fentiman v. Smith*, 4 East, 107. *Hewlins v. Shippam*, 5 B. & C. 221. *Frankum v. Earl of Falmouth*, 2 Ad. & E. 452; 6 C. & P. 529. *Whaley v. Laing*, 27 L. J. Ex. 422; 2 H. & N. 476. The right must not be stated too largely (*Brunton v. Hall*, 1 Q. B. 792); but it may be stated more narrowly than it really is, if the statement is wide enough to cover the disturbance complained of. *Duncan v. Lamb*, 6 Q. B. 904. *Tebbutt v. Selby*, 6 Ad. & E. 786. If the right as alleged be divisible, the verdict may be limited to the part proved. *Giles v. Groves*, 12 Q. B. 74.

[4] In actions of this nature the plea of not guilty operates as a denial of the obstruction, &c. only, and not of the plaintiff's right. *See* Not Guilty, vol. v. p. 561. *Frankum v. Earl of Falmouth*, *supra*. *Dukes v. Gostling*, 1 Bing. N. C. 588. And such right, if disputed, must be specially traversed. *Drewett v. Sheard*, 7 C. & P. 465. *Thomas v. Thomas*, 2 C., M. & R. 37. *Magor v. Chadwick*, 11 Ad. & E. 586. If the defence be on the ground that the defendant has, by prescription, a grant or right to use the water in a particular manner, such justification should be specially pleaded. *Wright v. Williams*, 1 Mee. & W. 77. And so if the plaintiff had wrongfully penned back the water. *Frankum v. Earl of Falmouth*, *supra*. See *Ward v. Robins*, 15 Mee. & W. 237, 243.

[5] The 37th sect. of the 7 & 8 Geo. 4, c. 75, the Waterman's Act (a local and personal act), imposes a penalty on a person not being a freeman of the Waterman's Company, or an apprentice to a freeman, or to the widow of a freeman (with certain exceptions), who shall "act as a waterman or lighterman, or ply, or work, or navigate, or cause to be worked or navigated, any wherry, lighter or other craft, "upon the Thames, from or to any place or places, ship or vessel," within the limits of the act, for hire or gain:— *Held*, that a steam-tug of eighty-seven tons burden, employed in moving another vessel, was not a "wherry, lighter, or other craft" within the act. *Read v. Ingham*, 3 E. & B. 889; 1 Jur. N. S. 61; 23 L. J. M. C. 156. As to what is a "barge" within the 101st section of the act, see *Tibble v. Bradon*, 24 L. J. M. C. 104. The act does not apply to a party carrying his own servants. See *Tadhunter v. Buckley*, 11 W. R. 273. *See* Thames, *ante*, p. 526.

[6] "The Waterworks Clauses Act, 1847," 10

Waterworks (continued)—

II. Compensation for Injurious Works.[1]

III. Using Water.[2]

IV. Fouling Water.[3]

& 11 Vic. c. 17, consolidated the provisions at that time usually contained in acts authorising the making of waterworks for the supply of towns with water. But as many provisions of the like nature not comprised in the said act are now frequently introduced into acts of parliament relating to waterworks, the "Waterworks Clauses Act, 1863," 26 & 27 Vic. c. 93, was passed, comprising such last-mentioned provisions. And "the Waterworks Clauses Act, 1847," and "the Waterworks Clauses Act, 1863," may be cited together as "the Waterworks Clauses Acts, 1847 and 1863."

As to the supply of water for public use of inhabitants in districts subject to Board of Health, *see* 12 & 13 Vic. c. 63, ss. 50–75, *et seq.*

[1] By sect. 12 of 11 & 12 Vic. c. 17, powers for the execution of certain works are given, and it is provided that the undertakers shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers. In the execution of works authorised by a local act, incorporating that section, A. intercepted water which would otherwise have percolated through the strata of earth into a well upon the premises of B., and drained off water which had accumulated in the well. Upon a complaint by B. before justices, in order to recover compensation for the damage she had sustained, A. was ordered to pay her a sum of money and costs:—*Held*, that this order was wrong; for that, inasmuch as no action would lie against A. in respect of either quantity of water, supposing no act authorising the execution of the works had been passed, the claim for compensation could not be sustained. *New River Co. v. Johnson*, 29 L. J. M. C. 93; and see *South Shields Waterworks Co. v. Cookson*, 15 L. J. Ex. 315. *Mayor, &c. of Liverpool v. Chorley Waterworks Co.* 2 De Gex, M. & G. 152.

[2] By a provision in a local act, a company were empowered to furnish a supply of water for "domestic use" to the owners and occupiers of houses, at a certain rent. The appellant occupied a private dwelling-house, together with a coach-house and stable, in which he kept, for his private use, a carriage and horse:—*Held*, that water used by him for watering the horse and washing the carriage was water for "domestic use" within the meaning of the above-mentioned provision. *Busby v. the Chesterfield Waterworks Co. and Gaslight Co.* 27 L. J. Rep. M. C. 174; E. B. & E. 176.

A local board of health, empowered by their private act to supply a town with water at certain rates, supplied an ornamental fountain (which had been presented to the town by one of the inhabitants, and erected in one of the public streets) with water for the use of cattle in the cattle-market on market-days, and for horses, if yoked, when passing to and fro. The board had a fixed charge per horse for water supplied to persons keeping horses, who might choose to have water laid into their stables. The respondent, in order to evade payment of this charge, took his horses from his stable to the fountain to drink. Upon a complaint against him for so doing under the Waterworks Clauses Act, 1847, s. 69, which enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit, &c.," the magistrates being of opinion that the local board had no power to erect a fountain on the public highway except for the gratuitous use of the public, and that, therefore, the water supplied to such fountain came within the exception in the above clause, refused to convict:—*Held*, that the decision of the magistrates was wrong, for that, whether the fountain were a public nuisance or not, the board were at liberty to supply it with water on their own conditions. *Hildreth v. Adamson*, 30 L. J. M. C. 204.

[3] By 23 & 24 Vic. c. 77, s. 8, "any person doing any act whatsoever, whereby any fountain or pump is wilfully or maliciously damaged, or the water of any well, fountain, or pump, is polluted or fouled, is liable, upon summary conviction before two justices, to forfeit 5*l.*, and a further sum not exceeding 20*s.* for every day during which such offence is continued, after written notice from the local authority in relation thereto." A local act for the establishment of a gas company enacted, that if the company should at any time cause, or suffer to be conveyed, or to flow into any stream or place for water, any washing or thing produced for making gas, or should do any act to the water contained in such stream, &c., whereby it should be fouled or corrupted, the company should forfeit for every such offence 200*l.*, and an additional penalty of 20*l.* for every day such washing, &c. should be conveyed or should flow, after the expiration of twenty-four hours from notice of the offence served on the company:—*Held*, that the former penalty was not confined to the case of water wilfully or knowingly fouled, but extended to the case of water in a well fouled by water escaping through fissures in a gas-tank, occasioned by mining operations in the vicinity. *Hipkins v. Birmingham and Staffordshire Gaslight Co.* 5 H. & N. 74; 29 L. J. Ex. 169; 8 W. R.

WAY. *See* also Highways, vol. v. p. 33; Turnpike-Roads, *ante*, p. 592.

I. Different Kinds of Way.[1]
II. Way by Necessity.[2]
III. „ Grant. *See* Easement, vol. iv. p. 152.
IV. „ Implied Grant. *See* id.
V. „ Prescription. *See* id.
VI. Action for Obstructing Right of Way.[3]
VII. Defence to such Action.[4]

182. Affirmed on appeal, 7 Jur. N. S. 343, Ex. Ch.

[1] A way is either public or private. A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant, prescription, custom, by express reservation as necessarily incident to a grant of land, or by virtue of an inclosure act.

If a way leads to a market, and is a common way for all travellers, and communicates with a great road, it is a highway; but if it leads only to a church, a private house, or village, or to fields, it is a private way. But this is matter of fact, and much depends on reputation. *Austin's case*, Vent. 189.

There are four kinds of way:—1. A foot-way. 2. A horse-way, which includes a foot-way. 3. A carriage-way, which includes both horse-way and foot-way, 4. A drift-way (a way for driving cattle). Although a carriage-way comprehends a horse-way, yet it does not necessarily include a drift-way; it is said, however, that evidence of a carriage-way is strong presumption of the grant of a drift-way.

[2] Whenever one man grants land to another, to which there is *no access* but over the land of the grantor, or the land of a stranger, which cannot lawfully be traversed, the grantee has a right of way over the grantor's land, as a way by necessity, and the grantor shall assign the way where he can best spare it. And if the owner of two closes, having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity (*Howton v. Frearson*, 8 T. R. 50. *Morris v. Edgington*, 3 Taunt. 30. *Pennington v. Galland*, 9 Ex. 12; 22 L. J. Ex. 349. *Clarke v. Legge*, Cro. Jac. 170); a way of necessity is, in fact, a way by grant, 1 Saund. 323. *Proctor v. Hodgson*, 10 Ex. 824; 24 L. J. Ex. 195. It ought, however, plainly to appear that it is of absolute necessity. Lutw. 521.

[3] The owner of a *private* right of way is entitled to maintain an action and recover nominal damages for an obstruction, although there was no special or substantial damage. So also is a reversioner where the obstruction is of a permanent character, and injurious to the reversion (*Kidgill v. Moore*, 9 C. B. 364. *Bell v. Midland Rail. Co.* 10 C. B., N. S., 287); but otherwise, where there is no damage to the reversion, though done with the view of establishing an easement (*Baxter v. Taylor*, 4 B. & Adol. 72). The Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, takes away the common-law right of action for an interference with a private right of way under the powers of a railway company, except when special damage has been sustained (*Watkins v. Great Northern Rail. Co.* 16 Q. B. 96; 20 L. J. Q. B. 391). And a private individual cannot maintain an action for the obstruction of a public way, unless he has suffered a particular and special damage from the obstruction. *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281. *Rose v. Groves*, 3 Man. & G. 613. *Simmons v. Lyllystone*, 8 Ex. 431. *See* Highways, vol. v. p. 48.

In pleading a right of way, the particular nature of it ought to be shown, as that it is a foot-way, carriage-way, &c., and the *terminus* and course of a private one must be stated; but it is sufficient, if it be a public highway, to allege that it is a common highway, without showing how it became so, or that it has been appropriated to the public use time immemorial.

The right may be stated generally, without setting forth the nature of the title. 2 & 3 Wm. 4, c. 71, s. 5. *See* mode of pleading an easement, vol. iv. p. 159. The right should be pleaded according to the fact (*Brunton v. Hall*, 1 Q. B. 792); but if the allegation is divisible the verdict may be *pro tanto*. *Gales v. Groves*, 12 Q. B. 721.

A prescriptive right may still be pleaded in the old form, as annexed to the estate in fee, and as existing from time immemorial; but it must then be supported as such immemorial right by the evidence, and cannot be aided by the statute. A prescriptive right subsisting by force of the statute must be pleaded according to the fact (*Welcome v. Upton*, 5 Mee & W. 398. *Holford v. Hankinson*, 5 Q. B. 584, 587). Easements in gross are not within the statutes. *Welcome v. Upton*, *supra*. *Bailey v. Stevens*, 31 L. J. C. P. 226, 229.

As to the proof in justifying under rights of way, see *Cowling v. Higginson*, 4 Mee. & W. 245. *Dare v. Heathcote*, 25 L. J. Ex. 245. *Morant v. Chamberlain*, 6 Har. & W. 540; 30 L. J. Ex. 299.

[4] The plea of not guilty will operate as a denial of the obstruction only, and not of the right of way. *See* Not Guilty, vol. v. p. 561.

To an action for a right of way claimed by necessity, the defendant may show that the plaintiff has another way convenient to that which he claims, but such a plea cannot be pleaded where the way is claimed by grant or

WEIGHTS and Measures.

I. Statutes relating to.[1]

II. Cases Decided on the Statutes.[2]

prescription (*Staple v. Heydon*, 6 Mod. 1. *Holmes v. Goring*, 2 Bing. 76; but see *Proctor v. Hodgson*, 10 Ex. 824; 24 L. J. Ex. 195). He may prove that the way has ceased to exist, or has been extinguished by an inclosure act (*Holmes v. Goring, supra*); or by unity of ownership (Gale, 83); or that it was only by sufferance during the pleasure of himself and plaintiff (*Reignolds v. Edwardes*, Willes, 282); or that it has been abandoned (*Bower v. Hill*, 1 Bing. N. C. 555); but a temporary use of another way is no evidence of an abandonment of an immemorial way (*Wood v. Ward*, 7 Ex. 839). The defendant may also prove an extinguishment of the right by a substantial alteration in the original object of the grant of way (*Allan v. Gomme*, 11 Ad. & E. 759); or he may show a user of the way for purposes not contemplated by the grant (*Henning v. Burnet*, 8 Ex. 187; 22 L. J. Ex. 79). But a way is not necessarily lost by an alteration, improvement, or enlargement of the premises to which it is annexed, nor by every change in the use or destination of them. The nature of the way depends upon the terms of the grant and expressed object of it, and on the prejudice arising to the grantor by the altered user (*Allan v. Gomme, supra. Henning v. Burnet, supra. Luttrell's case*, 4 Co. Rep. 86). The declarations of a previous occupier or tenant of the dominant tenement, that he was entitled to the way only by permission, are not evidence to defeat the claim of a way. *Tickle v. Brown*, 4 Ad. & E. 369, 373, 378. *Papendick v. Bridgwater*, 5 El. & Bl. 166.

[1] The 5 & 6 Wm. 4, c. 63, which repealed 4 & 5 Wm. 4, c. 49, established uniformity on sales by weights and measures, and was amended by 22 & 23 Vic. c. 56.

The 23 & 24 Vic. c. 119, amended the law relating to weights and measures in Ireland, and was itself amended by the 25 & 26 Vic. c. 76.

The 22 & 23 Vic. c. 66, regulates the measures to be used in sales of gas.

The 16 & 17 Vic. c. 29, regulates the weights to be used on sales of bullion.

[2] *Legality.*—Under the 5 & 6 Wm. 4, c. 63, earthen vessels are liable to seizure if ordinarily used as measures, and if, on examination, they are found to be unjust. *Washington v. Young*, 5 Ex. 403; 19 L. J. Ex. 348. *R. v. Aulton*, 30 L. J. M. C. 129.

The 6th sect. of 5 & 6 Wm. 4, c. 63, which abolishes the use of certain weights and measures, and the 21st sect., which enacts that any contract, bargain, or sale made by any such weights or measures shall be wholly null and void, do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights and measures mentioned in the 6th sect., unless the contract relating to such goods is also to be performed in this country. *Rosseter v. Cahlman*, 8 Ex. 361; 22 L. J. Ex. 128.

A contract for the sale of a number of tons of iron, by the ton, "long weight," *i.e.* tons of 20 cwt. of 120 lbs. avoirdupois each, is not in contravention of the 5 & 6 Wm. 4, c. 63, and the 5 Geo. 4, c. 74; and consequently such contract is valid. *Jones v. Giles*, 10 Ex. 119; 2 C. L. Rep. 1100; 23 L. J. Ex. 292.

The 5 & 6 Wm. 4, c. 63, s. 6, abolishes all local or customary measures, and imposes a penalty on any person who shall sell by any denomination or measure other than one of the imperial measures, or some multiple or aliquot part thereof:—*Held*, that this applies only to measures of capacity, and not to sale by weight estimated in pounds, and that, therefore, it does not extend to sale by any local term designating a given number of pounds weight. As to sale of wheat by Welsh hobbett, it appearing by evidence that this designated 168 lbs. of wheat, and that a sale by hobbett entitled the purchaser to so many pounds of wheat. *Hughes v. Humphreys*, 3 El. & Bl. 954; 2 C. L. Rep. 1580; 1 Jur. N. S. 42; 23 L. J. Q. B. 356.

It was held on 5 & 6 Wm. 4, c. 63, s. 9, that the right of a corporation by custom to measure coals imported was not converted by 5 & 6 Wm. 4, c. 63, into a right to weigh. *Smith v. Cartwright*, 6 Ex. 927; 20 L. J. Ex. 401.

Where justices convicted W. under stat. 5 & 6 Wm. 4, c. 73, for possessing false weights and an unjust weighing machine. On a case stated under stat. 20 & 21 Vic. c. 43, it appeared that W. was receiver of the metropolitan police, and that a station-house and all the chattels there were vested in him under stat. 10 Geo. 4, c. 44, s. 16; and in the station-house were weights which were light, and a weighing-machine which, from an injury, gave light weight; that these were used in weighing coals which were allowed to the constables. The conviction was quashed; the weights, &c. not being used within the meaning of sect. 21 of 5 & 6 Wm. 4, c. 63, and the station-house not being a store, &c. where goods were exposed or kept for sale, nor weighed for conveyance or carriage, and, therefore, sect. 28 being inapplicable. *Wray v. Reynolds*, 1 El. & El. 165.

Inspectors, Appointment of.—The quarter sessions, acting under 5 & 6 Wm. 4, c. 63, s. 17, appointed an inspector and superintendents of police to be inspectors of weights and measures without remuneration:—*Held*, that there was nothing in the 2 & 3 Vic. c. 93, which rendered the appointment an excess of jurisdiction, and therefore it could not be questioned, the *certiorari* being taken away by 5 & 6 Wm. 4, c. 63, s. 36. *R. v. Jarvis*, 2 E. & B. 640. The appointment of

WEIR. *See* Fish and Fisheries, vol. iv. p. 469.

WHARF and WHARFINGER.[1] *See* Bailment, vol. ii. p. 114; Delivery under Statute of Frauds, vol. iv. p. 547; Lien, vol. v. p. 385; Negligence, vol. v. p. 532; Stoppage in Transitu, *ante*, p. 504.

the inspector is in the *county* quarter sessions. *Derby v. Sharood*, 23 L. J. Q. B. 413; 6 E. & B. 830.

Powers and Duties of Inspectors. — An inspector of weights and measures, appointed under the 5 & 6 Wm. 4, c. 63, does not require a special warrant in order to authorise him to act in each individual case, his general warrant under sect. 28 being sufficient for that purpose. *Kershaw v. Johnson*, 1 C. & Kir. 329. By sect. 21, no weight above 56 lbs. is required to be inspected and stamped; but the inspector may still enter places within the meaning of the act, in order to inspect, although no weight of 56 lbs. or under be kept therein. (Id.) Under the 28th sect. an inspector is not authorised in seizing any weight, without having first compared it with the standard in order to ascertain whether it be just or not. (Id.) *Semble*, that it is not necessary, in order to justify an inspector in entering under the 28th sect., that the place in which he enters should be one in which goods are actually exposed "or kept for sale." If he have good reason to believe that it is so, and the entry be made *bonâ fide* under this belief, that will be sufficient. (Id.)

An inspector of weights and measures under 5 & 6 Wm. 4, c. 63, s. 28, duly entered a shop to examine weights and measures and weighing-machines. He seized and carried away as forfeited a pair of scales, and detained them after being requested to give them up; the owner sued in a county court, when the jury found that the scales were in fact unjust, that they were a weighing-machine, and not a weight or measure, and that the defendant *bonâ fide* believed that he was acting in pursuance of the act. Under the direction of the judge, the jury found for the plaintiff: — *Held*, on appeal under the above act, weighing-machines are not forfeited, though unjust, although weights and measures are; and consequently that the defendant was not authorised to seize the scales. *Thomas v. Stephenson*, 2 El. & Bl. 108; 17 Inst. 597; 22 L. J. Q. B. 258.

The words "any inspector" at the end of sect. 25 of the 5 & 6 Wm. 4, c. 63, apply to an inspector appointed under the provisions of that section, as well as to an inspector appointed by county justices, so that any inspector, however appointed, who knowingly stamps the weights or measures of a person residing within the limits of any local jurisdiction for which another inspector may have been legally appointed, is liable to a penalty under that section. Therefore, where an inspector appointed by the mayor of the city of C., stamped, at his office in the said city, certain weights, knowing them to be the property of a person residing within a district for which an inspector had been appointed by the justices of the county of C., and which weights were brought to him at his office for the purpose of being stamped: — *Held*, that he was rightly convicted of an offence under this section. *Reg. v. Skelton*, 28 L. J. M. C. 222.

[1] A wharf is a convenient place for the landing, warehousing, and shipping of goods. Natural ground on the banks of a canal, though used for the purpose of a wharf, is not a wharf; neither is the sea-beach. Cowell's *Dict.* The term, in its ordinary and legal import, means a place built or constructed for the purpose of loading and unloading goods; and for the use of which wharfage or compensation is paid to the owner.

Of a wharfinger reasonable and common care of any commodity entrusted to his charge is exacted (Peake, 114); he is not, like an innkeeper and carrier, bound by any custom of the realm, nor to be considered as an insurer, unless he also unite the character of a carrier (1 Stark. 172); he stands therefore, in general, in the situation of an ordinary bailee for hire, and is therefore answerable only for ordinary neglect. *See* Bailment, vol. ii. p. 114; Jones, Bail. 49, 96, 97. He is not answerable for a theft committed by his servants, if he can prove that the goods were lodged in a place of security, and that he has not been guilty of positive negligence, nor exercised less care towards them than towards his own property. He is not answerable for destruction by rats, reasonable care having been taken to prevent such mischief (Peake, 113); nor is he liable for loss arising from robbery, accident, or fire, unless the same be occasioned by his gross default or negligence. *Garside v. Trent Navigation Co.* 4 T. R. 581; 2 Stark. 401.

The responsibility of a wharfinger commences directly the goods are delivered into his custody. The responsibility of the warehouseman commences from the time that his tackle is applied to the goods for the purpose of lifting them into the warehouse; and it is no excuse for the injury done in raising them from the cart or other vehicle that the owner's agent or carman refused to secure them in the manner which the warehouseman pointed out. 4 Esp. 262. The responsibility ceases when the goods are delivered by the wharfinger out of his possession, according to the owner's express or implied directions. *Leigh v. Smith*, 1 C. & P. 638. Where it is the custom of wharfingers, when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or make any charge for shipping, the responsibility of the wharfinger ceases with the delivery to the mate, though the goods

WIFE. *See* Abatement, Pleas in, vol. i. p. 17; Husband and Wife, vol. v. p. 59; Marriage, id. p. 443.

WILD Fowl. *See* Game, vol. iv. p. 571.

WILL, Tenant at. *See* vol. v. p. 301.

WILLS.[1] *See* Administration, vol. i. p. 162; Donatio Causâ Mortis, vol. iv. p. 127; Executors and Administrators, id. p. 360; Legacy, vol. v. 356; Probate, *ante*, p. 253.

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XIX. Parol Evidence, when Admissible to Explain Will. *See* vol. i. p. 322.

XX. Evidence of Wills, p. 666.

(A) *As relates to Personal Property*, p. 666.

(B) *As relates to Real Estate*, p. 667.

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are lost before they are carried off the wharf. *Cobham v. Down*, 5 Esp. 41.

Goods in bales were sent from the country to the wharf of the defendants, who were wharfingers in London, consigned to B. and Co., who were factors, for sale, and made deliverable to them or their assigns. A. having bought of B. & Co. forty-eight bales of goods, so consigned, and lying at the defendants' wharf, B. and Co. ordered the defendants to weigh and deliver the same to A. The defendants accordingly weighed the goods, and communicated the weight to B. and Co., who therefore sent to A. an invoice, stating the weight, together with the price. Five of these bales were afterwards delivered by the defendants, on the order of A., to a party to whom A. had resold them; the residue remained at the defendants' wharf, and were afterwards stopped by B. & Co. as unpaid vendors. No transfer of any of the bales was made in the defendants' books from B. and Co. to A., nor was any warehouse rent paid by him. A. afterwards became bankrupt, and his assignees brought an action against the defendants for non-delivery of the goods:—*Held*, that these facts did not make the defendants wharfingers to the bankrupt, so as to entitle the plaintiff to sustain the action. *Tanner v. Scovell*, 14 Mee. & W. 28; 14 L. J. Ex. 321.

The defendant, a carrier and wharfinger, received into his warehouse goods of the plaintiff, on the terms that they should be conveyed by the defendant's barges to London, when the plaintiff should direct, at the usual freight, and that in the meantime they should be kept by the defendant without charge for warehousing:—*Held*, in an action for not keeping the goods safely, that the defendant was not a gratuitous bailee. *White v. Humphery*, 11 Q. B. 43.

Where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which he had not received, the wharfinger was held not responsible, because it was not within the scope of the agent's authority in the course of his employment to give such a receipt. *Coleman v. Riches*, 16 C. B. 104; 3 C. L. Rep. 795; 1 Jur. N. S. 596; 24 L. J. C. P. 125.

[1] *See* Jarman on Wills; Williams' Exe-

I. Definition and Characteristics of.[1]
II. Capacity or Incapacity to Make.
(A) *Capacity.*[2] (B) *Incapacity.*[3]

cutors; Powell on Devises; Smith's Real and Personal Property; Fearn on Remainders.

[1] A disposition of real and personal property, to take effect after the death of the person making it. 3 Kent's Com. 501.

A will, when it operates upon personal property, is sometimes called a "testament," and when upon a real estate a "devise;" but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of "last will and testament." (Id.)

By 7 Wm. 4 and 1 Vic. c. 26, the word "will" is declared to extend to a testament, to a codicil, and to an appointment by will, or by writing in the nature of a will, in execution of a power.

A codicil is a supplement which is made to a will for the purpose of altering, explaining, adding to or subtracting from the dispositions made by the will. 2 Bl. Com. 500; 6 Cruise, T. 38, c. 1, s. 13.

The party making a will of personalty is called the "testator," of "realty" the "devisor." Generally, indiscriminately designated the "testator." The parties intrusted with the execution of the testator's will, "executors" or "trustees;" the parties benefited, "legatees of personalty," or "devisees of realty."

Although a will, made in execution of a power, does not derive its effects from the Statute of Wills, but from the deed of uses by which the power is created, and a will made under these circumstances is, in fact, an appointment of a use; yet, being made through the medium of a devise, it has all the essential properties of a will. Thus, a will made in execution of a power is revocable: the appointee must survive the appointor, in order that the appointment may have any effect; an appointee in fee-simple, if heir-at-law, was by the old law in by descent, and not by purchase. A will made in execution of a power is construed in the same manner as an ordinary will. 4 Cruise, T. 32, c. 16, ss. 24–26.

It is peculiar to a will that it is in all cases a revocable instrument, even if in terms made irrevocable (8 Co. 824); and though sealed and executed with the formalities of a deed it is revocable, and not considered as a specialty. 1 Cowp. 260; 3 Price, 368.

Two or more persons, who make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon the death of each, as if he had made a separate will. *Re Stracey*, 1 Deane, Ent. R. 6; 1 Jur. N. S. 1177. But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either. *Re Raine*, 1 S. & T. 144.

A. and B., being sisters, executed a joint will, in which they stated their desire, that as they were then living mutually together upon the joint savings of each other, at the death of either the survivor should have all that remained; and further, on the death of the survivor, that any residue should be divided amongst certain persons. The surviving sister did not prove this document, but on her death, administration, with this paper annexed as the will of the survivor, was granted to one of the parties entitled in distribution to her property. *In Goods of Lovegrove*, 2 S. & T. 453; 8 Jur. N. S. 442; 31 L. J. Prob. 87; 6 L. T. (N. S.) 131.

A will inpencil or with blanks is valid. 1 Jarm. 13. Instruments in the form of deeds, agreements, &c., held to be testamentary: so instruments commencing as an indenture, but ending as a will. A will, from its own nature, is ambulatory, and movable during the testator's life. It is this ambulatory quality which forms the characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument. A will may be made so as to take effect only on a contingency; and if the contingency does not happen, the will ought not to be admitted to probate. *Parsons v. Lane*, 1 Ves. 190; 1 Wils. 243. *Sinclair v. Hone*, 6 Ves. 607. *Southale v. Jones*, 28 L. J. Prob. 112.

[2] All adults, who have the power of disposing of their real or personal estate by any conveyance, *inter vivos*, may dispose of them by will. 6 Cruise, T. 38, c. 2, s. 1; 1 Wms. Exors. 4th ed. 11.

As to the capacity of the reigning sovereign, *see* 39 & 40 Geo. 3, c. 88, s. 10, and 1 Add. 255, 263.

Alien friends (vol. i. p. 285) may make wills and dispose of personal estate: but alien enemies, unless they have the queen's license, express or implied, to reside here, are incapacitated from making any testamentary disposition whatever. 1 Wms. Exors. 10.

A devise of lands by an alien is at least voidable (*see* Shep. Touch. 404); the Crown being entitled, after the office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remain in him, with all the incidental qualities belonging to such estates. *See* 7 & 8 Vic. c. 66, vol. i. p. 287.

[3] By 1 Vic. c. 26, s. 8, no will made after 1st of January, 1838, by any person under the age of twenty-one, shall be valid: but prior to that date infants, who had attained the age of fourteen, if males, and twelve, if females, were capable of making wills of personal estate. The act has abolished, as regards infant testators, the pa-

III. Locality or Place of Making.[1]

ternal power of appointing guardians conferred by the act of 12 Car. 2, c. 24, so that a person under age is now not competent by will to appoint a guardian to his children.

The 7 Wm. 4, and 1 Vic. c. 26, s. 8, which provides that no will of a married woman shall be valid, except such as might be made before the act, is intended as a qualification of sect. 3, and has for its purpose the retention of a married woman's general incapacity to devise, not the withdrawal of a married woman's will from the law as constituted by that enactment. *Thomas v. Jones*, 2 Johns. & H. 475; 8 Jur. N. S. 1124; 31 L. J. Chanc. 732; 10 W. R. 853. Consequently the rule of law, that a general devise by a will executed since the statute operates as an execution of a power which came to the devisor after the date of the will (7 Wm. 4 and 1 Vic. c. 26, ss. 24, 27), operates, whether the devisor be a man or a married woman devising under a power. (Id.)

Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion. *In Goods of Owston*, 2 S. & T. 461; 31 L. J. Prob. 177; 10 W. R. 410; 6 L. T. (N. S.) 368.

All persons, who have not sufficient understanding to manage their own affairs, whether from natural weakness, from old age, drunkenness, lunacy, or from what cause soever such failing proceeds is immaterial, cannot make a will. *Ex parte Cranmer*, 12 Ves. jun. 445. The testator ought to have a disposing memory to be able to make a disposition of his property with reason and understanding; a memory sufficient to answer familiar and usual questions is not enough. *Marquis of Winchester's case*, 6 Rep. 23, a. *See* Lunacy, vol. v. p. 406. A will made by a person while in a lunatic asylum may be supported by the reasonableness of its provisions. *M'Adam v. Walker*, 1 Dow, 178. *Cartwright v. Cartwright*. 1 Phill. 90. Letters written to the testator, but not acted upon or indorsed by him, cannot be used to establish his sanity. *Wright v. Doe*, 4 Bing. N. C. 489. But a correspondence, the conduct of the testator with reference to the property, and matters connected with the preparation and execution of the will, may tend to establish the will. *Tathan v. Wright*, 2 Russ. & M. 21.

If derangement be proved, and a lucid interval be alleged to have taken place, the burden, in order to establish the will, attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act was done to which the lucid interval refers. *Attorney-General v. Parnther*, 3 Bro. C. C. 443. *White v. Driver*, 1 Phill. 88. *Cartwright v. Cartwright*, *supra*. A *feme covert* may dispose of property by will which she holds *in autre droit*, as executrix. *Scammel v. Wilkinson*, 2 East, 552); or, under a power contained in a marriage-settlement. *Driver v. Thomson*, 4 Taunt. 294); or property given to her separate use. *Re Smith*, 1 S. & T. 125. *Haddon v. Flodgat*, 27 L. J. Prob. p. 21. As to land, see *Humphrey v. Richards*, 25 L. J. Ch. 442. And in equity, if she has a separate estate, she may make a will without a power: *per Mansfield, C. J.*, 4 Taunt. 297. But married women were expressly disabled by the old statute of wills from devising their lands. And by sect. 8 of the stat. 1 Vic. c. 26 it is enacted, that "no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act." But married women are frequently enabled to dispose of lands by will, operating as appointments under powers contained in conveyances to uses. 6 Cruise, T. 38, c. 2, s. 7.

[1] A will of immovable property is governed by the *lex loci rei sitæ;* and hence the place where a will happens to be made, and the language in which it is written, are wholly unimportant; as affecting both its construction and the ceremonial of its execution, the locality of the devised property is alone to be considered. *Bovey v. Smith*, 1 Vern. 85. *See* also *Bowaman v. Reece*, Pre. Ch. 577. *Drummond v. Drummond*, 3 Bro. P. C.; Toml. 601. *Brodie v. Barry*, 2 Ves. & B. 131. Story, C. L. s. 474. Lands in England, belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law. See *Doe d. Birtwhistle v. Vandill*, 5 B. & C. 438. As to the converse case, see *Earl Nelson v. Earl Bridport*, 8 Beav. 547. In regard to personal or movable property, the *lex domicilia* prevails. [This position respects only the devolution of the property, and not the court of administration, which, by our law, is regulated by the *lex loci rei sitæ*.] If, therefore, a British or foreign subject dies domiciled in England, his personal property in England, in case he were intestate, will be distributed according to the English law of succession; and any will which he may have left, whether made in his native or in his adopted country, or elsewhere, and wherever he may have died, must be construed according to the law of England. *Anstruther v. Chalmer*, 2 Sim. 1. *Price v. Dewhurst*, 8 Sim. 299; Mylne & C. 76. *Spratt v. Harris*, 4 Hagg. 408. *Countess Ferraris v. Marquis of Hertford*, 3 Curt. 468; 7 Jur. 262; 2 No. Cas. 230. *Croker v. Marquis of Hertford*, 4 Moo. P. C. C. 339; 8 Jur. 863; No. Cas. 150. *Reynolds v. Kortwright*, 18 Beav. 417; *Robins v. Dolphin*, 27 L. J. Prob. 24 (will of a *feme covert*, whose husband was a domiciled Englishman). Stock in the public funds is undistinguishable in this respect

IV. What may be the Subject of Devise or Bequest.[1]

from other personal property. As to leaseholds, *see* 1 Jarm. p. 6, n. k.

Movable property of a person out of England at the time of his death will also follow the domicile, but this depends on the laws of the state in which the property is situate, which may not accord with our own in this particular. The ecclesiastical courts will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though invalid and incapable of operation as an English will. *See* Story, C. L. ss. 464, 474.

A will of personalty made under a power forms an exception to the general rule, for, if executed as required by the power, it will be good without reference to the testamentary law of the testator's foreign domicile, because the appointee takes not under the instrument exercising, but under the instrument creating the power (*Tatnall v. Hankey*, 2 Moo. P. C. C. 342. *In re Alexander*, 1 S. & T. 454, n.; 29 L. J. Prob. 93); and the latter instrument is to be construed according to the law of the place where it is executed, if it deals with movables, and according to the *lex loci rei sitæ* if with immovables. Story, Confl. chap. viii.; 3 Burge, pt. ii. c. 20. *See* Domicile, vol. iv. p. 122.

A testatrix, who had acquired a French domicile, left the place of her residence in France, with the intention of resuming her English domicile, and embarked on board a vessel in a French harbour, bound for England. Before the vessel started, she was taken so ill that she was obliged to land, and never afterwards recovered sufficiently to prosecute her voyage, and soon died. The court refused, on motion, to grant probate of her will, executed in accordance with the law of England. *In the Goods of Emily Raffenel*, 3 S. & T. 49; 9 Jur. N. S. 386; 8 L. T. (N. S.) 211. *See* Code Napoleon.

By 24 & 25 Vic. c. 114, s. 1, wills made out of the kingdom to be admitted to proof if made according to the law of the place where made. By sect. 2, wills made in the kingdom to be admitted if made according to local usage. By sect 3, change of domicile not to invalidate will. By sect. 4, nothing in this act to invalidate wills otherwise made. Sect. 5 extends only to wills made after 6th August, 1861.

When a British subject dies abroad after the passing of the 24 & 25 Vic. c. 114, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to file affidavits showing that he had not acquired a foreign domicile. *In the Goods of Rippon*, 32 L. J. P. M. & A. 141.

An application for probate of a testamentary instrument executed by a person when domiciled abroad, should be supported by evidence that, according to the law of the domicile, such instrument is a good will. *In the Goods of Stoddart*, 31 L. J. 195; 2 S. & T. 356.

The rule that a will must be executed according to the law of the deceased's domicile at the time of death, does not apply to a will so far as it is made in execution of a power. *In the Goods of Alexander*, 6 Jur. N. S. 354, Prob.

A declaration propounding a will made by a person domiciled abroad, should aver in terms that the will was valid according to the law of the foreign country. *Isherwood v. Cheetham*, 31 L. J. Prob. 99.

A., who was master of a trading-vessel, in the course of a voyage arrived at Port Adelaide, whence he wrote, and forwarded by post, a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—*Held*, that he was a mariner at sea, and, consequently, that such a letter, being in his handwriting, and testamentary, was entitled to probate. *In the Goods of Parker*, 2 S. & T. 375.

[1] The law upon this subject is now, in many respects, essentially varied and modified by 1 Vic. c. 26, which repeals of the statutes of wills, 32 Hen. 8, c. 1, s. 4; 34 & 35 Hen. 8, c. 5; 10 Car. 1, sess. 2, c. 2; sects. 5, 6, 12, 19, 20, 21, and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 Wm. 3, c. 12; sect. 14 of 4 & 5 Anne, c. 16; 6 id. c. 10; sect. 9 of 14 Geo. 2, c. 20; 25 Geo. 2, c. 6 (except as to colonies); id. c. 11; 55 Geo. 3, c. 192. Sect. 1 defines "real estate" to be manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary, or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any individual share thereof, and to any estate, right or interest (other than a chattel interest) therein.

Personal Estate shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, or to any share or interest therein.

By sect. 3, all property may be disposed of by will, comprising customary freeholds and copyhold, with surrender, and before admittance, and also such property as could not before the act be devised, including estates *per autre vie*, contingent interests, rights of entry, and property acquired after the execution of the will. This act does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. Shelf. *Real Prop. Acts*, 6th ed. 484. *Bishop v. Curtis*, 21 L. J. Q. B. 391. *See* Chose in Action, vol. iii. p. 98.

Anciently a mere hope or chance of succession of an heir, apparent or presumptive, was not devisable (Burton, 258); nor could an interest, which at the time of making of the will was contingent, if the testator was

V. Who may be Devisees or Legatees.[1]

VI. Formal Requisites of a Devise or Bequest.

(A) *Before January* 1, 1838 (1 *Vic. c.* 26).[2]

not then ascertained as the person in whom, or in whose heirs, the interest must vest, if it vest at all. Burton, ss. 257, 258; 2 Pres. Shep. T. 322.

Estates which were divested and converted into rights, whether at the time of making the will or merely at the testator's death, were not devisable (Burton, s. 259; Watk. Conv. 3d ed. by Prest. 97, 114; 1 Jarm. Wills, 2d ed. 38, 122, 124. In the case of a devise of a legal estate the will could not take effect, unless the devisor was not only seised at the date of the will, but was also seised at the time of his death. Hence, if a person devised his lands, and was afterwards disseised and died before entry, the devise was void. 6 Cruise, T. 38, c. 3, s. 37. If a mortgagee devised the lands mortgaged before the condition was broken, such devise was void, because a condition was not devisable. But an estate in mortgage may be devised after the condition is broken; and an equity of redemption, being an equitable estate, is devisable. Id. ss. 13, 14; 2 Prest. Shep. T. 242; Watk. Conv. 3d ed. by Pres. 33; Smith, R. & P. 872.

Formerly a devise only operated upon such real estates as the testator had at the time of executing and publishing his will. Freehold lands purchased after that time would not pass, unless subsequent to the purchase or contract the devisor republished his will (2 Bl. Com. 378; 9 Sugd. *Concise View*, 127; Burt, 258; 1 Jarm. Wills, 2d ed. 39); nor would copyholds, unless they were afterwards surrendered to the use of the will. Sugd. *Concise View*, 128; 1 Jarm. Wills, 2d ed. 46. But where an agreement in writing was entered into for the purchase of lands, and before a conveyance of the legal estate was executed the purchaser devised the land so contracted for, such devise was held good in equity (6 Cruise, T. 38, c. 3, s. 8; Smith, R. & P. 873. A joint-tenant could not devise his share, whether he survived the other joint-tenant or not. But in the case of leaseholds or other personal property, if the joint-tenancy was severed, a general or residuary bequest in a will made previous to the severance would pass the share. And the same is now the case with respect to real property, where there is a general or residuary devise made since the year 1838, as a will now operates on after-acquired property. Co. Litt. 185, b; 6 Cru. T. 38, c. 3, ss. 27, 28; 1 Jarm. Wills; Smith, R. & P. 874.

[1] *Aliens may take* real estate by devise, as the property remains in the alien till office found, when it devolves to the Crown. *Duplessis v. Attorney-General*, 1 Bro. P. C. Toml. 415. Where lands are devised to an alien and another concurrently as joint-tenants, the entirety does not vest in the latter (as would be the effect if the devise to the alien were absolutely void), but in both jointly; and if the Crown does not, during the joint lives, seize the alien's undivided moiety, as it might do after office found (*King v. Boys*, Dy. 283, b), then, on the decease of the alien, leaving his devisee surviving, such moiety will devolve to the latter by virtue of the *jus accrescendi*.

A trust of freehold or copyhold lands, or chattels real declared in favour of an alien, is forfeited to the Crown (Alleyn; 16 Sty. 20; *see* 24 Beav. 1), except such as an alien may himself hold (1 Jarm. on Wills, 62), and the proceeds of real estate may be given to an alien. So may a denizen or naturalised person take and hold lands devised.

Corporations.—The 1 Vic. c. 26, has repealed the 34 & 35 Hen. 8, c. 5, and has not revived the prohibition against corporations taking real estate by devise. At present, therefore, the law is, that every corporation which is empowered by license in mortmain to take and hold real property at all, may take, by way of devise, to the extent of its license, as well as by any other means; but that no corporation without such license can take real estate by devise, any more than before the late Wills Act. But *see* Jarm. on Wills, 58, 3d ed. Grant on Corp. 112, 113.

[2] Prior to the above date nuncupative testaments were valid; but the Statute of Frauds (29 Car. 2, c. 3, s. 19) provided, that no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses, at the least, that were present at the making thereof. By sect. 20, it must be put into writing within six days, otherwise it cannot be proved after six months. By sect. 21, when to be proved; citation of next of kin. By sect. 22, written wills of personal property not to be repealed or altered by a nuncupative disposition; the statute as to nuncupative wills construed strictly; three witnesses must attest the will on oath, as well as be present at its making. *Phillips v. St. Clement Danes*, 1 Abr. Eq. Cas. 404; also reported in Swinb. 6th ed. 60.

The form of a nuncupative was immaterial; it might be made by interrogations. Swinb. pt. i. s. 12, pl. 6. A disposition of this description may sometimes be sustained as a trust, though invalid, or a nuncupative will. 10 Mod. 404. It has been questioned whether the Statute of Frauds extends to a will made abroad. 1 Hagg. 380; 2 Ca. Temp. Lee, 495.

The formalities of attestation and signature required by the Statute of Frauds (29 Car. 2, c. 3, s. 5) for a devise of lands, were not essential to the validity of a will or codicil of personal estate, except in the case of a bequest of stock in the public funds, which

was required by certain statutes to be attested by two witnesses. A testament of chattels only was good if proved to be written in the testator's own hand, though without his name or seal to it, and without any witness present at its publication; and though written in another party's hand, and never signed by the testator, yet if proved to be according to his instructions, and approved by him, it is a good will of personal estate. 2 Bl. Com. 501; 1 Jarm. Wills, 3d ed. 82, 83.

Of Real Estate.—By the Statute of Frauds (29 Car. 2, c. 3, s. 5, which is still in force with reference to wills made before the 1st January, 1838) all devises of lands or tenements must be in writing, and signed by the party devising the same, or by some other person, in his presence and by his express direction, and attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be utterly void. The words "lands or tenements" in the act denote a fee-simple. A will devising an estate which is doubtful, whether strictly copyhold or customary, is not within the act. *Doe d. Cook v. Danvers*, 7 East, 299. Three things, therefore, must be proved, in order to substantiate a will of real property within the Statute of Frauds: 1. That the will is in writing; 2. The signature; 3. The attestation. Signing the testator's seal, without his signature, will not suffice. See *Grayson v. Atkinson*, 2 Ves. 459. *Ellis v. Smith*, 1 Ves. jun. 11. *Wright v. Wakefield*, 17 Ves. 458; 18 id. 175. The statute requires the signature of the testator, but is silent as to sealing; and, therefore, where a will of lands was signed, but not sealed, by testator, and two years afterwards a clause was added to it, signed by the testator, but not sealed, and attested in his presence by three credible witnesses, the will was held good. *Carleton d. Griffin v. Griffin*, 1 Burr. 549. The testator's signature may be in any part of the will, at the beginning (I, A. B., &c.) or at the bottom, or in margin (*Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538); or, if he cannot write, his mark, or the impression of his name with a stamp, will be sufficient. Where the will consisted of several sheets, and the testator signed two, but from weakness could not sign the rest, the will was held incomplete. *Right d. Cater v. Price*, Dougl. 241. But where the will, which was written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, but had omitted to sign the other sides, it was held that the will was good. The signing the last sheet showed that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. & B. 650; 5 Moo. 484.

If the testator have lost his sight, the will need not be read over to him in the presence of the attesting witnesses before its execution. *Longchamp v. Fish*, 2 N. R. 415. On the same paper with an unexecuted will was written a codicil, duly executed and attested, and which referred expressly to the will:—*Held*, a good will. *Doe v. Evans*, 1 C. & M. 42. But see *Moneypenny v. Bristow*, 2 Russ. & Mylne, 117.

Attestation.—It is not required by the statute that the witnesses should see the devisor sign, or that he should sign in their presence. It is sufficient that he declare to the witnesses that the instrument offered to them to be subscribed is his will, and that the signature is his handwriting. *Grayson v. Atkinson*, 2 Ves. 454. *Ellis v. Smith*, 1 Ves. jun. 11; Dick. 255. Although proof be necessary that the will was attested by the witnesses in the presence of the testator, it is not necessary that such attestation should be stated on the face of the will. *Croft d. Dalby v. Pawlett*, Vin. Abr. Devise, No. 9; Bac. Abr. Wills, D, 2. *Brice v. Smith*, Willes, 1; 4 Taunt. 217; and *per Lord Eldon*, 6 Dowl. 202. See 1 Vic. c. 26. The attestation of an illiterate witness, by making his mark, is a sufficient subscription (*Harrison v. Harrison*, 8 Ves. jun. 185. *Addy v. Grise*, id. 504); nor is it essential that the will should be subscribed by the witnesses at the same time (Pre. Ch. 185); nor in each other's presence; if, however, they attested at several times, one witness will not be enough to prove the execution. *Cook v. Parson*, id; see 1 Vic. c. 26. Where the devisor published his will in the presence of two witnesses, who subscribed it in his presence, and some time after he sent for a third witness, and published in his presence, the will was holden to be duly attested. *Jones v. Lake*, 16 Geo. 2, B. R; 2 Atk. 176, n.; 2 Ves. 458. *See* also *Stonehouse v. Evelyn*, 3 P. Wms. 253. *Westbroke v. Kennedy*, 1 Ves. & B. 362. *Ellis v. Smith*, *supra;* and *Grayson v. Atkinson*, *supra*. *See* 1 Jarm. 74, 3d ed.

It is not necessary that the witness should know the paper to be a will. *Wright v. Wright*, 7 Bing. 457. *Stonehouse v. Evelyn*, P. Wms. 254. It is requisite, however, that he should acknowledge to one of the witnesses, at least, that the signature is his handwriting. *Johnson v. Johnson*, 1 C. & M. 140. Where it appeared by the attestation that the will had been signed in the presence of three witnesses, who, in the presence of the testator, and of each other, attested, &c., if one of them state that he and another saw the testator sign, but that the third, whose signature was proved, was not then present (*Doe v. Lewis*, 7 C. & P. 574), the witnesses need not attest every page, or know the contents, but all the will should be in the room at the time of attestation; whether it were so or not is a question for the jury. *Bond v. Seawell*, 3 Burr. 1773; 1 Black. 407. *Lea v. Libb*, 3 Mod. 262. Though there be no proof that testator saw the witnesses sign the will, his presence may be implied, if it be shown that he was in such a situation that he might have seen them. *Shires v. Glasscock*, 2 Salk. 688. *Sir G. Sheen's case*, cited in Carth. 81. *Davy v. Smith*, 3 Salk. 395. *Todd v. Winchelsea*

(B) *On or after January* 1, 1838.[1]

(*Earl of*), 1 M. & M. 12. *Casson v. Dade*, 1 Bro. C. C. 99; Bac. Abr. Wills, D, 1. If, however, it be shown that, although in one part of the room the testator might have seen the attestation, yet, if he was not in that particular spot, his presence is negatived, and the execution has in such case been held bad. *Doe v. Manifold*, 1 M. & S. 294. *See* also *Eccleston v. Petty*, Carth. 79; Comb. 156; 1 Show. 89; Holt, Rep. 222. *Machell v. Temple*, 2 Show. 288. *Langford v. Eyre*, 1 P. Wms. 740.

If the hand of one witness is guided by another, it is enough, though the witness cannot read or write. *Harrison v. Elvin*, 3 Q. B. 117.

Who a Credible Witness within the Act.—The witnesses must be persons who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by interest. 1 Selw. N. P. 858. Idiots, insane persons, and children, who, upon examination by the court, appear to want understanding, are excluded as competent witnesses. Any person who believes in God, the obligation of an oath, and a future state of rewards and punishments, is a credible witness. *Rex v. Taylor*, Peake, 11. *See post*, Witness.

The statute expressly requiring that a devise of land should be attested by credible witnesses, persons having a beneficial interest under the will were deemed not to be qualified. This restriction occasioned much injustice, and 25 Geo. 2, c. 6, after reciting the 5th sect. of 29 Car. 2, c. 3, provided that beneficial devises and legacies to attesting witnesses should be utterly void, and such person should be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, &c.; and that creditors, whose debts were charged on the lands, &c., should be competent, notwithstanding the charge, &c. One who is interested at the time of the execution, but discharges his interest previous to examination, is not a good witness. *Hatfield v. Thorp*, 5 B. & A. 589. A party to whose wife the will gives an estate in fee, after the determination of a life estate, is not a good witness within the statute (Id.), although the wife dies after the testator, before the determination of the life estate, and the witness survives the wife. (Id.) An executor, who takes no beneficial interest under the will, is a competent attesting witness within the statute. *Phipps v. Pitcher*, 2 Marsh. 20, 6; Taunt. 220. So is the wife of an acting executor, taking no beneficial interest under the will. *Bettison v. Bromley*, 12 East, 250. Where an attesting witness would take the same interest, either under a former will, to which he was not a witness, or under a latter will, he stands indifferent in point of interest, and is a good witness to prove the latter will. *Wood v. Teage*, 5 B. & C. 335. The act did not apply to wills of copyhold (3 De Gex & J. 502), or personal estate, where no witness was required. 3 Russ. 430.

By 1 Vic. c. 26, s. 14, it is enacted, that if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not, on that account, be invalid. Sect. 15 invalidates any beneficial devise, legacy, estate, interest, gift, or appointment, of any real or personal estate, except charges for the payment of debts to any person who, or whose wife or husband, shall attest the execution of any will, and makes such person a good witness to attest the will. Sect. 16 makes the attestation of a will, charged with the payment of any debts by a creditor, or his or her wife or husband, a good witness to prove the execution of the will. By sect. 17, an executor is a good witness to prove the execution of the will, or its validity or invalidity.

In *Doe v. Mills* (1 M. & Rob. 288) it was decided in regard to wills of freehold lands, that the fact that the witness was not wanted to make up the statutory number (there being three others), did not render valid a gift to such supernumerary witness; and this rule applies to every case of a gift to a witness by a will coming under the operation of the recent act. *Wigan v. Rowland*, 11 Hare, 157.

The provisions in the recent act extend the disqualification of the witness to take beneficially to wills of every description, the act having, by assimilating the execution of wills of real and personal estate, destroyed all grounds for distinguishing between them, as in regard to this point. By sect. 15, a legatee under a will does not lose his legacy by attesting a codicil which confirms the will (*Gurney v. Gurney*, 3 Drew, 208. *Tempest v. Tempest*, 2 K. & J. 642; 7 De Gex, M. & G. 470); and a residuary legatee, so doing, does not lose his share of the residue, although the codicil in fact increases that share by revoking some particular legacies. *Gurney v. Gurney*, *supra*. Each witness attests only the instrument to which he puts his name. 1 Jarm. 69.

It will be observed that the act dispenses with all personal qualification, as required by the earlier statute, by the use of the words "credible witness."

[1] The 1 Vic. c. 26, s. 9, enacts, that no will shall be valid unless it shall be in writing, and executed in manner thereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the

presence of the testator, but no form of attestation shall be necessary.

Shortly after the passing of this section, the courts decided that the words "foot or end" were to be construed strictly, and the signature must follow the concluding part of the will, and in such manner that nothing could be interposed between the signature and the last words in the will. *See* Sug. R. P. stats. 311. This rigorous interpretation compelled the legislature again to interfere, and the will to be valid if the signature be placed at, or after, or following, or under, or beside, or opposite to the end of the will, provided it be apparent that the testator intended to give effect to his will. The 15 Vic. c. 33, refers to the circumstances which had been deemed to invalidate wills, and recites the 1 Vic. c. 26, which enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction. Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will. The word "will" shall, in the construction of this act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act, 1 Vic. c. 26. This act may be cited as "The Wills Act Amendment Act, 1852." These acts abolish the distinctions between real and personal estate, for we have seen a devise of the former required *three credible* witnesses, while to a bequest of the latter no witness was required: now, whatever is the nature of the property, two witnesses are indispensable to every will or codicil. Every testamentary instrument is in this respect placed on the same footing, whether it relates to realty, personalty, or copyhold. The following remarks and valuable suggestions by Lord St. Leonard's to a testator, in his *Handy-Book of Property Law*, pp. 143–152, comprise accurate and full directions as to what should be done with respect to the execution of a will under the existing law, and its general scope and effect. He says,—

"Although the signature is properly placed, yet any disposition or direction which is underneath, or which follows the signature, will be inoperative; nor, of course, will the signature render valid any disposition or direction inserted after the signature shall be made.

"Take care that, if written on several separate sheets of paper, they are all fastened together, and that the pages are numbered. Sign your name at the bottom of each sheet, and state at the end of your will of how many pages your will consists. It has been suggested by a learned writer, that where the testator is *in extremis* it seems advisable that the first or only signature should be at the end, for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last. If there are any erasures or interlineations put your initials in the margin opposite to them, merely to identify them, *and notice them in the attestation*. The attestation should be already written at the end of the will, and may be in this form:—

"'Signed by the above-named testator, in the presence of us present at the same time, who have hereunto signed our names as witnesses thereto, in the presence of the said testator, and in the presence of each other [the words interlined in the 4th line of the 3rd page having been first added, and the erasures in the 7th and 8th lines in page 6 having been first made.'] Where this addition is necessary, it should of course refer to the proper pages; the above is an example.

"The two persons intended to be the witnesses should be called in, and told that you desire them to witness your will, and then you should sign your name in their presence, and desire them each to look at the signature. Your signature should follow your will, but should precede the signatures of the witnesses, for if you were to sign after they have signed, your will would be void. When, therefore, you have signed, they should sign their names and residences at the foot of the attestation. You will observe, that according to the attestation, neither of the witnesses, although he has signed the attestation, should leave the room until the other witnesses has signed also. Remember, that they must both sign in your presence, and therefore you should not allow them to go into another room to sign, or even into any recess, or any other part of the same room, where it is possible that you might not be able to see them sign. If, therefore, you do not choose them to sign after you at the same table or desk, have a table placed close to you before they come into the room, so as to create no confusion, at which they can and ought to sign before leaving the room. If you were to send your servant, who happened to be one of your intended witnesses, out of the room even for

a table, he would probably leave the room before you sign. If after your death a question were to arise upon the fact of your having signed in the presence of both of the witnesses present at the same time, the man of course would admit that he left the room before you did sign, and then imagine what reliance would be placed upon that fact in cross-examination, and in the address to the jury. The precaution which I recommend would prevent this difficulty from arising.

"Even if you are ill and confined to your bed, you should have a table ready at your bedside at which the witnesses should sign after you, and you should not turn your back upon them whilst they are signing. These simple precautions will render it impossible to impeach your will for want of its due execution.

"The actual law is, that no will shall be valid 'unless it shall be in writing, and signed at the foot or end thereof by the testator, *or by some other person in his presence, and by his direction;* and such signature shall be made *or* acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; *but no form of attestation shall be necessary.*' And the words, 'at the foot or end,' have been explained and extended by a later act in the manner to which I have already referred, so as to render valid any common mode of signing a will.

"You will observe, therefore, that if you cannot sign your name yourself, some other person may do so for you in your presence, and by your direction; but this should be noticed in the attestation. It will be no objection that the person signing for you is also one of the attesting witnesses. It has been decided, that where a person signed for the testator, but in his own name, stating it to be for the testator, and by his direction, the signature was a good one. You might, if you could not write, or did not choose to do so, sign by your X or mark, and so may the witnesses, if they cannot write; but to sign by a mark when you can write would be an act of folly, and if you can avoid it, do not have marksmen for witnesses. Although one of the witnesses is unable to write, yet the other cannot sign for him; but in such a case the other witness may guide the hand of the witness unable to write, so as to enable him to write his name. It would, however, be more advisable to let a marksman affix his mark.

"A husband cannot sign for his wife where they are the witnesses. A witness cannot, by going over his signature with a dry pen, give effect to it as a new signature; nor can he, by adding a further description to his place of residence mentioned in his original signature, give a new effect to that signature. You should attend to this if you have occasion to re-execute your will, and should require the witnesses to re-write their names as witnesses to the re-execution. I will presently explain to you the object of a re-execution of your will. I have shown to you that there must be two witnesses to your will; but you may have more if you please, although I advise you to be content with two.

"But although a witness cannot give effect to his signature by recognition, yet you will have observed that you, the maker of the will, may, if you please, sign your name in the absence of the witnesses, provided you acknowledge *your signature*, not merely the will, in their presence. *But the witnesses should see that the will is signed by you.* Pray attend to this: if you do not sign in their presence, point out your signature carefully to them, although you need not tell them that it is your will, but it is better to do so. If you were to fold your will so as to conceal all its contents and the attestation clause, and the witnesses were not to see you sign nor see your signature, the will would be void, although you acknowledged the paper to be your will before the witnesses.

"But even gestures by a testator, intimating that he has signed the will, and wishes the witnesses to attest it, have been held sufficient where they saw the signature. A will, however, will not be set aside simply upon the infirm or confused recollection of witnesses. Their want of recollection where the will, on the face of it, is properly executed, will not have much weight. At a distance of time, persons not accustomed to witness the execution of instruments, forget nearly all that passed; therefore defective memory alone in witnesses cannot be allowed to overturn a will. The Court must first be satisfied that the will was not duly executed, and where the negative is not established, the affirmative must be held to be proved. Where a will was properly signed on the face of it, and two servants attested it, and the testatrix was writing when the first of them went into the room, although neither of them knew it was a will, or saw the testatrix sign, and she did not acknowledge her signature, yet as the paper was open, and they might have seen it, the will was established. If the witnesses disagree, and the one against the will is discredited, the evidence of the other, with corroborating circumstances, would support the will. If you follow the plain directions which I have given you, no such question could arise.

"I have advised you to keep both of the witnesses present until they have both signed the attestation. This is not required by the statute, and after some doubt, it appears to be settled that it is not necessary, although I think it highly expedient, for it will impress the matter more upon their minds; but do not fall into an error on this head. *You must* sign or acknowledge your signature in the presence of the two witnesses *present at the same time*, according to the very words of the statute.

"I have furnished you with a formal attestation, *which will save both delay and expense in the proof of your will after your*

death; but although the statute requires the witnesses to attest and subscribe the will, yet it declares that no form of attestation shall be necessary, so that no attestation clause whatever is required. If the witnesses sign as such, that is sufficient. The word 'witnesses,' for example, prefixed to their names at the end of the will, would be a compliance with the law.

"The act protects you against the incompetency of the witnesses to prove the execution of your will; so that, although they may have been guilty of crimes, for example, which would formerly have excluded their evidence in common cases, yet that would not render your will invalid. *See* further, 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 99. You would not, of course, if you were aware of it, allow persons of bad character to witness your will. Creditors or executors may prove the execution of a will to which they are attesting witnesses; but no person to whom you give a legacy, or to whose wife or husband you give one, should be a witness to your will: for although the testimony of such a witness would be good, the legacy to him or her, or to his or her wife or husband, would be void.

"I have advised you not to lose sight of the witnesses until they have signed the attestation: on no account allow them to take the will out of the room where you sign it, or even to sign it in any part of the room where you cannot see them. The decisions on this head reflect no credit on the law of England. It is, however, sufficient if the witnesses sign where you might see them; it is not necessary to prove that you actually did see them. I have endeavoured, but in vain, to prevail upon parliament to place the law upon this subject upon a better footing. Even in the case of a blind man, he is treated as if he could see, for the witnesses must sign where, if he enjoyed the organ of sight, he could see them!

"In one case, where a lady went to her attorney's office to execute her will, but executed it in her carriage in the presence of the witnesses, who then returned into the office to attest it, the validity of the will was established, because the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the lady might see what passed; that is, the witnesses signing the attestation. In another case of this nature, there was an unseemly contest between the Court of Chancery and the juries who had to try the validity of a will of a noble duke, which depended upon the question whether the testator could see the witnesses who signed in an adjoining room. Two juries found in favour of the will, and yet the court directed a third trial.

"If you add a codicil to your will, you should call it a codicil, and should execute it, and have it attested, just as if it were an original will. Remember, that you cannot give a single additional legacy without once more going through these ceremonies.

"Do not make your will at intervals. If you do you must execute what you have written every time you leave off, and it must be attested just as if it were a full disposition, if you mean to give effect to it, although you should die before you finish your will. If you were to write two testamentary instruments on the same sheet of paper, and sign them both, and the witnesses were actually witnesses to the signature to both, yet if *they* signed an attestation at the end of the first instrument, that would not render the second operative.

"If you obliterate, interline, or make any other alteration in your will *after* it is executed, you must sign your name, and the witnesses subscribe theirs 'in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.' If you neglect this direction, the alteration will not have any effect, except so far as the words or effect of the will before such alteration shall not be apparent; for if the obliteration is effectual, of course the disposition in the will as it originally stood cannot be made out; and where the intention is simply to revoke, and not to substitute another legacy for that given by the will, no evidence can be admitted to show what the words really were; but expert persons may be employed, and magnifying glasses may be used, in order to make out the words.

"The initials of the testator and of the former witnesses have been deemed sufficient to give effect to such interlineations. I recommend you to have all the names written at length; it would be still better to re-execute the will, and have it regularly re-attested, noticing the interlineations.

"Generally speaking, any alteration should be made by a regular codicil, and not by obliteration or interlineation. If there are any interlineations in your will unattested, it will be presumed that they were made *after* the execution of your will, and they consequently will be inoperative, although parol evidence may be received to show that they were made before the will was executed.

"A codicil duly executed will make the will speak as of the date of the codicil, unless a contrary intention appears. So a will or a codicil not duly executed may be rendered valid by a later codicil duly executed, and referring clearly to it, or in such a manner as to show the intention; therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will although not duly executed. But if you had several wills and codicils in your possession, and some were duly executed and some were not, and by a codicil duly executed you were expressly to confirm all your wills and codicils, this codicil would only confirm those which were duly executed; for they by themselves would satisfy the strict meaning of the words. This was

decided in a contest for large legacies under dispositions by the late Marquis of Hertford. No doubt a harsh construction; but without perplexing you with other instances of a strict construction on this head, this may serve to point out to you how careful you should be in referring distinctly to any unexecuted testamentary papers which you desire to render valid.

"Although by a codicil, duly executed, you may set up a prior will, not duly executed, yet you cannot by a will, though duly executed, give validity to any future codicil you may make not duly executed.

"I may observe to you, that if you have a *power* to dispose of any property *by your will*, which means a right to give it to another, although the property itself does not belong to you, and the will is required to be executed by you in a particular manner, or in the presence of a particular number of witnesses, or nothing is said on the subject, you must execute your will in exercise of the power precisely in the same mode as if you were disposing of your own property, and it is not necessary to observe the mode of execution required by the power itself."

A. executed a draft will in April, 1847. In May, 1847, he executed an engrossed will. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. It was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations in the testator's handwriting in ink and pencil, and cancellations. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil:—Probate decreed of the draft will of April, 1847, including the alterations in ink, but not those in pencil, in so far as they agreed with the will of March, 1847, together with the codicil of 1854. *In the Goods of Wyatt*, 2 S. & T. 494; 31 L. J. Prob. 197; 10 W. R. 783; 6 L. T. (N. S.) 694.

A. wrote out his own will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation clause, and requested that they would sign their names, which they did. His name was not written at the foot or end otherwise than in the attestation clause:—*Held*, that under the 15 & 16 Vic. c. 24, the execution was valid. *In the Goods of Walker*, 2 S. & T. 354; 8 Jur. N. S. 314; 31 L. J. Prob. 62; 5 L. T. (N. S.) 766.

In order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity. *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341.

To make a valid subscription and attestation to a will there must be either the name of the witness, or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. *Hindmarsh v. Charlton*, 8 H. L. C. 160; 7 Jur. N. S. 611; 9 W. R. 521; 4 L. T. (N. S.) 125.

The signature or acknowledgment of a testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged, subscribe the will in his presence. (Id.)

The attesting witnesses to a will, not being able to write, held the top of the pen while the writer of the will subscribed their names:—*Held*, that, as the witnesses took some share in the act of writing, the court could not determine on the more or less, and that the attestation and subscription were good. *Lewis v. Lewis*, 2 S. & T. 153; 4 L. T. (N. S.) 583. S. C. nom. *In the Goods of Lewis*, 7 Jur. N. S. 688.

Under the Statute of Frauds, when acknowledgment came to be admitted, the subject to be acknowledged was the devise or bequest; that is, the will or paper-writing itself. Under the recent act, the subject to be acknowledged is the "signature of the testator," whether made by the testator or by another for him. There is no sufficient acknowledgment unless the witnesses either saw, or might have seen, the signature. *Re Harrison*, 2 Curt. 863. *Mott v. George*, 3 id. 160; 4 Moo. P. C. C. 265; 8 Jur. 323; and see *Faulds v. Jackson*, 6 No. Cas. Supp. 1. When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary: a mere statement that the paper is his will (*Re Davis*, 3 Curt. 748. *Re Ashmore*, id. 756; 7 Jur. 1045), or a direction to them to put their names under his (*Re Philpot*, 3 No. Cas. 2. *Gaze v. Gaze*, 3 Curt. 451; 7 Jur. 803), or even a request by the testator (*Keigwin v. Keigwin*, 3 Curt. 607; 7 Jur. 840), to sign the paper is sufficient. When the signature is seen or expressly acknowledged it is not material that the witnesses are not told that the instrument is a will (*Keigwin v. Keigwin, supra. Faulds v. Jackson, supra*), or are deceived into thinking that it is a deed. Sugd. R. P. Stat. p. 334; but *see* the observations of Sir H. J. Fust in *Wallis v. Lowe*, 5 No. Cas. 432. A testator, whether speechless or not, may acknowledge his signature by gestures. *Re Davies*, 2 Rob. 337; and see *Parker v. Parker*, Milw. N. Parl. Rep. 545.

By sect. 21, 1 Vic. c. 26, no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore, is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator

VII. Vacating Will by Revocation.[1]

and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

A codicil not duly attested is not now included in the term "codicils," where there are duly-attested codicils to satisfy its strict meaning (*Case of Croker v. Hertford*, 5 Sim. 274. *See* also *Crosbie v. Macdonall*, 4 Ves. 610. *Pigott v. Wilder*, 26 Beav. 90; 4 Moo. P. C. C. 339; 8 Jur. 863; 3 No. Cas. 150. *Countess of Ferraris v. Marquis of Hertford*, 3 Curt. 468; 7 Jur. 261; 2 No. Cas. 230), nor in the term "will." A different rule prevails where there is no duly-attested codicil or duly-attested will. The fact that an imperfect instrument is written on the same paper as a perfect one only facilitates identification. Lev. 11; Moo. P. C. C. 455, 461. *Re Claringbull*, 3 No. Cas. 1. *Re Smith*, 1 No. Cas. 1; 2 Curt. 796. Unexecuted alterations may be rendered valid by subsequent codicil confirming the will. *Lushington v. Onslow*, 6 No. Cas. 183; 12 Jur. 465. *Re Tegg*, 4 No. Cas. 531.

[1] There are now only four modes by which a will can be revoked:—1. By another inconsistent will or writing executed in the same manner as the original will. 2. By burning or other act of the same nature. 3. By the disposition of the property by the testator in his lifetime, leaving nothing for the will to operate upon. 4. By marriage. By the 2d and 4th modes the revocation will be complete. By the 1st and 3d, consistently with the new disposition, the revocation may be partial only.

The 6th section of the Statute of Frauds enacts, that no devise of lands, &c. shall be revocable otherwise than by some will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent.

To prove a revocation by a subsequent will, the second will must be executed according to the provision of the 5th section of the statute. *Edlestone v. Speake*, 1 Show. 89. *Onyons v. Tyrer*, 1 P. Wms. 343. *Limbery v. Mason*, Com. Rep. 454. If the second will do not expressly revoke the first, it does so only in so far as it is clearly inconsistent with the first; and if testator destroy the second will (the first still existing), the first is thereby revived. *Harwood v. Goodright*, Cowp. 91. *Glazier v. Glazier*, 4 Burr. 2512: cited by *Buller, J.*, Dougl. 40. *Guest v. Willassy*, 3 Bing. 614.

Where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect, by reason of the revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention in the will. *Doe d. Heale v. Hicks*, 1 Clark & Fin. 20.

To prove a revocation by some other writing, signed in the presence of three or four witnesses, the testator must have signed in the presence of the witnesses, but the act does not require, as in the 5th section, that they shall sign in his presence (1 P. Wms. 345); nor is their signature necessary at all (8 Vin. Abr. Devise, 142), although it must be shown that they were present. The latter words of the clause relate to the words "other writing," and not to the word "will:" a complete execution, therefore, according to the 5th section, is necessary in the case of a will or codicil, and such will may be complete, and take effect as a revocation, though testator does not sign in the presence of the witnesses. *Hoil v. Clarke*, 3 Mod. 218. *Ellis v. Smith*, id. in notes; 4 Burn, *Ecc. Law*, 199.

The revoking of wills since 1st of January, 1838, is governed by the 1 Vic. c. 26; the 20th section of which provides that no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil executed pursuant to the 9th section, or by some writing similarly executed, or by burning, tearing, or otherwise destroying it by the testator, or by some one in his presence, and by his direction, with the intention of revoking the same.

Sect. 18. Will may be revoked by marriage, unless where it is made under a power where the property would not, in default of appointment, go to the representatives of the testator.

Sect. 19. No will shall be revoked by presumption of intention in consequence of alteration of circumstances.

Sect 21. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Sect. 22. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked be-

VIII. Vacating by Cancelling, Tearing, &c.[1]

fore the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Sect. 23. No conveyance, &c., subsequent to the execution of the will (except an act of revocation) shall prevent the operation of the will, with respect to such estate or interest, as the testator shall have power to dispose of by will at the time of his death.

Sect. 24. A will of real or personal estate shall be construed to speak from the death of the testator, unless a contrary intention be shown by the will.

A will or codicil containing a devise of real estates, but not duly witnessed, is good if confirmed by a subsequent codicil having the proper attestation, though the latter document be in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one or the will. *Semble*, however, that the instrument relied upon as confirming a previous one, should distinctly refer to it. *Utterton v. Robins*, 1 Ad. & E. 423.

Before the late act, a will was revoked absolutely by marriage of a woman (*Forse v. Hembling*, 4 Rep. 61. *Doe v. Staple*, 2 T. R. 695. *Hodsden v. Lloyd*, 2 Bro. C. C. 533), or by a marriage and *birth* of a child unprovided for by a man. *See* cases cited, 1 Jarm. on Wills, 115, particularly *Kenebel v. Scrafton*, 2 East, 530. But a will made by a married woman before marriage, under a power, is not necessarily a revocation. *Doe v. Barford*, 4 M. & S. 10. Nor is a will revoked in favour of a pre-existing child. 1 Ves. & B. 391. The death of the child in the testator's lifetime is immaterial. 2 Salk. 523, n.; 1 Phill. 413, 343; 2 id. 266, n.

Wills made prior to 1838 are still governed by the old law as regards revocation by marriage and the birth of issue. See *Brooke v. Kent*, 3 Moo. P. C. C. 334.

[1] The act of burning or tearing must be done with the intent to cancel (*Burtenshaw v. Gilbert*, Cowp. 52); and though such act do not effect a complete destruction, if the intent be apparent, the will will be vacated. *Weaver v. Pratt*, 2 B. & B. 650. *Doe d. Perkes v. Perkes*, 3 Com. Rep. 453. *Tilner v. Tilner*, 3 Wils. 508. No destroying will operate as a revocation where the party was of unsound mind at the time of the act. *Timbery v. Foulham*, 1 Ph. Ad. 74. Declarations of the testator at the time of committing the act, and his subsequent declarations respecting it, are admissible. *Burtenshaw v. Gilbert*, Cowp. 53; 2 East, 534, n. (b). The testator threw his will on the fire, with the intention of destroying it, when it was snatched off by another person, but it was only burned in the corner. This person afterwards promised the testator that he would burn it, and pretended to have done so:—*Held*, to be no revocation. *Doe v. Harris*, 6 Ad. & E. 209. *See* 8 id. 1. Whether the testator had finished all that he intended to do for the purpose of destroying the will is a question for the jury. *Doe d. Perkes v. Perkes*, 3 B. & A. 489.

A will must be revoked by some unequivocal act of cancellation or obliteration by the testator, or by some one in his presence, and by his direction. A mere abandonment is not sufficient. *Andrew v. Motley*, 12 C. B. (N. S.) 514. Tearing off signature of witnesses suffices. *Evans v. Dallow*, 31 L. J. Prob. 128.

Where a testator cut a piece out of his will, which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason at the time for having so cut the same that he had some idea of altering it, and having a new will made; and subsequently, on the same day, re-fastened the piece he had so cut out, saying "that his will would do for the present, and that if he wanted another will he could do it afterwards," and died without making another will; the court, on motion, but with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein. *In Goods of Eeles*, 32 L. J. Prob. 4; 11 W. R. 31; 7 L. T. (N. S.) 338.

A testator destroyed his will, believing that it had already been revoked by a later will, which was, in fact, invalid; and the only evidence of his object in destroying it was a declaration made at the time that it was no use to keep it, as he had another:—*Held*, that the will was not revoked. *Clarkson v. Clarkson*, 2 S. & T. 497; 31 L. J. Prob. 143; 10 W. R. 781; 6 L. T. (N. S.) 506.

A disposition by will, since the 7 Will. 4 and 1 Vic. c. 26, can be revoked only by ademption of the property devised, or by a declaration of intention to revoke, or words equivalent thereto; and therefore a will executing a power of appointment is not revoked by deeds subsequently executed, and making a different disposition of the property appointed. *De Pontes v. Kendall, Ford v. De Pontes*, 8 Jur. (N. S.) 323; 31 L. J. Ch. 185.

The cutting, in order to be effectual, need not necessarily be a cutting up of the whole will, the cutting out of a particular clause, or of the name of a legatee, will be a revocation *pro tanto* (*Re Cooke*, No. 5 Cas. 390. *Re Lambert*, 1 No. Cas. 131); but cutting out that part of the will which may be said to be the principal part (*Williams v. Jones*, 7 No. Cas. 106), or that part which gives effect to the whole, as the signature of the testator (*Hobbs v. Knight*, 1 Curt. 768. *Re Gullan*, 1 S. & T. 23; 27 L. J. Prob. 15. *Re Lewis*, id.; 1 S. & T. 31; *Re Simpson*, 5 Jur. N. S. 1366); or it is presumed of the witness (*Birkhead v. Brandoin*, 2 No. Cas. 66; and see *Hobbs v. Knight*, 1 Curt. 780–781. *Abraham v. Joseph*, 5 Jur. N. S. 179. *Re James*, 7 id. 52), will cause a revocation of the whole will. And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left. *Re*

IX. Vacating by Alteration or Disposition of Estate.[1]

Gullan, 1 S. & T. 23; 27 L. J. Prob. 15; 4 Jur. N. S. 196. *Gullan v. Grove*, 26 Beav. 64. It has also been decided that tearing off, *animo revocandi*, the seal of a will, constituted a revocation. The words "otherwise destroying," must be taken to mean a destruction *ejusdem generis* with the modes before mentioned; that is, destruction, in the proper sense of the word, of the substance or contents of the will, and not a "destroying" in a secondary sense (*Stephens v. Tupsell*, 2 Curt. 458. *Hobbs v. Knight*, 1 id. 779), as by cancelling or incomplete obliteration. Where obliterations and interlineations appear on the face of a will, and there is no evidence (*Keigwin v. Keigwin*, 3 Curt. 607; 7 Jur. 840. *Re Jacob*, 1 No. Cas. 401) to show the time at which they were made, the presumption is that they were made after the execution of the will or codicil. *Cooper v. Bockett*, 4 Moo. P. C. C. 419; 10 Jur. 931. *Simmons v. Rendall*, 1 Sim. N. S. 115. *Burgoyne v. Showler*, 1 Rob. 5; 8 Jur. 814; 3 No. Cas. 20. *Re Thompson*, id. 441. *Gann v. Gregory*, 3 De Gex, M. & G. 777. *Doe d. Shallcross v. Palmer*, 16 Q. B. 747. *Re James*, 1 S. & T. 238. *Re White*, 6 Jur. N. S. 808. *Williams v. Ashton*, 1 Johns. & H. 115; but see *Re Swindin*, 2 Rob. 192. *Re Streaker*, 28 L. J. Prob. 50; and see *Banks v. Thornton*, 1 Hare, 180; 1 Jarm. 136, n.

The admissibility of parol evidence to rebut the presumption of revocation, was subject to much discussion. See *Lord Kenyon's* observations in *Doe d. Lancashire*, and of *Lord Alvanley* in *Gibbon v. Caunè*, 4 Ves. 848, and of the *Lord Chancellor* in *Kenebel v. Scrafton*, 5 Ves. jun. 664, in opposition to such evidence; and the opinion of *Eyre, C. J.*, in *Goodtitle v. Otway*, 2 H. Black. 522. *Lugg v. Lugg*, Ld. Raym. 441, and *Brady v. Cubitt*, Dougl. 31. But such evidence has since been held to be inadmissible. *Marston v. Roe*, 8 Ad. & E. 14.

[1] An actual alienation or disposition of an estate, legal or equitable, after a devise, generally operated as a revocation; for in such cases the alienation was deemed undoubted evidence of an alteration of intention, and in some of these cases the devisor did not die seised. 6 Cru. T. 38, c. 6, s. 55; 1 Jarm. Wills, 2nd ed. 122, 124.

Even an agreement or covenant to convey lands which have been previously devised by will, whether in execution of a power or not, operates in equity, though not at law, as a revocation or ademption of such devise, as well in cases before the statute 1 Vic. c. 26, as in cases within it. 6 Cru. T. 38, c. 6, s. 58; 2 Sug. Pow. 10; Sug. *Concise View*, 131, 132. *Andrew v. Andrew*, 2 Sm. & G. 130; 1 Jarm. Wills, 2nd ed. 135. And the devisee is not entitled to the purchase-money (11 Jarm. & Byth by Sweet, 794); even though the contract were entered into under the compulsory powers of a railway company (*In re Manchester and Southport Rail. Co.* 19 Beav. 365. *Gale v. Gale*, 21 Beav. 349). In cases where the will is revoked in equity but not at law, the legal estate passes by the will to the devisee; but the Court of Chancery will compel him to convey it to the person entitled under the equitable agreement. Smith, P. & R. 907.

Even an intended alienation of an estate previously devised, which fails of taking effect for want of some formality, has been held to operate as a revocation of the devise. Thus, a feoffment without livery, and a bargain of sale not enrolled, have been held to be revocations of prior devises, because such intended alienations were considered as proofs of an alteration of intention (6 Cru. T. 38, c. 6, ss. 62, 63; 1 Jarm. Wills, 2nd ed. 137–139). An alienation to a trustee or conveyance to a *cestui que* use, without any intention of parting with the estate, and though the alienor took back, the old use has been held to operate as a revocation of a prior devise. 6 Cru. T. 38, c. 6, s. 65; Burton, s. 267; 1 Jarm. Wills, 2nd ed. 124.

Where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate to the same uses, this is no revocation (6 Cru. T. 38, c. 6, s. 90. *Bullin v. Fletcher*, 2 Mylne & C. 432; 1 Jarm. Wills, 2nd ed. 129). And so where a person devises a copyhold estate, and is afterwards admitted to it, this does not operate as a revocation of the devise (6 Cru. T. 38, c. 6, s. 92); and the mere change of a trustee does not operate as a revocation of a preceding devise (6 Cru. T. 38, c. 6, s. 99; 1 Jarm. Wills, 2nd ed. 129). Nor does a partition of an estate between tenants in common operate as a revocation of a prior devise made by one of the tenants of his share, even though such a partition be corroborated by a fine. 6 Cru. T. 38, c. 6, s. 97; 6 Jarm. & Byth by Sweet, 596; 1 Jarm. Wills, 2nd ed. 125; Smith, R. & P. 910.

A conveyance to have the effect of a total revocation of a prior devise must be co-extensive with the disposition made by the will; for if it is only of a part of the property it affects the will no further than concerns that part: and if it is of a particular estate or interest only, it only operates as a revocation *pro tanto*. Hence, a lease made of lands already devised only operates as a partial revocation, or a revocation *pro tanto*, in such a way that the devisee takes the inheritance subject to the terms, with the rent, if any, reserved by the lease. 6 Cru. T. 38, c. 6, s. 104; 1 Jarm. Wills, 2nd ed. 122. Although a mere mortgage in fee made after the lands mortgaged were devised is a revocation of such devise at law, yet in equity it only has the effect of making the devisee take subject to the mortgage as against the mortgagee, and in cases within the statute 17 Vic. c. 113, as against the testator's representatives.

A surrender of a lease for lives, and the taking a new lease, was held to operate as a revocation of a prior devise of it. 6 Cru. T. 38, c. 6, s. 111. A devise is revoked by a bankruptcy so far only as may be necessary

X. Republication and Revival of Revoked Wills.[1]

XI. Registration and Enrolment.[2]

XII. Appointment of Executors.[3]

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for the purpose of paying the creditors. 6 Cru. T. 38, c. 6, s. 110. The republication of a former will revoked one of a later date, and established the first again. 2 Bl. Com. 502.

[1] The revival of a will after its revocation can only be accomplished by the re-execution of it, or by a codicil duly executed, showing testator's intention to revive it. The intention to revive it should be expressly declared.

By the statute 1 Vic. c. 26, s. 22, "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. Formerly, a republication of a will had a twofold effect; first, in general, to give it the effect of a will made at the time of its republication; and secondly, to set up and re-establish a will that has been revoked (Burton, s. 271; 6 Cru. T. 38, c. 7, s. 1); and a codicil will have this effect even though it relate to the testator's personal estate only (Burton, s. 274; Sug. *Concise View*, 127; 1 Jarm. Wills, 2nd ed. 159); or only appoints a new executor (*In re Earl's Trust*, 4 K. & J. 673). But where a codicil is expressly confined to the lands devised by the will it does not operate as a republication of such will, so as to make it pass after purchased lands (6 Cru. T. 38, c. 7, s. 12. *Moncypenny v. Bristow*, 2 Russ. & M. 117; 1 Jarm. Wills, 2nd ed. 161, 165). Where a person executed his will, and afterwards revoked it by making another will, but did not actually cancel the first will, the cancelling of the second will operated as a republication of the first. 6 Cru. T. 38, c. 7, s. 15.

Republication does not revive a devise or bequest lapsed by death of the devisee or legatee (*see* 2 Ves. 526; and *see* also *Doe v. Kett*, 4 T. R. 601), nor cure defect of expression in will (*Lane v. Wilkins*, 10 East, 241); whether under the old law republication brings property comprised in a lapsed specific devise within residuary devise in will, has been questioned. The doctrine of republication will lose much of its interest by the operation of the enactment which makes the will speak in regard to the subjects of disposition from the death of the testator, more especially of the provision which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. This will render it unnecessary, in regard to wills made since 1837, to have recourse to the doctrine which makes a codicil by means of its republishing force extend a general devise in a will to after-acquired real estate.

A codicil or re-execution may still, as formerly, operate to revive a will which has been revoked by marriage, or by a subsequent will, or otherwise.

Lord St. Leonards says (*Handy Book*, 157), "formerly a will of real estate was required to be *published*; when new force was given to it—by re-execution, for example—it was *republished*. But publication had no precise meaning, and the necessity of it was taken away by the late act. As, therefore, there is no longer a publication, there can, properly speaking, be no republication, and the framers of the act supposed that the latter word would no longer be used; but so inveterate is habit, that the expression has found its way into the act itself."

[2] By the statute 2 & 3 Anne, c. 4, and 6 Anne, c. 35, relating to the West Riding of Yorkshire, by the latter statute relating to the East Riding, by the statute 8 Geo. 2, c. 6, relating to the North Riding, and by the statute 7 Anne, c. 20, relating to the county of Middlesex, wills are made void against a subsequent purchaser unless a memorial be registered as directed by those statutes (6 Cru. T. 38, c. 1, s. 38, 32; Sug. *Concise View*, s. 77). Wills devising lands or tenements in the city and liberties of London, duly executed and attested, may be enrolled either in the Hustings of Pleas, of Land, or Common Pleas, the same being first proved in open court, on the oaths of two of the subscribing witnesses thereto, and proclaimed at one of those courts. 1 Jarm. & Byth by Sweet, 263. Smith, L. & P. 866.

[3] A will of personal estate has always been considered as operating in a different manner from a will of lands. The latter was, until the recent Wills Act, regarded as a present conveyance operating at a future time (the death of the testator), by virtue of the ancient statute of wills, 32 Hen. 8, c. 1. But a will of personal estate has always been considered as speaking from the death of the testator, being the first sentence of a man's will, touching what he would have done after his death (2 Bl. Com. 499). The mode of operation of a will of personalty was always different from the operation of a will of lands; in strictness, the appointment of an executor was formerly essential to a will of personalty (Wentworth's *Executors*, 3, 4, 4th ed.; 2 Bl. Com. 503); and at the present day the usual and proper method is to appoint an executor as to the personal estate, whereas, under a devise of landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable. The executor of a will of personal estate, we have seen, becomes entitled from the death of the testator to all his personal property

XIV. Will Operates from time of Testator's Death.[1]
XV. Lapse, Devises and Bequests.[2]
XVII. General Principles of Construction.[3]

(Co. Litt. 888, a; Com. Dig. Biens (C.); Executors and Administrators, vol. iv. p. 362, n. [2]); which, after payment of the debts of the deceased, he is bound to apply according to the directions of the will. The most striking difference, however, between a will of personal estate and a will of lands remains to be noticed. A will of lands has always operated, and still operates, as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate requires to be proved in the Court of Probate. In this court the will itself is deposited, and a copy of the will which is given by the court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator. *Rex v. Netherseal*, 4 T. R. 260. *See* Probate, *ante*, p. 258; *post*, p. 666.

A testator appointed executors in the following terms: "I appoint A., merchant, as my executor, with any two of my sons:"—*Held*, that, as regards the sons, the appointment was void for uncertainty. *Baylis, In Goods of*, 8 Jur. N. S. 546; 31 L. J. Prob. 119; 7 L. T. (N. S.) 251. *Ante*, p. 258.

[1] Under the stat. of Hen. 8, a will of lands was regarded in the light of a present conveyance to come into operation at a future time, namely, the death of the testator. And if a man having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession again, become subject to his will without a subsequent republication or revival of the will. 1 Jarm. on Wills, 130, 180. But under the 1 Vic. c. 26, s. 23, no subsequent conveyance shall prevent the operation of the will with respect to such devisable estate or interest as the testator shall have at the time of his death. In the same manner, the old statute was not considered as enabling a person to dispose by will of any lands except such as he was possessed of at the time of making his will; so that lands purchased after the date of the will could not be affected by any of its dispositions, but descended to the heir-at-law. (Id. 587.) This also is altered, we have seen, by the new act, which enacts (sect. 24) that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; so that every man may now dispose by his will of all such landed property or real estate as he may hereafter possess, as well as that which he now has. Again, the result of the old rule, that a will of lands was a present conveyance, was that a general devise by a testator of the residue of his lands was, in effect, a specific disposition of such lands, and such only as the testator then had, and had not left to any one else. (Id.)

A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. This rule is altered by the recent act, under which (sect. 25), unless a contrary intention appear by the will, all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

[2] The failure of a devise or bequest by the death of the object of the testator's bounty, in his lifetime, is called a lapse; and this lapse is not prevented by the lands being given to the devisee and his heirs; and in the same way, before the recent act, a gift to the devisee and the heirs of his body would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator. *Hodgson and Wife v. Ambrose*, 1 Dougl. 337. And so, although a legacy be given to a person, his executors, administrators, or personal representatives, it will lapse by his death before the testator, because the additional words may have been intended merely to denote the gift of the absolute interest, or to express to the legatee that if he should survive the testator, and afterwards die before the legacy would be payable, his personal representatives should receive it. 1 Rop. Leg. by White, 463; Burton, s. 275; 1 Jarm. Wills, 2d ed. 277, 278. Where the testator releases and forgives a certain sum owing on a bond, and directs the bond to be delivered up to be cancelled, the will does not import a general release, but the benefit of the release lapses by the death of the legatee before the testator. 11 Jarm. & Byth. by Sweet, 464.

When a bequest, which is not residuary, lapses, it falls into the general residue, and belongs to the residuary legatee. 1 Rop. Leg. by White, 436. But if a residuary bequest, or a share of a residuary bequest, lapses, it belongs to the testator's next of kin. Id. 498. *Lloyd v. Lloyd*, 4 Beav. 231.

By 1 Vic. c. 26, s. 32, it is provided that estates tail shall not lapse; and by sect. 33 gifts to children, or other issue, who leave issue living at the testator's death, shall not lapse. *See* 3 Hare, 157; 2 K. & J. 676; 3 Drew. 319.

[3] A will of realty, wherever made, and in whatever language, is construed according to the law of England, in which the estate is situate. *See ante*, p. 648. But a will of personalty is governed by the *lex domicilia* (*see ante*, p. 648, and vol. iv. p. 122); 2dly, The construction is the same at law as in equity, the jurisdiction of each being governed by the nature of the subject (3 P.

Wms. 259; cases cited 27 L. J. Ch. 726); 3dly, No technical words are necessary (2 Bl. Com. 381; 3 T. R. 86; 11 East, 246; 16 id. 222); 4thly, Will never operates until death of testator; 5thly, Since 1st Jan. 1838, it operates from death of testator. 6thly, In construing a will, the intention of the parties is the primary object to be attained, guided by such words as in legal construction can carry such intention into effect. *Driver d. Frank v. Frank*, 3 M. & S. 25; affirmed in Ex. Ch. 3 Moore, 519. *Baddeley v. Leppingwell*, 3 Burr. 1533. *Rowse's case*, Lofft, 97. *Fen d. Lowndes v. Lowndes*, 4 Burr. 2246. And in doing this the courts will attend to the circumstances under which the devisor makes his will, such as the state of his property (*Bettison v. Rickards*, 7 Taunt. 105; 2 Marsh. 413. *Doe d. Beach v. the Earl of Jersey*, 1 B. & A. 550; 3 B. & C. 870); and his family, 3 Bro. P. C. 257; 4 id. 441; 4 Burr. 2165; 3 B. & A. 657; id. 632. See *Richards v. Davies*, 32 L. J. C. P. 3.

Where two opposite intentions are expressed in a will, the last in order shall be preferred (*Daintry v. Daintry*, 6 T. R. 307); unless in the case of a general and particular intention, when the general intention shall prevail (*Doe d. Blandford v. Applin*, 4 T. R. 82); to which, particular expressions will be adapted, as far as grammar and language will permit (*Campbell v. Vaughan*, Lofft, 266): so as, that the latter shall qualify and restrain the former. *Cuthbert v. Lempriere*, 3 M. & S. 158. But where a particular intention is expressed in a will in clear and precise terms, it must be fulfilled in opposition to a general intention, that is only to be implied, though supported by conjecture, in the highest degree probable, that the devisee did not know the force of the expression he was using. *Denne d. Radclyffe v. Bagshaw*, 6 T. R. 512. And where a testator's intention cannot operate to its full extent, it must operate as far as it can. Finch. 139; 3 P. Wms. 250; 4 Ves. 325; 13 id. 486.

Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which, words of a technical kind are not necessarily to receive a technical meaning. *Jenkins v. Hughes*, 8 H. L. C. 571.

It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense. *Rhodes v. Rhodes*, 27 Beav. 413.

If the language in a will admits of two constructions, according to one of which property will go in a convenient and ordinary course of succession, and according to the other in a capricious and inconvenient course, courts of justice may reasonably lean towards the former, as being what was probably intended. *Jenkins v. Hughes*, 6 Jur. N. S. 1043: *Lord Cranworth*, H. L.

7thly. It is, next, a rule of construction, to which the intention of a testator must always be subservient, that in order to disinherit the heir-at-law, the devise must evidence a plain intention and not a probable one. *Doe d. Vessey v. Wilkinson*, 2 T. R. 209. *Doe d. Hick v. Dring*, 2 M. & S. 448.

The property must be completely devised to another. *Right d. Mitchell v. Sidebotham*, 2 Dougl. 759.

8thly. Words are always to be taken in their ordinary and grammatical sense, unless the testator has demonstrated an intention to use them in another (*Poole v. Poole*, 3 B. & P. 620); though, if a word cannot be read in the sense in which it is written, it will be so read as to make it intelligible. *Doe d. Comberbach v. Perryn*, 3 T. R. 484. *Denn d. Bridden v. Page*, 3 id. 87. And such construction should be allowed as will satisfy every word, if it reasonably may (*Roe d. Nightingale v. Quartley*, 1 id. 630); to which end, expressions must receive that interpretation which will make them consistent with other parts of the will, thereby giving effect, if the case require, to devises apparently inconsistent. 4 M. & S. 1.

Devise of freehold and leasehold estates to A. and the issue of her body, as tenants in common; but, in default of such issue, or, being such, if they should all die under age and without leaving issue, then over, the leasehold vests in the remainderman on the death of A. without issue. *Burnsall v. Davy*, 1 B. & P. 215; 6 T. R. 30.

9thly. Words in devises are not necessarily to receive the technical meaning which the law has annexed to them, when used in deeds, but are to receive that sense, whether technical or ordinary, which will best effectuate the devisor's intention. *Doe d. Cooper v. Collis*, 4 T. R. 294. *Denn d. Webb v. Puckey*, 5 id. 299. *Aumble v. Jones*, 1 Salk. 238. And neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders; nor mere words of condition, describing the order of succession in which the devises are to take place; nor the introduction of powers of jointuring, or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. It must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent. *Poole v. Poole*, 3 B. & P. 627. Still, in reading a will, reference must always be had to rules of law (*Doe d. Lyde v. Lyde*, 1 T. R. 593); in aid of which rule are the two following maxims: first, where a term is used to which the law has annexed one idea, and common opinion another, the latter shall be preferred. *Roe d. Conolly v. Vernon*, 5 East, 51; 1 Smith'sRep. 318. *See* Willes, 354. Secondly, where the term has obtained a definite technical meaning, it must be presumed that the testator used it in that sense. *Lane v. Stanhope*, 6 T. R. 345.

10thly. Where a will admits of two constructions, that is to be preferred which will render it valid (*Chapman v. Brown*, 3 Burr. 1626; 3 Bro. P. C. Tomlin's edit. 209. *Maudy v. Maudy*, Ca. Temp. Hard.

142; 2 Stra. 1020. *Carsey v. Wood*, T. Raym. 249), as a testator is always rather to be presumed to calculate on the disposition of his will taking effect, than the contrary; and, accordingly, on the same principle, a provision for the death of devisees will not be considered as intended to provide for lapse, if another construction can be put upon it. 2 Atk. 375; 4 Ves. 418, 514; 7 id. 586; 1 Ves. & B. 422; 1 Price, 264; 1 Swans. 161; 2 Ves. jun. 501; 1 M'Lell. 168.

11thly. Words in a will may be transposed, where the whole context would be thereby rendered more consistent with the facts (*Marshall v. Hopkins*, 15 East, 309. *Cole v. Rawlinson*, 1 Salk. 234; 2 Ld. Raym. 831) and the testator's intention. *Doe d. Wolfe v. Allcock*, 1 B. & A. 137. *See* 4 T. R. 39; 2 Sim. & Stu. 295. Another case of transposition sometimes arises; when a testator has devised lands at A. to B., and lands at C. to D., and it appears by the fact of the limitation of each devise being exactly applicable to his interest in the lands comprised in the other, and other circumstances, that he has mistakingly transposed the lands comprised in the several devises (*Mosley v. Massey*, 8 East, 149. *See* 1 Bro. C. C. 206; Fearn's *Ex. Dev.* 4th ed. 126; 1 T. R. 593; 2 id. 676; Ambl. 175; id. 374): in such case, or if he falls into any similar error, the court will correct it. *Denn d. Wilkins v. Kemeys*, 9 East, 366.

12thly. Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context (*Doe d. Leach v. Micklem*, 6 East, 486; 2 Smith's Rep. 490. *See* 1 Atk. 43; 2 id. 102; 3 id. 774; Willes, 305; 5 Burr. 2703; Cowp. 40; 1 Eq. Ca. Ab. 245; 2 Freem. 17; 3 T. R. 763; 2 Ves. 163; 6 Ves. jun. 404; 7 T. R. 433; 15 Ves. 29); of which rule the case of *Doe d. Wickam v. Turner* is a striking example. 2 D. & R. 398. Where, therefore, a testator divided his will into sections, numerically arranged, and in several instances placed the words of limitation at the end of each section, the court considered them as applicable to the several devises contained in it. *Doe d. Stevens v. Snelling*, 5 East, 87; 1 Smith's Rep. 314. *See* 5 T. R. 13, 564; 2 Atk. 341; 8 T. R. 1; 2 B. & P. 247; 3 Burr. 1533; 4 East, 496. But words cannot be supplied on mere conjecture, in order even to equalise the estates of several devisees created by distinct and independent devises, where there is no uniformity of purpose expressed (*Right d. Compton v. Compton*, 9 East, 267. *See* 8 T. R. 64, 118; 1 N. R. 358; 7 East, 259; 14 Ves. 364): though it may reasonably be conjectured that he had the same intention as to all. *Doe d. Child v. Wright*, 8 T. R. 64; N. R. 335. *Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320.

13thly. Words of conjunction in a will may be construed disjunctively, and *vice versâ*, when it is required to effectuate the testator's intention. *Fairfield v. Morgan*, 2 N. R. 38. *Eastman v. Baker*, 1 Taunt. 174. *See* 1 And. 161; Owen, 52; 1 Leon. 74, 243; Gould. 71; Cro. Eliz. 270, 575; Noy. 64; 2 Stra. 1175; 3 Atk. 193; 9 Mod. 444; 2 Ves. 243; 3 T. R. 470; 1 Ld. Raym. 505; 2 Vern. 388; 3 Burr. 1626.

14thly. Words cannot be rejected in a will, unless it be *clear* that by so doing effect is given to the devisor's intention. *Denne d. Briddon v. Page*, 11 East, 603, n. *Doe d. Comberbach v. Perryn*, 3 T. R. 484.

15thly. Words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appear from the context. *Goodright d. Docking v. Dunham*, 1 Dougl. 264.

16thly. Where the ends contemplated by distinct devises in a will are separate and disjoined, and there is no connexion by reference between them, the one cannot be adduced in aid of the construction of the other. *Goodright d. Drewry v. Barron*, 11 East, 220. On the contrary, if there be nothing in the context of a will to connect it, different clauses must be taken separately. *Fenny v. Ewestace*, 4 M. & S. 58. *Right d. Compton v. Compton*, 9 East, 267. But in this case the limitations in one clause of a will were drawn to and incorporated with another, by reason of the words, *as aforesaid*. *Meredith v. Meredith*, 10 East, 503.

17thly. When it is apparent on the face of the will that a local or other description is mistaken, the court will correct it. *Doe d. Humphreys v. Roberts*, 5 B. & A. 407. *Mosley v. Massey*, 8 East, 149. *Denn d. Wilkins v. Kemeys*, 9 East, 366. And the addition to a devise, in itself precise and definite, of a circumstance, false or mistaken, will have no effect. *Doe d. Harris v. Greathead*, 8 East, 91.

18thly. The inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous (*Defflis v. Goldschmid*, 1 Mer. 417. *Mason v. Robinson*, 2 Sim. & Stu. 295); nor is the fact that the testator did not foresee all the consequences of it a reason for varying it (*Driver v. Frank*, 3 M. & S. 37. *Smith v. Streatfield*, 1 Mer. 358) but where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent, purpose. *Jenkins v. Herries*, 4 Madd. 67. *Andrews v. Partington*, 3 Bro. C. C. 401.

19thly. The construction is not to be varied by events subsequent to the execution. Ca. Temp. Talbot, 21; 1 Cox, 324; 1 Ves. jun. 475. A residuary devise of real estate since 7 Wm. 4 and 1 Vic. c. 26, is not specific. *Dady v. Hartridge*, 1 Drew. & Sm. 236. Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue: *Held*, chargeable with the payment of debts, in priority to the real estates specifically devised. (Id.)

20thly. A codicil, duly executed, supersedes every part of the will to which it is contradictory: but as far as they are not ab-

solutely inconsistent, both the instruments are to be considered as incorporated into one. Burton, s. 602. *Hurtley v. Tribber*, 16 Beav. 510; 2 Rop. Leg. by White, 1460. *Butler v. Greenwood*, 22 Beav. 203.

21stly. A testator is presumed to know the law, whether as declared by decision or made by statute. *Buckell v. Blenkorn*, 5 Hare, 144. *Ware v. Rowland*, 15 Sim. 595. Substituted or additional legacies are governed by the nature of the original. 1 Rop. Leg. by White, 872; 1 Jarm. Wills, 154.

[1] *See* also, Legacy, vol. v. p. 356. The technical words of devise are, "give and devise;" of a bequest, "give and devise:" but any form of words which sufficiently show the intention of the testator to dispose of all or any part of his real estate, will be sufficient for that purpose. *Hodgkinson v. Star*, cited 1 Ld. Raym. 187, *Baker v. Wall*, id. 186. *Wright v. Wivell*, 3 Lev. 259. And if the intent of the donor be to make a devise, the instrument will operate as such, though an actual delivery be made of it as a deed. *Green v. Froud*, 3 Keb. 310; 1 Mod. 117. *Lessee of Clymer and Littler*, 1 Bl. Rep. 345. And in the case of *Habergham v. Vincent*, 5 T. R. 92; 2 Ves. jun. 204, *Lord Loughborough*, *Mr. J. Buller*, and *Mr. J. Wilson*, held, that a deed-poll, which was intended to operate after the death of the person who made it, and who had already published his will, to which it referred, should be considered as a codicil. *See* 3 Price, 318; 1 Ves. sen. 132; and Powell on Dev. by Jarman, vol. i. p. 11, n.

A testator may also make several partial and particular dispositions, relating to several parts of his estate, by distinct instruments. *Hitchins v. Basset*, 1 Show. 545.

A mere recital in a will does not, however, operate as a devise. *Wright v. Wivell*, 2 Vent. 56. *Right v. Hammond*, 1 Com. 232; 1 Stra. 427; 9 Vin. Abr. 110, pl. 32. It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which he has not made, the court will regard it as an inadvertent omission, and will accordingly supply it. Ambl. 661; 7 T. R. 492.

Words of advice, recommendation, or desire, do not create a devise; nor will they even operate so as to raise a trust in equity, unless the property is certain and the persons to whom it is given clearly described. Abr. 289; Prec. in Ch. 201, n.; 1 B. & P. 142; but *see* Ambl. 520; 1 Bro. P. C. 476; 17 Ves. 255; 19 id. 299. The courts have, however, allowed of a devise by implication, where it has been very apparent. Willes, Rep. 14, n.; 1 Ves. & B. 466. Any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, operate as a good description. *Bate v. Amherst*, T. Raym. 82. *Doe d. Le Chevalier v. Huthwaite*, 3 B. & A. 637. *Doe d. Calkin v. Tomkinson*, 2 M. & S. 165.

Children.—A devise to children to be born and begotten, is not confined to *future* children. *Doe d. Williams v. Hallett*, 1 M. & S. 124. *White v. Barber*, 5 Burr. 2703. The legal construction of the word "children" accords with its popular signification; for, in all the cases in which it has been extended to a wider range of objects, it has been used synonymously with a word of larger import, such as "issue." 1 Ves. sen. 196; Ambl. 681.

Though the word "children," in its primary sense, is to be read as a word of purchase, and to be confined to issue in the first degree, yet the interpretation of the word is subordinate to the intention to be collected from the rest of the will, and it may be converted into a word of limitation, and interpreted "heirs of the body." *Byng v. Byng*, 8 Jur. N. S. 1135; 31 L. J. Chanc. 470; 10 W. R. 633; 7 L. T. (N. S.), 1.

If a testator give to his children generally, or to the sister of A., as a class, the objects composing the class at his death, whatever be their number, and whenever born, are entitled. *Doe d. Stewart v. Sheffield*, 13 East, 526.

Limitation in a will to a testator's four granddaughters (by name), for their lives in equal shares, remainder to trustees to preserve contingent remainders, remainder (in equal shares) to the children of his four granddaughters, and the heirs of their bodies, such children taking their mothers' share as tenants in common in tail, remainder to the survivor or survivors of such children, and the issue of their, his, or her bodies, and in default of issue of his granddaughters, then over:—*Held*, affirming the decision of the Master of the Rolls, and reversing that of the Lords Justices, that cross-remainders in tail must be implied between the testator's granddaughters, and not between the children of such granddaughters. *Atkinson v. Holtby*, Holds. 554; Jur. N. S. 503; 8 L. T. (N. S.) 583.

Where a leasehold property was bequeathed to A., and in case she died without *having* children over, it was holden that the legatee's interest became indefeasible on the birth of a child. *Weakley v. Rugg*, 7 T. R. 322.

Descendants.—Where property was devised to A. and B. in fee, and, in case of death, to their children and grandchildren respectively, or to their issue and respective heirs, as tenants in common, yet, nevertheless, so as all the descendants of the said A. should together be entitled only to one moiety of the said premises, and all the descendants of the said B. should together be entitled to no more than the other moiety thereof, and that none of such descendants, either of A. B., should be entitled to any *greater* or *other* share of the *said respective moieties* of the said respective premises, *than* their parents would have been entitled to, if living; it was holden, that the word "descendants" included the children and

grandchildren, and that they took *per stirpes*, and not *per capita*. *Legard v. Haworth*, 1 East, 120. In *Butler v. Stratton*, 3 Bro. C. C. 367, under a devise to descendants, children and grandchildren were held to take *per capita;* but see *Rowland v. Gorsuch*, 2 Cox, 187.

Heir.—A devisee may be described by the word heir (*Goodright d. Brooking v. White*, 2 Bl. Rep. 1010), if the testator plainly show that the term was meant by him to be understood as a *descriptio personæ*. *Burchett v. Durdant*, 2 Vent. 311. *Darbison v. Beaumont*, 1 P. Wms. 229; 3 Bro. P. C. 60. *Doe d. Hallen v. Ironmonger*, 3 East, 533. But if one claim under the description of heir, he must show that he is heir in that sense in which the testator has used the term. *Collingwood v. Pays*, 1 Sid. 193; 1 Lev. 59. These rules are, it will be noticed, founded on the evidence afforded of the testator's intention. *Heny v. Purcel*, 2 Bl. Rep. 1002. *Baker v. Wall*, 1 Ld. Raym. 185. *Darbison d. Long v. Beaumont*, 1 P. Wms. 229.

Issue.—The word "issue" is a sufficient *designatio personæ*, or description of a devisee in a will, and comprises both children and grandchildren. 2 Vern. 545; 1 Ld. Raym. 205.

Kindred.—A. B. devised his estates to his sister, C. D., in strict settlement; remainder "unto the first and nearest of his kindred, being male, and of his name and blood, that should be living, at the determination of the several estates thereinbefore devised, and to the heirs of his body lawfully begotten." *Lord Eldon* held, in conformity to the opinions of *Mr. Justice Lawrence* and *Mr. Baron Thompson*, whom he had called to his assistance, that a person claiming under this limitation must be of the name as well as the blood; and that the qualification as to the name was not satisfied by having the name taken by the king's license previous to the determination of the preceding estates. 15 Ves. 92.

Next of Kin.—A devisee may be described as next of kin. Cro. Eliz. 532. Where a testator devises certain limited interests, and then bequeaths the property to his own next of kin, those who stand in that relation at *the death of the testator* will be entitled, without regard to the fact of their existence, at the period of distribution. *Doe d. Garner v. Lawson*, 3 East, 278. *See* 3 Bro. C. C. 64; 14 Ves. 385; 3 Meriv. 689.

Next of Testator's Name.—A devisee may be described as the next of the name of the testator; and the next relation of his name, whether it be male or female, shall take as devisee described thereby. Cro. Eliz. 532.

Posterity.—If lands be devised to the posterity of A., the lineal heir, if there be any, shall take them under the word "posterity;" but if A. die without issue, and there be no lineal heir of A., the collateral heir of the whole blood shall take them. 2 Eq. Ca. Abr. 290, 297.

Relations.—Under a devise to the relations on testator's side, all those shall take who would be entitled to personal estate under the Statute of Distributions. *Doe d. Thwaites v. Carr*, 1 Taunt. 263. The construction of the word "relations" is not varied by the word "near" being associated with it. 2 Ves. sen. 527 But where the gift is to the *nearest* relations, the next of kin will take, to the exclusion of those who would have been entitled by representation under the statute. 1 Ves. sen. 335; 1 Bro. C. C. 293; 19 Ves. 400; Ambl. 70.

Sons.—Lands were devised to the first son of A., who was not heir-at-law to A., his father. This was held a good description of the second son. *Marwood v. Darrell*, Ca. Temp. Hard. 91. *See* 1 Ves. 290.

Stock, Family, or House.—The words "stock, family," &c., are sufficient words of description. *Doe d. Chattaway v. Smith*, 5 M. & S. 126. The word "family" has been sometimes construed as descriptive of children; as where a testator devised the remainder of his estate, to be equally divided between brother L.'s and sister E.'s families; it was held by *Sir W. Grant, M. R.*, that the children of L. and E. took as well the real as the personal estate, *per capita*. *Barnes v. Patch*, 8 Ves. 604. *See* also *M'Leroth v. Bacon*, 5 id. 159; and *Doe d. Chattaway, supra*. The word "family" has also been treated as synonymous with "relations." *Cruwys v. Colman*, 9 Ves. 319. Every case, however, must depend upon its particular circumstances.

Misnomer, Misdescription.—Where a devisee is rightly described, but misnamed, the devise will be holden good (*Woodright v. Wright*, 10 Mod. 371); if sufficient appear to identify the party. *Doe d. Cook v. Danvers*, 7 East, 299; 3 Smith's Rep. 291. So, a wrong description will not vitiate a devise to a person properly designated. *Doe d. Le Chevalier v. Hulhwaite*, 3 B. & A. 632; 2 Moore, 358; and 8 Taunt. 459.

Particular Expressions.—Whether the will specifically mention lands (*Doe d. Bunny v. Rout*. 7 Taunt. 79. *Fisher v. Nicholls*, 3 Salk. 99), or not, expressions which would in general carry the real estate may be restrained by the context. *Bebb v. Penoyre*, 11 East, 160. The word "property" was accordingly restrained by subsequent explanatory particulars (*Roe d. Helling v. Yeud*, 2 N. R. 214); but to warrant such a construction of words otherwise applicable to realty, as to confine them to personalty, there must be a clear indication of such an intention. *Scott v. Alberry*, 1 Com. 337. For even the words "rents and profits" have carried land. *South v. Allen*, Comb. 375; 5 Mod. 102. S. P. *Maundy v. Maundy*, 2 Stra. 1020. So the words "all I am worth." 1 Bro. R. 437.

The words "residue of effects real and personal," following an express devise of lands, was holden to include the real estate. *Hogan v. Jackson*, Cowp. 299; 3 Bro. P. C. Tomlin's ed. 388. But the word "effects," without the word "real," will not, *proprio vigore*, comprehend land, though followed up by general words. *Grayson v. Atkinson*, 1 Wils. 333. *Camfield v. Gilbert*, 3 East,

XX. Evidence of Wills.

(A) *As relates to Personal Property.*[1]

516. So the word "estate" was holden to pass real property, though the term had been, in a previous part of the will, used in such a manner as to exclude it. *Fletcher v. Smiton*, 2 T. R. 656; 2 Chit. Rep. 558. So the words "testamentary estate" have passed "real estates" not specifically devised. *Smith v. Coffin*, 2 H. Black. 444. *Doe v. Penwarden*, 3 B. & B. 85. *Doe d. Andrew v. Lainchbury*, 11 East, 290.

In most of the cases hitherto mentioned there has been a specific devise of land; but the absence of such circumstance does not invariably negative the inclusion of real estate under such-like terms, though collocated with words descriptive of personal property only. *Doe d. Wall v. Langlands*, 14 East, 370. So, in the case of *Doe d. Gillard v. Gillard*, 5 B. & A. 785, real estate was held to pass under the words "I do make, constitute, and appoint R. G. my whole and sole executor *of all my lands for ever, and leasehold property*;" but *see* Prec. in Ch. 471.

The introduction of limitations and expressions inapplicable to real estate, has sometimes prevented it being included under words of general description. *Doe d. Hurrell v. Hurrell*, 5 B. & A. 18. *Doe d. Spearing v. Buckner*, 6 T. R. 610. But the mere introduction into the limitations of expressions inapplicable to real property, will not, in all cases, confine the expressions made use of to personal estate. *Doe d. Burkitt v. Chapman*, 1 H. Black. 223. See *Newland v. Marjoribanks*, 5 Taunt. 268; 1 Marsh. 44.

In some cases, however, lands have been even included under expressions of a much more informal nature, such as "whatsoever else I have not before disposed of." *Hopewell v. Ackland*, 1 Com. 164. S. P. *Roe d. Allport v. Bacon*, 4 M. & S. 366. In this case the words "my proportionable share" were held sufficient to pass the estate of one brother to another. So, "all that I die possessed of, real and personal" (*Pitman v. Stevens*, 15 East, 505), and "legacy," have in some instances carried land. *Hope d. Brown v. Taylor*, 1 Burr. 268. So the words "personal estate." *Doe d. Tofield v. Tofield*, 11 East, 246. So, real estate has been holden to pass by the word "effects" in a devise, where the intention was apparent. *Doe d. Chilcot v. White*, 1 East, 33. And the words, "said effects bequeathed to E. F.," were holden to refer to lands before devised. *Den d. Franklin v. Trout*, 15 East, 394. But the words, "said house, goods, and chattels," did not in this case carry real estate. *Roe d. Walker v. Walker*, 3 B. & P. 375.

General introductory words in a will, enumerating what is intended to be devised, are not alone sufficient to pass it. *Doe d. Spearing v. Buckner*, 6 T. R. 610.

Where there is a correct and specific description of the property devised, a mistake in any additional words will have no effect. *Hastead v. Searle*, 1 Ld. Raym. 728. *St. John v. Winton*, Cowp. 94. But where the first description is merely general, these additional words will be considered either as explanatory or restrictive, according to the intent of the testator. *Paul v. Paul*, 2 Burr. 1089; 1 Bl. Rep. 255. S. P. *Doe d. Parkin v. Parkin*, 5 Taunt. 321. A direction that legacies be paid "clear," means that they shall be paid clear of legacy duty. *Ford v. Buxton*, 1 Coll. 403. Where a fund is given to a class of persons, with a direction that on the death of any of them their "shares," "parts," or "portions," are to go over, the original shares only, and not the accruing shares, will go over, unless the word "interest" is added, or there is some other indication of an intention that the accruing shares should also go over. *Douglas v. Andrews*, 14 Beav. 347. *Rickett v. Guillemand*, 12 Sim. 88; 2 Rop. Leg. by White, 1398; 2 Jarm. Wills, 2d ed. 595–6. *Goodwin v. Finlayson*, 25 Beav. 65. *Evans v. Evans*, id. 81. In case of a limitation over to the survivors or survivor of a class of legatees, the word "survivors" or "survivor" is construed "others" or "other," where it was apparently the intention of the testator that the others or other should take without reference to the contingency of his, her, or their surviving the person from whom the property is to go over. But when unexplained by the context, the word will be construed according to the literal meaning. 1 Rop. Leg. by White, 638; 2 Jarm. Wills, 2d ed. 578, 580, 588. The circumstance of a solicitor preparing for a client a will containing depositions in favour of the solicitor, does not of itself take away the right of the solicitor to be a devisee or legatee for his own benefit. *Hindson v. Weatherill*, 5 D. M. & G. 301.

[1] Rights under a will, connected with personal estate, are proved by production of the probate, *i.e.* a copy of the original will under the seal of the ordinary or metropolitan, together with a certificate of its having been proved before him. 2 Bl. Com. 508. *R. v. Barnes*, 1 Stark. 243. *Pinney v. Pinney*, 8 B. & C. 335. In *Rex v. Inhabitants of Netherseal*, 4 T. R. 260, *Lord Kenyon* said, "Nothing but the probate, or letters of administration, with the will annexed, are legal evidence of the will, in all cases respecting personalty." In *Denn v. Barnard*, Cowp. 595, it appears to have been admitted that an authentic certificate from the Prerogative Court, produced by the proper officer, was equivalent to the probate itself; being, in fact, the same thing, only under another form. Although, however, the probate has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of

(B) *As relates to Real Estate.*[1]

WINDING-UP. *See* Joint-Stock Companies, vol. v. p. 243.

WINDOWS. *See* Lights, vol. v. p. 389.

WITHDRAWING Juror. *See* vol. v. p. 284.

Record.[2]

WITNESS. *See* Arrest, vol. i. p. 532; Attesting Witness, vol. ii. p. 3; Husband and Wife, vol. iv. p. 90.

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the Probate Court, without some indorsement upon it for the purpose of authentication. *R. v. Barnes, supra.* See *Pinney v. Pinney, supra. Doe v. Mew*, 7 Ad. & E. 240. If it be shown that the probate has been lost, an exemplification under the seal of the court, or an examined copy of the act-book (Ca. T. Hardw. 108. *Elden v. Kennell*, 8 East, 187. See *Doe v. Mew, supra*), or the original will properly authenticated and indorsed, as the instrument on which probate has been granted (*Gorton v. Dyson*, 1 B. & B. 219), are admissible as secondary evidence.

[1] To prove the probate revoked an entry of the revocation in the book of the Prerogative Court is admissible evidence where no other record is kept. *Ramsbottom's case*, 1 Leach, C. C. 30.

To establish a devise of real property, the will itself must be produced; an exemplification, a copy, or the probate, is not sufficient. Bull. N. P. 246. *Doe v. Calvert*, 2 Camp. 389. Probate is not evidence, even to prove relationship in a case of pedigree. *Dike v. Polhill*, 1 Ld. Raym. 744. If, however, the will has been lost or destroyed, or is in the possession of the opposite party, upon proof of its former existence and subsequent loss or destruction, or of the possession of the adverse party, and notice to them to produce it, secondary evidence of its contents is admissible (1 Stark. Ev. 328; 3 Stark. 1682) as evidence of it from the register-book, or ledger-book (*St. Legar v. Adams*, 1 Ld. Raym. 731; Bull. N. P. 246), or an examined copy; or, in the absence of these, which should be accounted for, parol evidence of the will may be admitted. *Doe v. Calvert, supra.* The probate is not admissible as secondary evidence without proof, *aliunde*, that it is a true copy (1 Ld. Raym. 731; 2 Skin. 174; 3 Stark. 1682); for the spiritual court has no authority to authenticate a will of lands. 4 Burn, *Ec. Law*, 195. *Netter v. Brett*, Cro. Car. 396. *Habergham v. Vincent*, 2 Ves. jun. 230. Nor is the probate evidence that an instrument is a will, so as to pass copyhold or customary estate.

A will thirty years old, if the possession has gone under it, and sometimes without possession, and the signing is sufficiently attested, proves itself; but if the signing is not sufficiently recorded, it is a question whether the age alone proves its validity, and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the duly signing. The thirty years may be computed from the date of the will, and not from the death. See *Renire v. Fraser*, 9 Ves. 5. *Doe v. Wolley*, 8 B. & C. 22. Such a will proves itself, though the witnesses are still living. S. C. 8 B. & C. 22. *Doe v. Burdett*, 4 Ad. & E. 1. See *Andrews v. Motley*, 12 C. B. (N. S.) 514; 32 L. J. C. P. 128.

Copyhold lands are not, properly, the subject of devise. Formerly, if a man would devise a copyhold estate, it was necessary to surrender it to the use of his will; and, upon this surrender, the will operated as a declaration of the use, and not as a devise of the land. 1 Atk. 388. A draft of, or instructions for, a will, have been held sufficient to direct the uses of a surrender (*Carey v. Askew*, Bro. C. C. 319. *Doe v. Danvers*, 7 East, 299, 324); but, by the 55 Geo. 3, c. 192, it is enacted, "that the disposal of copyhold estates by will shall be effectual, without a previous surrender to the use of the will." The statute, however, supplies only the want of a formal surrender. Where the surrender is matter of substance, it is still necessary. *Doe d. Nethercote v. Bartle*, 5 B. & A. 492. The will must now be in writing. 1 Vic. c. 26, s. 3; *ante*, p. 650. After production and proof of the will, the claimant must prove the admittance of the testator, as also his own admittance; for, till admittance, although after the surrender, the legal estate remains in the surrenderer, and descends to his heir. *Roe v. Wroot*, 5 East, 137. *Roe v. Hicks*, 2 Wils. 15. *Holdfast v. Clapham*, 1 T. R. 600. *Doe v. Hall*, 16 East, 208; Com. Dig. Copyhold, D, 2. *Wilson v. Weddell*, Yelv. 144; Scriven. Copyhold.

[2] If on a cause being called on at new trial (*see* Trial, *ante*, p. 568) the plaintiff, from some unexpected event, absence or illness of witnesses, &c., is unable to proceed, and the judge refuses to postpone the trial, the record should be withdrawn before the jury are sworn, unless the defendant consents to its being done after. The effect of the withdrawal is to render the plaintiff liable to the defendant for the costs of the day, and he must afterwards re-enter the cause, and give notice of trial, &c. If the defendant takes down the record by proviso and the plaintiff does not appear, the plaintiff should be nonsuited. See *ante*, p. 570.

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XXVIII. Privilege of Witnesses *eundo et redeundo*, vol. i. p. 532. See *Andrews v. Masters*, 12 C. B. (N. S.) 371, as to delay in making application for discharge.
XXIX. Deposition of a Deceased Witness. *See* vol. iv. p. 314.
(A) *Before Justices*, p. 679.
(B) „ *Coroners*, p. 679.

I. Competency of Witness.

(A) *Question of Competency one for Judge.*[1]

[1] It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility. *Carpenters' Co. v. Hayward*, 1 Dougl. 375. And wherever the admissibility of a witness depends on a disputed fact, the decision of such fact is for the judge, subject to review in the court above. *Wright v. Tatham*, 7 Ad. & E. 356. *Doe v. Webster*, 12 id. 442. *Shepton v. Thornton*, 9 id. 314, 327. The objection to competency should in strictness be taken in the first instance on the *voir dire*, previous to an ex-

(B) *Incompetency from want of Understanding.*[1]

(C) *Incompetency from want of Religion.*[2]

(D) *No Incapacity by reason of Crime.*[3]

(E) „ „ *Interest, or being Parties to the Suit.*[4]

amination in chief, for otherwise the party objecting might suspend the objection for the purpose of obtaining an unfair advantage (*R. v. Muscot*, 10 Mod. 192); but in practice the objection may be taken at any time while the witness is under examination (*Jacobs v. Layborn*, 11 Mee. & W. 685), although he has denied the ground of incompetency on the *voir dire*. *Moore v. Howell*, 12 Vin. 48. But where the witness, having been examined, had left the box, but on being recalled answered a question put by the court, from which it appeared that he ought to have been rejected, it was held that his competency could not then be disputed. *Beeching v. Gower*, Holt's C. 313. And where a witness had been examined and cross-examined, on interrogatories without objection, it was held that the objection to competency could not be taken at the trial. *Ogle v. Paleski*, id. 485. *Abrahams v. Bunn*, 4 Burr. 2256. *Morish v. Foote*, 8 Taunt. 458. And where the objection is apparent, and the opposite party has permitted the examination to proceed, the court will not afterwards allow him to insist upon the incompetency (*Fellingham v. Sparrow*, 9 Dowl. P. C. 141. *Dewdney v. Palmer*, 4 Mee. & W. 664), although he be recalled for further examination. *Woollaston v. Hakewill*, 3 Man. & G. 297.

[1] Insane persons and idiots are incompetent; but a lunatic, in his lucid intervals, is competent (Com. Dig. Test. A. 1); but a person born deaf and dumb may, if he have sufficient understanding, give evidence by signs, through an interpreter (*Burton's case*, 1 Leach, C. C. 455); or by writing. *Morrison v. Lennard*, 3 C. & P. 127. Children not able to comprehend the moral obligation of an oath are also incompetent (Com. Dig. *supra*. *R. v. Williams*, 7 C. & P. 320); but tender age alone is no objection. *Brasier's case*, 1 East, P. C. 443.

[2] It is not necessary that a witness should be a Christian, or even believe in the Old Testament, as laid down in some of the older authorities (*see* Co. Litt. 6, b; Gilb. Ev. 142, 143), in order to render him competent; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. *Ormichund v. Barker*, Willes, 538; 1 Atk. 19, 21; 1 Wils. 84; Bull. N. P. 292. *R. v. Taylor*, Peake, 11. Thus, Christians of all sects and denominations (*R. v. Maldrone*, Leach, 412; Peake, 11, 23, 155), Jews (Gilb. Ev. 143; 2 Stra. 821), Turks, Moors, and other Mussulmen (*see* 2 Stra. 1104), Gentoos (Willes, 538; 1 Atk. 19, 21; 1 Wils. 84), Chinese (Car. & M. 248), and the like, may be witnesses: but a man wholly without religion, and having no belief in the moral obligation of an oath, shall not be received to give evidence in any case whatever. 1 Atk. 44. *Madan v. Catanach*, 7 H. & N. 360; 31 L. J. Ex. 118. All persons ought to be sworn according to the ceremonies of their religion. *Ormichund v. Barker*, Willes, 547. *Atchison v. Everitt*, Cowp. 390. *See* Oath, *ante*, p. 19.

[3] By 6 & 7 Vic. c. 85, s. 1, no person offered as a witness shall be excluded "by reason of incapacity from crime, from giving evidence, but every person so offered shall be admitted to give evidence, notwithstanding "he may have been previously convicted of *any crime or offence*." But the offence and conviction may still be proved by the admission of the witness or otherwise, as before, for the purpose of impugning his credit. *R. v. Castell Carenion*, 8 East, 78.

[4] The 6 & 7 Vic. c. 85, removed the incompetency of witnesses to give evidence by reason of interest or crime, but excepted any party to any suit, action, or proceeding individually named in the record, or any party jointly interested with the plaintiff, or any person in whose immediate and individual behalf any action might be brought or defended. The 14 & 15 Vic. c. 99, repealed these exceptions.

By the 2d sect. of the last-mentioned statute it is enacted, "that on the trial of any issue, matter or question, or on any inquiry arising in any suit or other proceedings in any court, or before any person having by law or consent authority to hear evidence, the parties thereto, and the persons on whose behalf any suit or proceeding may be brought or defended, shall be *competent* and *compellable* to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the suit or other proceedings."

Sect. 3 provides that the act shall not render any defendant, or person charged in a criminal proceeding, competent or compellable to give evidence for or against himself, nor render any person compellable to answer any question tending to criminate himself.

At the hearing before justices of an information under 1 & 2 Wm. 4, c. 32, s. 23, for unlawfully using engines for the purpose of taking game without being authorised by a game certificate, the defendant is not competent to give evidence. *Cattell v. Ireson*, 27 L. J. M. C. 167.

By sect. 4, 14 & 15 Vic. c. 99, the act is not to apply to any suit, proceeding, or bill in parliament, instituted in consequence of *adultery*, or to any action for *breach of promise of marriage*; nor (sect. 5) repeal any provision in the 1 Vic. c. 26, for the amendment of the law of wills.

By the 17 & 18 Vic. c. 122, s. 15, it is

(G) *Incompetency on ground of Professional Confidence.*[1]

(H) *Incompetency on ground of Public Policy.*[2]

V. Examination in Chief.[3]

enacted, that sect. 2 of the last-mentioned act shall not apply to proceedings for any offence, penalty, or forfeiture, under any law relating to the customs or land revenue.

[1] Counsel (*Curry v. Walter*, 1 Esp. 456), solicitors, and attorneys, cannot be compelled to reveal communications made to them in confidence as such. *R. v. Duchess of Kingston*, 20 How. St. Tr. 612. A person who acts as interpreter (*Du Barré v. Livette*, Peake, Co. 78), or as agent (*Parkins v. Hawkshaw*, 2 Stark. 239), between the attorney and his client, or the attorney's clerk (*Taylor v. Forster*, 2 C. & P. 195. *R. v. Upper Boddington*, 8 D. & R. 732), cannot be called upon to reveal such communications. And *see* Attorney, vol. ii. pp. 19, 21.

The privilege is that of the client, and not of the attorney; and the court will prevent the attorney, though he be willing, from making the disclosure (Bull. N. P. 284. *Wilson v. Rastall*, 4 T. R. 759. But see *Hibberd v. Knight*, 2 Ex. 11), unless the client waives the privilege. *Merle v. More*, R. & M. 390. The judge is the proper person to decide whether the communication is privileged, subject to revision by the court (*Cleave v. Jones*, 7 Ex. 421); and he may hear witnesses to satisfy himself on this point. (Id.) If the attorney of one of the parties is called by his own client, and examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to that matter, though not as to others. *Vaillant v. Dodemead*, 2 Atk. 524. This privilege, however, is to be considered as excluding the disclosure merely of such facts as have *bonâ fide* been communicated confidentially by the client to the attorney, &c. in his professional capacity (*Reg. v. Jones*, 1 Den. C. C. 166. *Reg. v. Farley*, id. 197; 2 C. & Kir. 313. *Reg. v. Hayward*, id. 234), and therefore does not extend to facts known to the attorney previously to his retainer (Gilb. Ev. 136. *Cuts v. Pickering*, 1 Vent. 197; Skin. 404); or to the contents of a notice served upon nor to the attorney on the other side, requiring him to produce at the trial a certain paper belonging to his client in his hands (*Spenceley v. Schulenburgh*, 7 East, 367), or the like. And where an attorney was present at the time his client swore to an answer in chancery, it was holden that he could be compelled to give evidence of that fact on an indictment against his client for perjury. Bull. N. P. 284; 2 Stra. 1122. So, he may be called to prove his client's handwriting, though the knowledge was obtained from witnessing his execution of a bail-bond in the action (*Hard v. Moring*, 1 C. & P. 372); and he may be called to prove his client's identity (*Studly v. Saunders*, 2 D. & R. 347. *Parkins v. Hawkshaw*, 2 Stark. N. P. 239); and if he be a subscribing witness to a deed, he may be examined as to the execution. *Doe v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. 235; 5 id. 52.

[2] A witness is not allowed to disclose communications which may be injurious to the interest of the state. *Hardy's case*, 24 How. St. Tr. 743, 814. So, a witness for the Crown, on a revenue information, cannot be asked whether he was the informer (*Attorney-General v. Bryant*, 15 Mee. & W. 169. *Horne v. Bentinck*, 2 B. & B. 162. *R. v. Watson*, 2 Stark. 136); and a member of parliament cannot, without leave of the House, be compelled to answer questions respecting the votes of the members. *Chalk v. Salomons*, 3 C. & Kir. 75. So, communications between the governor of a colony and his attorney-general are confidential (*Wyatt v. Gore*, Holt, N. P. C. 299. *Cooke v. Maxwell*, 2 Stark. 184); and so between an agent of government and a secretary of state (*Anderson v. Hamilton*, 2 B. & B. 156), and cannot be disclosed. And so, confidential proceedings of the privy council. *Layer's case*, 16 How. St. Tr. 224. But this rule is confined to communications made by and between ministers and officers of the government, in the discharge of their public duty; and therefore a letter written by a private individual to the secretary of the postmaster-general, complaining of the conduct of the guard of a mail, is not privileged from disclosure. *Blake v. Pilfold*, 1 M. & Rob. 198; Rosc. *Crim. Evid.* 147, 149. Communications to medical attendants or divines, or in auricular confession, however confidential, must be disclosed, *Duchess of Kingston's case*, 20 How. St. Tr. 573. *Gillham's case*, 1 Moo. C. C. 186. Best, Ev. 690.

[3] In the direct examination of a witness, he must not in general be asked leading questions. Peake, Evid. 196; and *see* Stark. 81. Yet, where a witness swears to a certain fact, and another is called for the purpose of contradicting him, the latter may be asked directly whether the fact took place. 1 Camp. 43. So, if the witness appears evidently hostile to the party who has called him, the counsel may put leading questions to him in the same manner as on cross-examination, having first obtained the permission of the court to do so (Peake, Evid. 198); and if the witness stands in a situation which of necessity makes him adverse to the party calling, the counsel may, as a matter of right, so examine him. *Clarke v. Saffery*, R. & M. 126. *Dickenson v. Shee*, 4 Esp. 67. The witness must be examined as to facts within his own knowledge and recollection, and not opinions, unless it be on a question of skill. *Goodtitle v. Braham*, 4 T. R. 497. *R. v. Wright*, R. & R. 456. A witness produced to read or explain a series of ancient records brought into court, may be asked to state the result of them. *Rowe*

VI. Cross-Examination.[1] VII. Re-Examination.[2]
VIII. Recalling Witness.[3] IX. Impeaching Credit of Witness.[4]

v. Brenton, 3 M. & Rob. 212. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms if that be the person he meant. *R. v. Watson*, 2 Stark. 116. And where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked in direct terms whether that fact ever took place. *Courteen v. Touse*, 1 Camp. 43.

[1] When the direct examination is finished, the witness may be cross-examined by the counsel for the opposite party. But if the party calling a witness do not think proper to examine him after he is called and sworn, he may nevertheless be cross-examined by the counsel for the opposite party (1 Esp. 357; 2 Stark. 472), unless he was merely called to produce a document (*Rush v. Smith*, 1 C., M. & R. 94), or by mistake, and no question put to him. *Wood v. Machinson*, 2 M. & Rob. 273. In cross-examining a witness, the counsel may ask him leading questions, or indeed any questions at all relevant to the cause. 4 Esp. 68. He may even be cross-examined as to a fact irrelevant to the issue for the purpose of discrediting his testimony by what he himself may state in evidence (2 Camp. 637); but otherwise, where it is done with the intention of calling other witnesses to disprove what he says. 7 East, 108.

In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine a witness for the plaintiff as to the bad character of the plaintiff, nor as to previous charges made against him. *Downing v. Butcher*, 2 M. & Rob. 374. In such an action, if the plaintiff's counsel ask his witness what was said by the defendant when the parties were before the magistrate, the defendant's counsel may ask, on cross-examination, what was said by the magistrates. *Richards v. Turner*, 1 C. & M. 414.

By the C. L. P. Act, 1854, s. 24, "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit." On this section it was held, that the plaintiff could not be asked on cross-examination whether his name was inscribed in a certain book. *Darby v. Ouseley*, 25 L. J. Ex. 227. The opposite counsel has a right to see the document before the cross-examining counsel puts any question upon it. *Cope v. Thames-Haven Dock Company*, 2 C. & Kir. 757; but see *R. v. Duncombe*, 8 C. & P. 369.

[2] A re-examination being only for the purpose of explaining facts which may come out on the cross-examination, must be confined to the subject-matter of the cross-examination. If a witness upon his cross-examination admit his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examination, is confined to such questions as may elicit the meaning of the expressions and the motives of the witness in using them. But where the witness speaks to expressions used by a party to the cause, he is entitled to re-examine as to the whole of the conversation in which they were used. The *Queen's case*, 2 B. & B. 294; but see *Prince v. Samo*, 7 Ad. & E. 627, where it was held that a witness of the plaintiff, cross-examined as to assertions of the plaintiff in a particular conversation, cannot be re-examined as to other *unconnected* assertions of the plaintiff in the *same* conversation, although connected with the *subject of the suit*.

[3] It is in the discretion of the judge whether he will permit a witness to be recalled. *Adams v. Bankart*, 1 C., M. & R. 681. *Catlin v. Barber*, 5 C. B. 201. *Middleton v. Barned*, 18 L. J. Ex. 433.

[4] By the C. L. P. Act, 1854, s. 22, "a party producing a witness shall not be allowed to impeach his credit by *general evidence of bad character*, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." *See* Phil. & Arn. on Evid. vol. ii. p. 225; C. L. Com. 2 Rep. p. 16, and *Macdonell v. Evans*, 21 L. J. C. P. 141; 11 C. B. 930. In order that a party producing a witness may be allowed to give in evidence, under the 22nd section of the Common Law Procedure Act, 1854, a previous statement of the witness as being inconsistent with his present statement, it is not necessary that the two statements should be directly or absolutely at variance. *Jackson v. Thomason*, 31 L. J. Q. B. 11. By sect. 23, "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be

X. Supporting Credit of Witness.[1]

XI. Privilege of Refusing to Answer.[2]

XII. Opinion, when Admissible.[3]

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given that he did, in fact, make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

A collateral and irrelevant inquiry cannot be gone into to discredit a witness on the other side. *Palmer v. Trower*, 22 L. J. Ex. 32. *Attorney-General v. Hitchcock*, 1 Ex. 91. Where a witness, on cross-examination, denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness is not at liberty to lead him by reading from his brief the words denied; the conversation spoken to by the first witness being evidence in itself. *Hallett v. Cousins*, 2 M. & R. 238.

Where a party to the cause gave evidence himself in support of his case:—*Held*, that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not been brought against him by another person in a county court, in respect of a similar claim, upon which he had given evidence, and had had notwithstanding a verdict of the jury against him; and that he might be so examined without production and proof of the record of the proceedings in such county court. *Henman v. Lester*, 31 L. J. C. P. 366.

By C. L. P. Act, 1854, s. 25, "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

[1] Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character. *Rex v. Clarke*, 2 Stark. C. 241. As a general rule, when the testimony of a witness is impeached, evidence to shew that he made the same statement on different occasions is not admissible. *R. v. Parker*, 3 Dougl. 242. But where counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 1 Phill. Ev. 293; notes to Pothier on Oblig. by Evans, vol. ii. p. 251.

[2] A witness is not bound to answer questions, the answers to which may expose him to punishment or to a criminal charge (*Oates v. Hardacre*, 3 Taunt. 429. *Queen's case*, 2 B. & B. 311), or which are put for the mere purpose of degrading his character (*Cook's case*, 13 How. St. Tr. 334. *Friend's case*, id. 17), though such questions may be put. *R. v. Edwards*, 4 T. R. 440. The objection to the question must come from the witness, and not from the counsel in the cause (*Thomas v. Weston*, M. & M. 48); nor will counsel be allowed to argue in support of such objection. *R. v. Adey*, 1 M. & R. 94. The privilege may be claimed at any period of the examination. *Gosbel's case*, 1 Den. C. C. R. 236. It is, however, for the judge to decide whether the question must be answered, and the mere statement of the witness that it tends to criminate him is not conclusive. *Osborne v. London Dock Co.* 10 Ex. 698; 24 L. J. Ex. 140. *Fisher v. Ronalds*, 12 C. B. 762; 22 L. J. C. P. 62. It would seem that a party cannot refuse to answer merely because the answer may tend to a forfeiture of property. *May v. Hawkins*, 24 L. J. Ex. 309; 11 Ex. 210. *Chester v. Wortley*, 25 L. J. C. P. 117. All other questions for the purpose of impeaching a witness's character must be answered. *Candell v. Pratt*, 1 M. & M. 108. The refusal of a witness to answer ought not legally to have any effect with the jury. *R. v. Watson*, 2 Stark. 157. *Rose v. Blakemore*, R. & M. 382. A pardon under the great seal takes away the privilege of a witness in not answering, so far as regards any risk of prosecution at the suit, or in the name of the Crown. *Reg. v. Boyes*, 1 B. & S. 311.

[3] In questions of science a witness may be examined as to his *opinion*, upon facts previously stated; thus, although a physician may never have seen the patient, he may swear to his opinion of the disease, &c. upon facts stated by others (*M'Naghten's case*, 10 Clark & Fin. 200. *Fenwick v. Bell*, 1 C. & Kir. 312. *Rickards v. Murdoch*, 10 B. & C. 527). So when the question is as to the

XIII. Refreshing Memory.[1]
XIV. Ordering Witnesses out of Court.[2]
XV. Party to Suit may act as Advocate and Witness.[3]
XX. Compelling Attendance of Witnesses on Motions, &c.[4]
XXI. „ „ at Trial.
(A) *Subpœna.*[5]

forgery of a seal, engravers may be called to show a difference between a genuine impression and that supposed to be false (*Folkes v. Chadd*, 3 Dougl. 157). The opinion of a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence on several occasions, both in actions on the policy and against insurance-brokers for negligence (*Berthon v. Loughman*, 2 Stark. 258. *Rickards v. Murdock*, 10 B. & C. 527. *Chapman v. Walton*, 10 Bing. 57). And the opinion of a nautical witness on a question of skilful navigation, assuming the facts to be true (*Fenwick v. Bell*, 1 C. & Kir. 312). The opinions of persons versed in the law of a foreign country are also admissible (*Chaurand v. Angerstein*, Peake, C. 44. *See* also Handwriting, vol. v. p. 14). But witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted on one way rather than another. *Campbell v. Richards*, 5 B. & Adol. 840. *See* Usage, *ante*, p. 606.

[1] A witness will be allowed to refresh his memory from an entry in a book or on paper (*Doe v. Perkins*, 3 T. R. 749), made contemporaneously with, or shortly after, the occurrence of the fact referred to (*Steinkeller v. Newton*, 9 C. & P. 313); if he can afterwards swear to the fact from his recollection, and this, though he himself did not make the entry (*Henry v. Lee*, 2 Chit. Rep. 124. *Burrough v. Martin*, 2 Camp. 112. *Burton v. Plummer*, 2 Ad. & E. 341. *Horne v. Mackenzie*, 6 Clarke & Fin. 628). And where a witness, on seeing his initials affixed to an entry of payment, said "I have no recollection that I received the money; I know nothing but by the book: but seeing my initials, I have no doubt that I received the money;" this was held sufficient evidence (*Maughan v. Hubbard*, 8 B. & C. 14; 2 M. & R. 5. *Trentham v. Deveril*, 2 Bing. N. C. 397; 4 Scott, 128). Where a paper is put into the hands of a witness to refresh his memory, the opposite counsel has a right to inspect it, without being forced to put it in evidence. *Sinclair v. Stevenson*, 1 C. & P. 582.

[2] Either party, at any period of the cause, has a right to require that the unexamined witnesses should be out of court (*Southey v. Nash*, 7 C. & P. 632). But where a witness remains in court, after an order for the witnesses to withdraw, it seems that the judge cannot refuse to allow him to be examined, although the witness may be fined for his contempt (*Cobbett v. Hudson*, 22 L. J. Q. B. 11. *Parker v. M'William*, 6 Bing. 683. *R. v. Wylde*, 6 C. & P. 380). But the attorney, and party to the cause who is to be examined as a witness, will be allowed to remain. *Pomeroy v. Baddeley*, R. & M. 430. *R. v. Webb*, 2 Stark. *Evid.* 1733. *Constance v. Brain*, 2 Jur. N. S. 1145, Ex. *Charnock v. Dearing*, 3 C. & Kir. 373.

[3] A party may lawfully conduct his own cause in court, examine his witnesses, and give evidence as one himself. *Cobbett v. Hudson*, 1 E. & B. 11. *See* vol. i. p. 217, n. 3.

[4] By the C. L. P. Act, 1854, s. 46, "upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their own discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *viva voce*, either by such court or judge, or before the master; and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just." *Ashcroft v. Foulkes*, 25 L. J. C. P. 202.

By sect. 47, "the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the production of any writings, or other documents to be mentioned in such rule or order: and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the court under an act passed in the first year of the reign of his late majesty King William the 4th, intituled 'An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogations, or otherwise;' and it shall be lawful for the court, or judge, or master, to adjourn the examination from time to time as occasion may require, and the proceedings upon such examination shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *viva voce* examination of witnesses under the last-mentioned act."

[5] A witness must be subpœnaed, for it has been holden that even a person actually present at the trial may refuse to be sworn unless he have been duly subpœnaed (*Bowles v. Johnson*, 1 W. Bl. 37). The service should be personal, otherwise he cannot be attached for non-appearance (*Smalt v. Whitmill*, 2 Stra. 1054). It must be served so as to give

(C) *Subpœna duces tecum.*[1] (D) *Expenses of Witness.*[2]
(E) *Warrant of Secretary of State or Judge to bring up Prisoner as Witness.*[3]
(F) *When Witnesses in Scotland or Ireland.*[4]

witnesses reasonable time, so as to put their affairs in such order that their attendance may be as little prejudicial to themselves as possible (*Hammond v. Stewart*, 1 Stra. 510). Whether it has been so served is a question for the judge (*Barber v. Wood*, 2 M. & Rob. 172). What is a reasonable time depends on the circumstances of each particular case. *Maunsell v. Ainsworth*, 8 Dowl. 869. *Pitcher v. King*, 2 D. & L. 755. *Jackson v. Segor*, 13 L. J. Q. B. 217. *Goff v. Mills*, 13 L. J. Q. B. 227. *Sims v. Kitchen*, 5 Esp. 46.

The names of not more than four witnesses may be inserted in the writ (*Doe v. Andrews*, Cowp. 846); but it may be issued in blank, and the names of the witnesses inserted after service (*Wakefield v. Gall*, Holt, C. N. P. 526). It must mention the place of trial (*Wilson v. Day*, 3 M. & P. 333). If it require the attendance of a witness on the commission day of the assizes, it extends to the whole assizes. *Scholes v. Hilton*, 10 Mee. & W. 15. But see *Vaughton v. Brine*, 1 Man. & G. 359. He is protected from arrest while attending, though not subpœnaed. *Arding v. Flower*, 8 T. R. 536. *See* vol. i. p. 532.

[1] If a person who is not a party to the cause have in his possession any written instrument, &c., which would be evidence for the trial, instead of a common subpœna, he must be served with a *subpœna duces tecum*, commanding him to bring it with him and produce it at the trial. Upon a *subpœna duces tecum* the documents mentioned in it must be produced, or a lawful excuse stated (*Amey v. Long*, 9 East, 473). The validity of such excuse is matter for the judgment of the court, and not of the witness. (Id.) The mere assertion of an attorney that it is a title or other privileged document is conclusive (*Doe d. James*, 2 Mee. & W. 47. *Volant v. Soyer*, 22 L. J. C. P. 83); and if the instrument required to be produced would, if disclosed, subject the party to a criminal charge or penalty (*Roe v. Harvey*, 4 Burr. 2489. *Whitaker v. Izod*, 2 Taunt. 115); or if it be his title-deed (*Pickering v. Noyes*, 1 B. & C. 263; 2 D. & R. 386. *Doe v. James*, 3 M. & Rob. 47. *Hodgson v. Warden*, 1 D. & L. 286); or if he be an attorney, his client's (*Harris v. Hill*, 3 Stark. 140. *Ditcher v. Kenrick*, 1 Car. & P. 161) title-deed; or if he be a clerk in a public office, and he is called upon to produce an official paper which his principal has not given him leave to produce (*Austin v. Evans*, 2 Man. & G. 430; and see *Lord Falmouth v. Ross*, 11 Price, 455); the court will not compel him to produce it. A person merely subpœnaed to produce and not to testify need not be sworn (*Perry v. Gibson*, 1 Ad. & E. 48). And if sworn by mistake he is not liable to cross-examination (*Rush v. Smith*, 1 C. M. & R. 94). When the production is excused secondary evidence is admissible. *Marston v. Downes*, 1 Ad. & E. 31. *See* vol. iv. p. 303.

[2] If it be a town cause, and the witness live within the bills of mortality, it is usual to tender him one shilling with the subpœna. *Jacob v. Hungate*, 3 Dowl. 456. But if he live at a greater distance, or the action is to be tried at the assizes, then the reasonable expenses of going to, staying at, and returning from the place of trial. *Newton v. Harland*, 1 Scott, N. R. 502. *Fuller v. Prentice*, 1 H. Black. 49. These expenses may be tendered at any reasonable time before the trial. *Horne v. Smith*, 6 Taunt. 9. *Newton v. Harland*, 1 Man. & G. 856. But such tender is not requisite if the expenses have already been paid by the opposite party. *Bettley v. M'Leod*, 5 Dowl. 481; 3 Bing. N.C. 405. The witness may waive his right to these expenses. *Newton v. Harland*, *supra*. And if he do not object on the ground of the amount tendered being insufficient, he cannot avail himself of such insufficiency in answer to a motion for attachment. *Goff v. Mills*, 13 L. J. Q. B. 227. *Dickson v. Lee*, 1 C., M. & R. 645. *See* also, Costs, Allowance of Witnesses, vol. iii. p. 321.

[3] By the 16 & 17 Vic. c. 30, s. 9, "it shall be lawful for one of her majesty's principal secretaries of state, or any judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of habeas corpus awarded by any of her majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

[4] By 17 & 18 Vic. c. 34, s. 1, "if in any action or suit now or at any time hereafter depending in any of her majesty's courts of common law of Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said

XXII. Commission to Examine Witness within Jurisdiction.

(A) *Statute relating to before Trial.*[1]

courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, or warrant of citation, shall issue in special form, commanding such witnesses to attend such trial, wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom, shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues." Under this section a plaintiff resident in Ireland may be compelled to attend at the trial of a cause in England. *Harris v. Barber*, 25 L. J. Q. B. 98.

By sect. 2, "every writ shall have at foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be, and no such writ shall issue without such special order."

By sect. 3, "in case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her majesty's superior courts of common law at Westminster, in case such service was had in England, or in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland, to any of her majesty's superior courts of common law at Dublin; and the court to which such certificate is so sent shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to the writ of subpœna or other process issued out of such last-mentioned court."

By sect. 4, "none of the said courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this act, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person."

By sect. 5, "nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this act, they shall think fit to issue such commission."

By sect. 6, "nothing herein contained shall alter or affect the admissibility of any evidence at any trial where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court; but the admissibility of all such evidence shall be determined as if this act had not passed."

[1] By 1 Wm. 4, c. 22, s. 4, "it shall be lawful to and for each of the said courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise; and, by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

Compelling Witnesses to attend.— By 1 Wm. 4, c. 22, s. 5, "when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writing or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or

by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause."

Where Witness is a Prisoner.—By sect. 6, "it shall be lawful for any sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination under the authority of this act, by virtue of a writ of habeas corpus, to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*."

Examination to be on Oath.—By 1 Wm. 4, c. 22, s. 7, "it shall be lawful for all and every person authorised to take the examination of witnesses by any rule, order, writ, or commission made or issued in pursuance of this act, and he and they are hereby authorised and required to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorised, or by any judge of the court wherein the action shall be depending; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of Middlesex, if the evidence be given out of England."

Filing Depositions.—By r. 33, H. T. 1853, "all depositions of witnesses taken under the order of a judge, rule of court, or writ of commission, shall be returned to and filed in the office of the masters of the court in which the action or proceeding is pending."

Certifying Examination.—By 1 Wm. 4, c. 22, s. 8, "it shall be lawful for the master, prothonotary, or any other persons to be named in any such rule or order as aforesaid, for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon, or relating thereto; and the court is hereby authorised to institute such proceedings, and make such order and orders upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court."

Admissibility of Depositions.—By 1 Wm. 4, c. 22, s. 10, "no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hands of the commissioners, masters prothonotary, or other persons taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions. *See* Evidence, vol. iv. p. 332.

Costs of Proceedings.—By 1 Wm. 4, c. 22, s. 9, "the costs of every rule or order to be made for the examination of witnesses, under any commission or otherwise, by virtue of this act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed, either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court." See *Bridges v. Fisher*, 1 Bing. N. C. 510.

[1] This act applies where a witness is about to leave the country before the trial (*Carruthers v. Graham*, 9 Dowl. 947), or where the state of his health is such that there is no probability of his being able to attend the trial. *Pond v. Dimes*, 3 M. & Sc. 161. As to the case of pregnancy, *Abraham v. Newton*, 8 Bing. 274. It extends to an issue out of Chancery. *Bonadeaux v. Rowe*, 1 B. & C. 721. *R. v. Wood*, 7 Mee. & W. 571. But not to a criminal information (*R. v. Upton*, 10 Q. B. 827; 17 L. J. M. C. 13); nor, perhaps, to any proceeding in which the Crown is a party. *R. v. Wood*, *supra*.

[2] The application for a rule or order to examine should not be made till after issue joined (*Mondel v. Steele*, 8 Mee. & W. 300. *Fynney v. Beasley*, 20 L. J. Q. B. 395); but this rule is not imperative, if sufficient reason be shown for infringing it. *Brown v. Mollatt*, 24 L. J. C. P. 213. The witness must be a material one. *Baddeley v. Gilmore*, 1 Mee. & W. 55. The affidavit in support of the application should state the name of the witness (*Norton v. Lord Melbourne*, 3 Bing. N. C. 67), and the grounds for the application (*Davies v. Lowndes*, 7 Dowl. 101).

The application will not be granted if there have been improper delay in making it (*M'Hardy v. Hitchcock*, 17 L. J. Ch. 256); or if it be made for the purpose of delay (*Lloyd v. Key*, 3 Dowl. 253); or if it be not *bonâ fide*.

(A) *Enactments relating to.*[1] (B) *Application for.*[2]

XXIV. Mandamus for Examination of Witnesses in India, &c.[3]

[1] *See* 1 Wm. 4, c. 22, ss. 1, 4, 7–10, *supra*.

[2] It is discretionary with the court to grant the order; and they will consider whether the doing so will be conducive to the administration of justice. *Castulli v. Groome*, 21 L. J. Q. B. 308. The commission may issue under the above statute to any place out of the jurisdiction. *Norton v. Lamb*, 5 Dowl. 181. *Duckett v. Williams*, 1 Dowl. 291. *Bain v. De Vetry*, 3 Dowl. 516. As to a commission into an enemy's country, see *Barwick v. Bunbury*, 16 C. B. 492). When the witnesses are willing to attend the examination, recourse is usually had to the above-mentioned, instead of the proceedings by *mandamus*, under the 13 Geo. 3, c. 63, s. 40; and 1 Wm. 4, c. 22, s. 1. By 6 & 7 Vic. c. 82, ss. 5, 6, for compelling the attendance of witnesses, when they are within the realm. And s. 7 of the same statute enacts, that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses, and for loss of time, as for and upon attendance at any trial in a court of law; and no person shall be compelled to produce, under such rule or order, any writing or other document, that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order."

[3] *On Indictments and Informations.*—By stat. 13 Geo. 3, c. 63, s. 40, "In all cases of indictments or informations laid or exhibited in the said court of King's Bench, for misdemeanors or offences committed in India, it shall and may be lawful for his majesty's said court, on motion to be made on behalf of the prosecutor, or of the defendant or defendants, to award a writ or writs of *mandamus*, requiring the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, who are hereby respectively authorised and required accordingly to hold a court, with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively, and in the meantime to cause such public notice to be given of the holding of the said court, and to issue such summons or other process as may be requisite for the attendance of witnesses, and of the agents or counsel of all or any of the parties respectively, and to adjourn from time to time, as occasion may require; and such examination as aforesaid shall be then and there openly and publicly taken *vivâ voce* in the said court, upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their different religions; and shall, by some sworn officer of such court, be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates should be required by or on behalf of the parties interested, and shall be sent to his majesty, in his court of King's Bench, closed up, and under the seals of two or more of the judges of the said court; and one or more of the said judges shall deliver the same to the agent or agents of the party or parties requiring the same; which said agent or agents (or, in case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in court of his majesty's court of King's Bench, in the public office, and make oath that he received the same from the hands of one or more of the judges of such court in India (or, if such agent be dead, in what manner the same came into his hands), and that the same has not been opened or altered since he so received it (which said oath such clerk in court is hereby authorised and required to administer); and such depositions, being duly taken and returned, according to the true intent and meaning of this act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present and sworn, and examined *vivâ voce*, at any trial for such crimes and misdemeanors as aforesaid in his majesty's said court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own cost and charges."

In Actions and Suits.—By 13 Geo. 3, c. 63, s. 44, "when and as often as the said united company, or any person or persons whatsoever, shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen or shall hereafter arise in India, against any other person or persons whatever, in any of his majesty's courts at Westminster, it shall and may be lawful for such court respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission as aforesaid, to the chief justice and judges of the said supreme court of jurisdiction for the time being, or the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated."

The Supreme Courts and Suddur Courts of India are now abolished, and "High Courts," with jurisdiction of Supreme Courts, established in their room, by 24 & 25 Vic. c. 104.

By 1 Wm. 4, c. 22, s. 1, the powers and provisions of the above sections of the 13

XXV. Action by Witness for Expenses.[1]

XXVI. „ against Witness.[2]

XXVII. Number of Witnesses.[3]

XXIX. Depositions of Deceased Witnesses.[4]

Geo. 3, c. 63, were extended to all colonies and places under the dominion of the Crown in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of her majesty's courts of law at Westminster, *whether the same may have arisen within the jurisdiction of the court*, to the judges whereof the writ or commission may be directed, *or elsewhere*.

Where an application was made for a *mandamus* to examine witnesses in Quebec, the court granted a commission and a *mandamus*, the latter not to be used unless necessary. *Farnmouth v. Hyde*, 11 W. R. (C. P.) 783.

By 1 & 2 Wm. 4, c. 22, s. 2, "the judge or judges to whom the writ shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses as the court whereof they are judge does or may possess for that purpose, in suits or causes depending in suchcourt.

By 13 Geo. 3, c. 63, s. 40, the witnesses are to be examined *vivâ voce* in the court to which the *mandamus* is directed, and their examinations are to be reduced into writing. The same section points out the way in which the examinations are to be returned to this country. See *R. v. Douglas*, 13 Q. B. 42.

Costs of Proceedings.—By 1 Wm. 4, c. 22, s. 3, the costs of every writ or commission under the 13 Geo. 3, c. 63, or the 1 Wm. 4, c. 22, s. 1, are to be in the discretion of the court. As to where the above enactments apply, see *R. v. Wood*, 7 Mee. & W. 571. *Savage v. Binney*, 2 Dowl. 643. *Attorney-General v. Reilly*, 13 Mee. & W. 676. *Bain v. De Vetry*, 3 Dowl. 516. *Norton v. Lord Melbourne*, 3 Bing. N. C. 67.

[1] A witness may sue for his reasonable expenses, but not for loss of time, although he be an attorney. Chitt. jun. *Cont. Hallett v. Mears*, 13 East, 15. *Edmonds v. Pearson*, 3 C. & P. 113. *Willis v. Peckham*, 1 B. & B. 514. *Moor v. Adams*, 5 M. & S. 156. *Collins v. Godefroy*, 1 B. & Adol. 950. He may sue though not examined, because his expenses were not tendered. And where the plaintiff was subpœnaed as a witness by both parties in a cause of B. and E.; in consequence of B.'s subpœna he remained in attendance for eleven days. E. obtained the verdict at the trial, and the plaintiff called upon B. to pay his expenses, which B. refused to do. The attorney for E. then paid the demand, upon an understanding that the plaintiff should return to him any part which the master might strike off upon taxation. At the taxation the attorney swore that he had paid the plaintiff the whole sum demanded, but at the instance of B. the master struck off a certain portion, which the plaintiff accordingly returned, and then brought an action against B. to recover that amount:—*Held*, that he was not prevented from recovering in the action by reason of his re-payment of the sum which he had first received from the attorney for E. *Hale v. Bates*, 28 L. J. Q. B. 14. The attorney in the cause is not personally liable to a witness whom he subpœnaes for expenses. *Robins v. Bridge*, 3 Mee. & W. 114.

[2] If a witness do not attend the trial in pursuance of his subpœna, the party who subpœnaed him may bring his action on the case for not attending, or he may apply for an attachment, or he may proceed on the 5 Eliz. c. 9, s. 12. *Pearson v. Iles*, 2 Dougl. 556. The former course is the one usually adopted in practice.

To obtain an attachment, the original subpœna must be shown at the time of serving the copy and a tender of expenses. *Jacobs v. Hungate*, 3 Dowl. P. C. 456.

Actual damage is essential to the action, and the law will not imply damage (*Couling v. Coxe*, 703. *Yeatman v. Dempsey*, 29 L. J. C. P. 177); but the costs of an issue are sufficient damage. *Couling v. Coxe*, *supra*. The evidence he had to give must be material. *Scholes v. Hilton*, 10 Mee. & W. 16. As to the averment of a good cause of action, see *Needham v. Fraser*, 3 D. & L. 190. *Couling v. Coxe*, *supra*.

An action will also lie against a witness for breach of promise to attend without a subpœna (*Yeatman v. Dempsey*, 7 C. B. (N. S.) 628; 9 id.; and for preventing the service of a subpœna on a witness. *Wigins v. Cooke*, 6 id. 784, 787.

Conduct-money paid to a witness with a subpœna, if the witness does not attend, may be recovered back. *Martin v. Andrews*, 7 E. & B. 1; 26 L. J. Q. B. 39.

No action for defamation will lie against a witness for false and malicious statements, whether oral or in an affidavit, made in the course of judicial proceedings. *Revis v. Smith*, 18 C. B. 126. *Henderson v. Broomhead*, 28 L. J. Ex. 360.

[3] The general rule at common law is, that a single witness, if credible, is sufficient for the proof of any fact; in which respect the law of England differs from the civil law, where one of the maxims is "*unius responsio non omnia audiatur.*" 2 Hawk. c. 46, s. 2; Fost. 233. But on an indictment for perjury there must be at least two witnesses. *R. v. Muscot*, 10 Mod. 194.

[4] These are admissible where a witness has been duly sworn and the opposite party had the right and opportunity of cross-examining. 1 Taylor, Ev. 327; Rouse, 41, 45.

(A) *Before Justices.*[1] (B) *Before Coroners.*[2]

WORK and Labour. *See* Arbitration, vol. i. pp. 445, 511; Bailment, vol. ii. p. 111; Barrister, id. 379; Carriers, vol. iii. p. 32; Condition, id. p. 166; Contract, id. p. 193; Frauds, Statute of, vol. iv. p. 546; Master and Servant, vol. v. p. 461; Persons entitled to Lien, id. p. 383; Physicians, *ante*, p. 132; Salvage, id. p. 446; Trustees, id. p. 588.

I. Where Common Count Sufficient.[3]

[1] 11 & 12 Vic. c. 42, s. 17, "in all cases where any person shall appear or be brought before any justice charged with any indictable offence, the justice, before he commits the accused for trial or admits him to bail, shall, in the presence of such accused, who is to be at liberty to put questions to any witness produced against him, take the statement, on oath or affirmation, of those who know the facts, and shall put the same in writing; and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and also by the justice taking the same; and shall afterwards be delivered (s. 20) to the proper officer of the court in which the trial is to be had, and before the first sitting of the court at which the person committed and bailed is to be tried, such person shall be entitled (s. 27) to have from the officers having custody of the same copies of the depositions, on payment of a reasonable sum." A magistrate's acting upon depositions taken in his absence, is an acting entirely without jurisdiction, and he is responsible in trespass. *Candler v. Seymour*, 1 Q. B. 892. If the depositions be legally taken, the only question is whether he had jurisdiction to investigate and commit. *Miller v. Collett*, 6 Bing. 92. The same section provides, that if any person whose deposition shall be so taken is dead, or so ill as not to be able to travel; and if also it be proved that such deposition was taken in the *presence of the person* so accused, and that he had a full opportunity of cross-examining the witness, then, if such deposition *purport* to be signed by the justice, before whom the same purports to have been taken, it shall be lawful to read such depositions as evidence, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the justice purporting to sign the same.

This statute repeals the former acts as to taking depositions. They contained no such enactment as the present, as to their being read on inability of witness to attend; but even then the depositions of a witness might be read against the accused upon his trial, if the witness were dead (2 Hawk. c. 46, s. 15. *Rex v. Smith*, R. & R. 339. *R. v. Osborne*, 8 C. & P. 113); or bedridden, and not likely to be ever able to atend (see *R. v. Wilshaw*, C. & M. 145); or unable to travel (2 Hawk. c. 46, s. 15); or had become insane (*R. v. Marshall et al.* C. & M. 147); or was kept out of the way by the prisoner. 2 Hawk. c. 46, s. 15. *R. v. Guthridge et al.* C. & P. 471: *per Parke, B.* It is not necessary that there should be a heading or a caption to the deposition. *R. v. Longbridge*, 2 C. & K. 975.

[2] *Depositions before a Coroner.* — Every coroner, upon an inquisition taken before him, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put *in writing* the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognisance all such persons as know or declare anything touching the said offence. 7 Geo. 4, c. 64, ss. 4, 5.

[3] The common count "for work done and materials provided by the plaintiff for the defendant at his request," lies where the work or services have been performed, and the remuneration is to be in money, although there may have been a special agreement, provided nothing is to be done by the defendant but to make a money payment. *Cooke v. Munston*, 1 B. & P. 354. *Alcorne v. Westbrook*, 1 Wils. 117. *Cutter v. Powell*, Smith's *Leading Cases*, vol. ii. p. 1. *Clarke v. Bulmer*, 1 D. & L. 367. Attorneys, surgeons, farriers, agents, apothecaries, surveyors, &c., may recover their charges on this general count. (Id.) Indeed it will suffice for the value of any mental skill and labour, such as in perfecting an invention. *Grafton v. Armstrong*, 2 C. B. 336. So may a printer, who prints with his own ink and paper, and delivers printed books complete (*Clay v. Yates*, 25 L. J. Ex. 237; 1 H. & N. 73); and where work is done by one party under a special contract, but not according to its terms, the other may refuse to accept it (*Ellis v. Hamlin*, 3 Taunt. 52); but if he does accept it, he may be sued for the value on this count (*Burn v. Miller*, 4 id. 745); but not so if the work be of such a nature that it cannot be rejected. *Ellis v. Hamlin, supra. Milner v. Field*, 5 Ex. 829. *Munro v. Batt*, 8 E. & B. 738. And where the defendant employed the plaintiff, an estate agent, to find a purchaser for an estate, for a per-centage, if the sale were effected and the plaintiff found a purchaser, but the defendant refused to complete the sale, it was held that the plaintiff could recover the value of his services in this form. *Prickett v. Badger*, 26 L. J. C. P. 33. *See* also *Mayor v. Payne*, 3 Bing. 288. *Planché v. Colburn*, 8 Bing. 14. *De Bernardi v. Harding*, 8 Ex. 822. It is, however, otherwise if the contract expressly allow a power of revocation without compensation. *Simson v. Lamb*, 25 L. J. C. P. 113; 17 C. B. 603. If a sum be claimed for *materials*, it must be stated in the count. *Heath v.*

II. Where Special Count requisite.[1]

III. Defence to Action for.[2]

WRECK.[3] *See* Ship and Shipping, *ante*, p. 430.

Freeland, 1 Mee. & W. 543. Work bestowed by the plaintiff on his own materials in making an article to be delivered under a contract of sale, is not work and labour done for the purchaser. *Atkinson v. Bell*, 8 B. & C. 277. *Lee v. Griffin*, 30 L. J. Q. B. 252.

[1] No action of *indebitatus assumpsit*, or upon a *quantum meruit*, can be brought for anything done under a special agreement which remains open (*Gordon v. Martin*, Fitzgibbon, 403. *Hulle v. Heightman*, 2 East, 145. *Cutler v. Powell*, 2 Smith's L. C. 1); or a condition precedent to be fulfilled; as obtaining architect or surveyor's certificate (*Morgan v. Birnie*, 3 M. & Scott, 76; 9 Bing. 672. *Milner v. Field*, 5 Ex. 829. *Coombe v. Green*, 11 Mee. & W. 480. *Russell v. Sa da Bandeira*, 32 L. J. C. P. 68); or extra work done without *written* order, according to the contract. (Id.) *Lamprell v. Guardians of Billericay*, 18 L. J. Ex. 244. *Kerk v. the Bromley Union*, 17 L. J. Ch. 127.

Where the plaintiff was to be paid an entire sum on the *completion* of the work, and the defendant has *wrongfully* discharged the plaintiff from completing the work agreed to be performed; or where, although the contract contains no particular clause as to payment, the plaintiff claims, not only the price and value of the work and materials *actually* done and provided, but also *damages* for the loss of the profits he would have acquired had the defendant allowed him to finish the work agreed for, the declaration should be special. *Hulle v. Heightman*, *supra*. It is also proper to declare specially where the plaintiff was to be paid by a bill of exchange, and the bill would not, if given, have been due when the writ was issued. *Harrison v. Luke*, 14 Mee. & W. 139. *Fair v. M'Iver*, 16 East, 130.

In general, where the contract is to *complete* an article, *no* remuneration is recoverable for partial work done. *Sinclair v. Bowles*, 9 B. & C. 92. *See* vol. i. p. 393, n. [2]. But a shipwright may recover to the extent of partial repairs done to a ship, though he were employed generally to put it in thorough repair. *Roberts v. Havelock*, 3 B. & Adol. 404.

In the case of a contract to make an article with materials the property of, or to be provided by the workman, if the *specific article* ordered has not become the *property* of the person who employed the workman, by having been appropriated to the use of, or set apart and accepted by the employer, or treated by both parties as his property, the price of work and materials cannot be recovered upon the common count; and the declaration should be specially framed for not *accepting* the article, stating that the plaintiff was to manufacture it, and did so, and was ready to deliver it, &c. *Atkinson v. Bell*, 8 B. & C. 277. *Carruthers v. Payne*, 5 Bing. 270. *Maberley v. Sheppard*, 10 id. 90. *Elliott v. Pybus*, id. 512. *Alexander v. Gardner*, 1 Bing. N. C. 671.

[2] The defendant may show, on *nunquam indebitatus*, that the work was done under a special contract and not executed (*Jones v. Nanney*, 1 Mee. & W. 333); or that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation (*Cope v. Thames Haven Railway Co.* 3 Ex. 841); or that the guardians of a union are charged for work done by a surveyor, which it was no part of their duty to order (*Paine v. Strand Union*, 8 Q. B. 326); or amount of remuneration to be left to employer. 28 L. J. Ex. 164. So, if the defendant has received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover anything. *Farnsworth v. Garrard*, 1 Camp. 38. *Montrion v. Jefferys*, R. & M. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew v. Daverell*, 3 Camp. 451. But see *Sinclair v. Bowles*, *supra*.

[3] There are four sorts of shipwrecked goods: flotsam, jetsam, ligan, and wreck properly so called. 1 Bl. Com. 292.

Flotsam is when the ship is split, and the goods float on the water between high and low water mark.

Jetsam is when the ship is in danger of foundering, and for the purpose of saving the ship the goods are cast into the sea.

Ligan, lagan, or ligam, is when heavy goods are thrown into the sea with a buoy, so that the mariners may know where to retake them. These are the queen's if no owner appear to claim them; but if any owner appear, he is entitled to recover the possession; for, even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not, by this act of necessity, construed to have renounced his property; much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. (Id.)

Wreck, properly so called, is where goods shipwrecked are cast upon the land; and goods which are termed flotsam, jetsam, and ligan, become, and are deemed, wrecks if they be cast upon the land.

All these species of wreck *primâ facie* were originally in the Crown by virtue of its prerogative. *De Prerogativâ Regis*, 17 Edw. 2, stat. 2, c. 11; 1 Bl. Com. 290. But now the laws relating to wreck are consolidated by 17 & 18 Vic. c. 104, part 8. So much, however, of this statute as relates

WRIT.

I. Writ of Capias. *See* Arrest on Mesne Process, vol. i. p. 534.

II. Writ of Capias ad Satisfaciendum. *See* Capias ad Satisfaciendum, vol. iii. p. 22.

III. Writ of Capias in Withernam. *See* Replevin, *ante*, p. 333.

IV. Writ of Capias Utlagatum. *See* Outlawry, *ante*, p. 29.

V. Writ in Ejectment, *See* Ejectment, vol. iv. p. 171.

VI. Writ of Exigi Facias. *See* Outlawry, *ante*, p. 28.

VII. Writ of Injunction. *See* Injunction, vol. v. p. 156.

VIII. Writ of Mandamus. *See* Mandamus, id. p. 424.

IX. Writ of Ne exeat Regno. *See* Ne exeat Regno, vol. v. p. 516.

X. Writ of Possession. *See* Ejectment, vol. iv. p. 179.

XI. Writ of Revivor. *See* Revivor, *ante*, p. 346.

XII. Writ of Scire Facias. *See* Scire Facias, *ante*, p. 362.

XIII. Writ of De Retorno Habendo. *See ante*, p. 332.

XIV. Writ of Venditioni Exponas. *See* Outlawry, *ante*, p. 29.

XV. Writ of Summons, p. 682.

(A) *All Actions must be commenced by Writ of Summons*, p. 682.

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(D) *No Form of Action need be mention in Writ*, p. 682.

(E) *Writ to contain Names of all the Defendants in Action, and no more*, p. 682.

XV. Writ of Summons (*continued*).

(F) *How Writ must be Dated*, p. 683.

(G) *Indorsement of Person Suing out the Writ*, p. 683.

(H) *Attorney to declare if Writ issued by him, and Name, &c. of Client*, p. 683.

(I) *Indorsement of Debt and Costs*, p. 683.

(J) *Concurrent Writs may be issued*, p. 684.

(K) *Renewal of Writ to save Statute of Limitations*, p. 684.

(L) *Production of Renewed Writ, Evidence of Commencement of Action*, p. 684.

(M) *Writ may be Served in any County*, p. 684.

(N) *Indorsement of Service to be made*, p. 684.

(O) *Service on Corporations and Inhabitants of Hundreds, &c.* p. 685.

(P) *Proceedings where Personal Service cannot be effected*, p. 685.

(Q) *Against British Subjects out of Jurisdiction*, p. 685.

(R) *Against Foreigners out of Jurisdiction*, p. 685.

(S) *Effect of Irregularity in Writ*, p. 686.

(T) *Substitution of one Writ for another by Mistake may be Amended*, p. 686.

(U) *Writs for Service within and without Jurisdiction may be concurrent*, p. 689.

(V) *Special Indorsement where Action for a Debt*, p. 686.

(W) *Writ, how Served in general*, p. 687.

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to delivery of wreck or receipt of proceeds, and the Crown's rights thereto, is amended by 25 & 26 Vic. c. 63, ss. 52, 53.

The jurisdiction of the Admiralty subsists as long as the shore is covered with water. The rights of lords of manor can exist only as long as the land is left dry. *The Pauline*, 2 Rob. *Adm. Rep.* 358; 9 Jur. 286.

A ship cannot be considered *wreckum maris*, nor the claim of a lord of a manor to wreck sustained, unless at the time of taking possession she is either on the actual shore itself, or left high and dry on land. (Id.) Priority of seizure is a fact of no importance in determining whether property be a wreck of sea or a droit of the Admiralty. (Id.)

A British ship was found abandoned at sea, and was taken in possession of and navigated for some days by the crews of two Danish vessels. She was then fallen in with by her majesty's ship Dolphin, who sent an officer and men on board, to whom, among other sailors, including the Danes, a certain sum was decreed as salvage by the court:— *Held*, that the British ship, when found by the Dolphin, was not a derelict within the 57 Geo. 3, c. 127, s. 6. *The Lady Kennaway*, 13 Jur. 944.

The term "wreck" in the 3 & 4 Wm. 4, c. 52, s. 50, is intended to apply to goods thrown on shore by the violence of the waves. *Legge v. Boyd*, 1 C. B. 92; 9 Jur. 307; 14 L. J. C. P. 138.

XV. Writ of Summons.

(A) *All Actions must be commenced by Writ of Summons.*[1]
(B) *What sufficient Statement of Name and Address of Defendant in Writ.*[2]
(C) *What of Plaintiff's Name.*[3]
(D) *No Form of Action need be mentioned in Writ.*[4]
(E) *Writ to contain Names of all the Defendants in Action, and no more.*[5]

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[1] By C. L. P. Act, 1852, s. 2, "all personal actions brought in her majesty's superior courts of common law, where the defendant is residing, or supposed to reside, within the jurisdiction of the said courts, shall be commenced by writ of summons in the form contained in the schedule A to this act annexed, marked No. 1, and in every such writ and copy thereof the place and county of the residence, or supposed residence, of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned, and such writ shall be issued by any one of the officers of the said courts respectively by whom like process hath been heretofore issued from such court, or by such other officer as the court shall direct." And now, by 23 & 24 Vic. c. 126, s. 26, real actions must be commenced by the same writ. So that at present all actions, with the exception of ejectment, are commenced by writ of summons. *See* Action, vol. i. pp. 137, 138.

The following is the form given in the Schedule A:—

No. 1. *Writ where the Defendant resides within the Jurisdiction.*

Victoria, by the grace of God, &c.

To C. D., of in the county of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our court of in an action at the suit of A. B.; and take notice, that in default of your so doing the said A. B. may proceed therein to judgment and execution.

Witness, &c.

Memorandum to be Subscribed on the Writ.

N.B.—This writ is to be served within [*six*] calendar months from the date thereof, or if renewed from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before Service thereof.

This writ was issued by E. F. of attorney for the said plaintiff, *or*, this writ was issued in person by A. B., who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.*]

Indorsement to be made on the Writ after Service thereof.

This writ was served by X. Y. on L. M. [the defendant, *or* one of the defendants] on Monday, the day of 18

(Signed) X. Y.

[2] The defendant may be sued by any name acquired by usage or reputation (*Williams v. Bryant*, 5 Mee. & W. 457), and in actions on written instruments, by the initial letters or contractions by which he appears on the instrument (3 & 4 Wm. 4, c. 42, s. 12; vol. ii. p. 400); and a wrong name will not invalidate the writ. *Wills v. Lord Suffield*, 4 C. B. 750. *Rolph v. Peckham*, 6 B. & C. 164. *See* vol. v. p. 512.

If the defendant has a name of dignity, as duke, earl, &c., he should be described by such name (*Cartwell v. Earl of Stirling*, 1 M. & Scott, 297; 8 Bing. 174. *Wills v. Lord Suffield*, *supra*); otherwise no addition need be given to either party (*Norris v. Smith*, 2 C., M. & R. 120), or statement of the special character in which he sues or is sued.

As to the residence of the defendant, a reasonable degree of certainty will be sufficient: as, "of Tufton Street, in the county of Middlesex" (*Cooper v. Wheal*, 4 Dowl. 281); or "of Clapham, in the county of Surrey" (*Toulmin v. Bowditch*, 2 B. C. R. 89); or "Beddegelert in the county of Carnarvon, to be found in the city of London" (*Parrott v. Stocks*, 11 Jur. 455). But "of the city of London" is not enough (*Cotton v. Sawyer*, 10 Mee. & W. 328); nor is "to be heard of at Peel's Coffee-house in the city of London." *Simpson v. Ramsay*, 13 L. J. Q. B. 91; 5 Q. B. 371. *See* also *King v. Hopkins*, 2 D. & L. 637; 13 Mee. & W. 685. *Levi v. Parratt*, 15 L. J. C. P. 4; 2 C. B. 345. *Downes v. Garbett*, 2 D. & L. 944.

[3] The Christian and surname of the plaintiff or plaintiffs should be inserted. *Walker v. Parkins*, 2 D. & L. 982. Where there is a misnomer of either plaintiff or defendant in the writ, the only mode of taking advantage of it is to have the declaration amended by inserting therein the right name, at the costs of the plaintiff, if the mistake be carried on so far. 3 & 4 Wm. 4, c. 42, s. 11. *See* vol. i. pp. 13, 324.

[4] By C. L. P. Act, 1852, s. 3, "it shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons, issued under the authority of this act." *Knowles v. Johnson*, 2 Dowl. 653.

[5] By C. L. P. Act, 1852, s. 4, "every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one." It is there-

(F) *How Writ must be Dated.*[1]

(G) *Indorsement of Person Suing out the Writ.*[2]

(H) *Attorney to declare if Writ issued by him, and Name, &c. of Client.*[3]

(I) *Indorsement of Debt and Costs.*[4]

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fore irregular to declare against more or fewer defendants than are in the writ (*Pepper v. Whalley*, 1 Bing. N. C. 71. *Carson v. Dowding*, 4 Dowl. 297), unless in the latter case the cause be several, and proceedings be stopped against the other defendant. *Knowles v. Johnson*, 2 Dowl. 653.

[1] By C. L. P. Act, 1852, s. 5, "every writ of summons shall bear date on the day on which the same shall be issued, and shall be tested in the name of the lord chief justice, or lord chief baron, of the court from which the same shall issue, or, in case of a vacancy of such office, then in the name of a senior puisne judge of the said court. It must not be dated on a Sunday (*Hanson v. Shackleton*, 4 Dowl. 48); and if dated wrongly it is irregular. *Anon.* 1 id. 654. *Miller v. Bowden*, 1 C. & J. 563. Figures are sufficient. *Solomons v. Nainby*, 5 Mee. & W. 389.

[2] By C. L. P. Act, 1852, s. 6, "every writ of summons shall be indorsed with the name and place of abode of the attorney actually suing out the same; and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's *residence*, if any such there be."

An indorsement which does not mislead satisfies this requirement. 7 Dowl. 176. The abode being stated, "Ely Place" is sufficient, or "Gray's Inn, London." *Englehart v. Edwards*, 6 Leg. Obs. 138. *King v. Monkhouse*, 2 Dowl. 221. "Agent for plaintiff" is bad. *Toby v. Hancock*, 4 D. & L. 385; 16 L. J. Q. B. 33. If omitted when the writ is sued out by an attorney, the court will stay the proceedings, and make the attorney pay costs. *Constable v. Johnstone*, 1 C. & M. 88. If the attorney belong to a firm, the name of such firm should be used. *Dawes v. Solomonson*, 6 Scott, 596.

[3] By C. L. P. Act, 1852, s. 7, "every attorney whose name shall be indorsed on any writ issued by authority of this act shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode, of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge."

If the address given be insufficient (*Hodgson v. Gamble*, 3 Dowl. 174), defendant may apply for an order for a better one. *Smith v. Bond*, 11 Mee. & W. 326. *Harris v. Holler*, 19 L. J. Q. B. 62.

[4] By C. L. P. Act, 1852, s. 8, "upon the writ and copy of any writ, served for the payment of any *debt*, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ, copy and service, and attendance to receive debt and costs; and it shall be further stated, that upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed; which indorsement shall be written or printed in the following form, or to the like effect:—

> 'The plaintiff claims £ for debt, and £ for costs, and if the amount thereof be paid to the plaintiff, or to his attorney, within four days from the service hereof, further proceedings will be stayed.'

"But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

This section in terms applies only to *debts*, and is not applicable to actions for damages (*Perry v. Patchett*, 1 C., M. & R. 87); bonds (*Smart v. Lovick*, 3 Dowl. 34); penalties (*Davies v. Lloyd*, 6 Dowl. 173); or to *qui tam* actions. *Hobbs v. Young*, 2 D. & L. 474; 14 L. J. Q. B. 4. When interest is claimed, the amount, or the date from which it runs, must be stated. *Bardell v. Miller*, 7 C. B. 753; 18 L. J. C. P. 249. The amount of the debt indorsed should not be more than is exactly due; and if it be such a sum as misleads the defendant, and prevents him from settling, the proceedings may be stayed on payment of the costs of the writ only, if the application be promptly made. *Elliston v. Robinson*, 2 Dowl. 241; 2 C. & M. 343. If it be less than the sum due, the defendant may, un-

(J) *Concurrent Writs may be issued.*[1]

(K) *Renewal of Writ to save Statute of Limitations.*[2]

(L) *Production of Renewed Writ Evidence of Commencement of Action.*[3]

(M) *Writ may be Served in any County.*[4]

(N) *Indorsement of Service to be made.*[5]

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less an amendment be allowed, stay the proceedings on payment of the sum indorsed within the four days (*Bowditch v. Slaney*, 2 Bing. N. C. 142. *Jaquot v. Bourra*, 3 Mee. & W. 156); but if not paid within the four days, the plaintiff may, in his declaration, claim a further sum. (Id.) The defendant may have the costs taxed, though he pay less than the indorsed costs. *Hunter v. Russell*, 5 Man. & G. 601. *Ex-parte Woollett*, 12 Mee. & W. 504. *Young v. Crompton*, 2 D. & L. 557.

[1] By C. L. P. Act, 1852, s. 9, "the plaintiff in any such action may, at any time during six months from the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be provided and kept for that purpose at the offices of the masters of the said courts, and shall be impressed upon the writ by the proper officer of the court out of which the original writ issued: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force."

The costs of only one writ will be allowed, unless more were absolutely necessary. *Angus v. Coppard*, 3 Mee. & W. 57.

[2] By C. L. P. Act, 1852, s. 11, "no original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior courts, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff, or his attorney, of a *præcipe*, in such form as has heretofore been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force, and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Where on renewal the seal of the court has been negligently omitted, without default of the officer, the court will not amend. *Nazer v. Wade*, 31 L. J. Q. B. 5. And where an application to reseal a writ, to save the Statute of Limitations, was made at the office of the court on Saturday, the 28th December (during the Christmas holidays, when no one was in attendance), the six months allowed for renewal terminating on the following day:—*Held*, that an application for the purpose on Monday, the 30th, was too late. *Evans v. Jones*, 8 Jur. N. S. 641.

Where a writ of summons, issued on the 23d of January, 1861, was duly renewed at intervals of six months, up to and on the 19th of July, 1862, and an application to renew it again was made on the 19th of January, 1863 (the 18th being Sunday) to the proper officer, who refused to affix the seal as provided by sect. 11 of the 15 & 16 Vic. c. 76, on the ground that six months had elapsed since the date of the last renewal, the court refused to grant a rule to renew the writ. *Anon.* 32 L. J. Ex. 88.

[3] By C. L. P. Act, 1852, s. 13, "the production of a writ of summons, purporting to be marked with the seal of the court, showing the same to have been renewed according to this act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action, as of the first date of such renewed writ, for all purposes."

[4] By C. L. P. Act, 1852, s. 14, "the writ of summons in any action may be served in any county."

[5] By C. L. P. Act, 1852, s. 15, "the person serving the writ of summons shall, and he is hereby required, within three days at least after such service, to indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed under this act; and every affidavit of service of such writ shall mention the day on which such indorsement was made."

A marksman may make this indorsement. *Baker v. Coghan*, 7 C. B. 731. The courts have allowed a longer time where the defendant snatched the writ from the process-server (*Brock v. Eldridge*, 2 Dowl. 647. *Burrows v. Gabriel*, 4 D. & L. 107); but not where he has not been prevented by the conduct of the defendant (*Atkinson v. Howell*, 7 Mee. & W. 213. *Russell v. Lowe*, 2 Dowl. N. S. 233); but there is no absolute duty on the part of a process-server, arising from the mere delivery of a writ of summons for service, to indorse on the writ the day of service, as required by

(O) *Service on Corporations and Inhabitants of Hundreds, &c.*[1]
(P) *Proceedings where Personal Service cannot be effected.*[2]
(Q) *Against British Subjects out of Jurisdiction.*[3]
(R) ,, *Foreigners out of Jurisdiction.*[4]

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the Common-Law Procedure Act (15 & 16 Vic. c. 76), s. 15. To render the server liable to an action for omitting to make such indorsement, there must have been some request, express or implied to him, to make the indorsement. *Curlewis v. Broad*, 31 L. J. Ex. 473.

[1] By C. L. P. Act, 1852, s. 16, "every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high-constable thereof, or any one of the high-constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace-officer thereof."

[2] By C. L. P. Act, 1852, s. 17, "the service of the writ of summons, whenever it may be practicable, shall, as heretofore, be personal, but it shall be lawful for the plaintiff to apply from time to time, *on affidavit*, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has *not appeared thereto*, it shall be lawful for such court to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit."

The affidavit should set out the writ, &c. (*Wakefield v. Teesdale*, 2 L., M. & P. 85), and state the residence of defendant (*Crofts v. Brown*, 7 Q. B. 284), and that an attempt has been made to serve him there. *Russell v. Knowles*, 7 Man. & G. 1001); or if his residence be unknown, the efforts made to serve him (*Gorringe v. Terrewest*, 20 L. J. Q. B. 209. *Wilkins v. Jones*, 3 D. & L. 747. *Baker v. Coe*, 1 Ex. 153), and such facts (not mere belief) as would lead to the conclusion that defendant wilfully evades service (*Channing v. Cross*, 9 Dowl. 118); or affects ignorance of the issuing of the writ. It should also appear on the affidavit when the search for appearance was made (*Brian v. Stretton*, 1 C. & M. 74. An application five days after is too late (*Amor v. Blofield*, 7 Dowl. 147), but within four, in time. *Waugh v. Pry*, id. 376. It should also show that eight days have passed since the time when it may be presumed that the writ came to the knowledge of the defendant. *Hocker v. Townsend*, 1 Hodges, 204.

[3] By C. L. P. Act, 1852, s. 18, "in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A) to this act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always, that the plaintiff shall, and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts, in the manner hereinafter provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment."

[4] By C. L. P. Act, 1852, s. 19, "in any action against a person residing out of the jurisdiction of the said courts, and not being a *British* subject, the like proceeding may be taken as against a *British* subject resident out of the jurisdiction, save that in lieu of the form of writ of summons in the schedule (A) to this act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule (A) marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule, also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the court or

(S) *Effect of Irregularity in Writ.*[1]

(T) *Substitution of one Writ for another by Mistake may be Amended.*[2]

(U) *Writs for Service within and without Jurisdiction may be Concurrent.*[3]

(V) *Special Indorsement where Action for a Debt.*[4]

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a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

[1] By C. L. P. Act, 1852, s. 20, "if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by this act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which the same shall issue, or to a judge; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the court or judge may seem fit."

The application to set aside the writ must be made within the eight days limited for entering an appearance, unless there be some good ground for delay. *Tiley v. Hodgson*, 2 D. & L. 655. *Holliday v. Lawes*, 3 Bing. N. C. 541. *See* Amendment, vol. i. pp. 325, 326.

[2] By C. L. P. Act, 1852, s. 21, "if either of the forms of writ of summons contained in the schedule (A) to this act annexed, and marked respectively Nos. 1, 2, and 3, shall by mistake or inadvertence be substituted for any other of them, such mistake or inadvertence shall not be an objection to the writ or any other proceeding in such action; but the writ may, upon an *ex-parte* application to a judge, whether before or after any application to set aside such writ, or on any proceeding thereon, and whether the same or notice thereof shall have been served or not, be amended by such judge without costs." *See* Amendment, vol. i. pp. 325, 326.

[3] By C. L. P. Act, 1852, s. 22, "a writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction; and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction."

[4] By C. L. P. Act, 1852, s. 25, "in all cases *where the defendant resides within the jurisdiction* of the court, and the claim is for a *debt* or *liquidated demand in money*, with or without interest, arising upon a contract, express or implied; as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note; the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim, in the form contained in the schedule (A) to this act annexed, marked No. 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by a court or judge."

No. 4.—*Special Indorsement.*

[*After the Indorsement required by the 8th section of this Act, this special Indorsement may be inserted.*]

The following are the particulars of plaintiff's claim:—

	£	s.	d.
1849. June 20. Half-year's rent to this day of house and premises in —— street, Westminster	25	10	0
Sept. 12. Ten sacks of flour, at 40s.	20	0	0
Dec. 1. Money received by defendant	17	0	0
	62	10	0
Paid	15	0	0
Balance due . .	£47	10	0

Or,

To butcher's meat supplied between the 1st of Jan. 1849, and the 1st of Jan. 1850 . .	£ 52	s. 0	d. 0
Paid . . .	20	0	0
Balance . .	£32	0	0

[*If any account has been delivered, it may be referred to, with its date, or the plaintiff may give such a description of his claim as in a particular of demand, so as to prevent the necessity of an application for further particulars.*]

Or,

£50 principal and interest due on a bond, dated the day of conditioned for the payment of 100*l.*

Or,

£90 principal and interest due on a covenant contained in a deed, dated the day of to pay 100*l.* and interest.

Or,

A penalty of 100*l.* under the stat. 55 Geo. 3, c. 137.

Or,

£85 on a bill of exchange for 100*l.*, dated the 2d February, 1849, accepted *or* drawn, or indorsed by the defendant.

Or,

£50 on a guarantee, dated the 1st January,

(W) *Writ, how Served in general.*[1]

WRONGFUL Dismissal. *See* Master and Servant, vol. v. p. 463; and see *M'Keon v. Cowley*, 7 L. J. (N. S.) 828. *Cauthorn v. Cordrey*, 32 L. J. C. P. 152.

Y.

YEAR.[2]

YEAR and a Day.[3]

1850, whereby the defendant guaranteed the due payment by E. F. of goods supplied, or to be supplied, by him.

[*To any of the above may be added, in cases where interest is payable,* "the plaintiff also claims interest on £ of the above sum from the date of the writ until judgment."]

N.B.—Take notice, that if a defendant served with this writ within the jurisdiction of the court do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed [with interest at the rate specified] and the sum of £ for costs, and issue execution at the expiration of eight days from the last day for appearance.

No item of unliquidated damages can be included in this indorsement; and if it be, judgment signed thereon would be irregular. *Roduay v. Lucas*, 24 L. J. Ex. 155. If the plaintiff neglects to make this special indorsement when it can be made, he will not be entitled to the costs of the declaration upon judgment being signed for want of a plea. C. L. P. Act, 1852, s. 28. *See* also Appearance, vol. i. p. 390.

[1] *See ante*, p. 685. When personal service is practicable, no equivalent will be allowed. C. L. P. Act, 1852, s. 17. *Christmas v. Eicke*, 5 D. & L. 156. *Heath v. White*, 2 id. 40. It does not mean that the copy of the writ shall be actually put in the corporeal possession of the defendant. "It suffices," says *Pattison, J.*, "seeing a person, and bringing the process to his notice." *Thompson v. Pheney*, 1 Dowl. 441. *Rhodes v. Innes*, 7 Bing. 329. If he refuses to receive it, then placing it on him or throwing it down in his presence is sufficient (*Bell v. Vincent*, 7 D. & R. 233; 1 Dowl. 443); or putting it through a crevice in the door of a room where the defendant is (*Smith v. Wintle*, Ca. Pr. C. P. 103); but sending it by post, without further evidence of its receipt, will not suffice. *Redpath v. Williams*, 3 Bing. 443. *Aldred v. Hicks*, 5 Taunt. 186, *contra*.

It is not necessary to show the writ itself, unless the defendant asks to see it. *Worley v. Glover*, 2 Stra. 877. *Panchand v. Woolley*, Barnes, 302. *Thomas v. Pearce*, 2 B. & C. 761. Service on a husband of a writ against husband and wife is sufficient. Barnes, 406, 412. Service on the printer, &c. of a newspaper, may be effected by leaving the writ at the house mentioned in the declaration of proprietorship. 6 & 7 Wm. 4, c. 76, s. 9. Service on criminal prisoners, see *Danson v. Le Capelain*, 21 L. J. Ex. 219. As to service on public companies, *see* Joint Stock Companies, vol. v. p. 242; on corporations and inhabitants of hundreds, *ante*, p. 685.

[2] Lat. *Annus;* L. F. *an, ann.* The period of 365 days, or twelve calendar months. 2 Bl. Com. 140; Co. Litt. 135; Cro. Jac. 166. By the stat. Hen. 3, the increasing day in the leap-year, together with the preceding day, were directed to be accounted for one day, and this rule has continued to be observed ever since. 2 Bl. Com. 141.

[3] Is a period particularly recognised in the law. Thus, if a judgment in an action be reversed, a party, notwithstanding the lapse of time mentioned in the Statute of Limitations pending that action, may commence a fresh suit within a year and a day after the day of such reversal. 4 Bl. Com. 315, 335. *Ruddock's case*, 6 Coke, 25; 1 Lev. 310. The day was probably added to remove any doubt as to the completion of the year, by inclusive or exclusive computation of the first or last day. Palmer's *Pr. Lords*, 175, n. Erskine observes, that a day is adjected to the year *in majoram evidentium*, that it may clearly appear that the year itself is elapsed. Ersk. Pr. b. 1, tit. 6, s. 22; Bell's *Dict.*

Before the 15 & 16 Vic. c. 76, 1852, when a year and a day had elapsed after judgment signed without execution being sued out upon it, the law presumed the judgment had been satisfied, or that the plaintiff had released the execution. *See* Revivor, *ante*, p. 343, n. [2]. Wreck and estrays become the property of the Crown or state, unless claimed by the owner within a year and a day. 1 Bl. Com. 292, 297; 2 Kent's Com. 359, 363. So in criminal law, in order to make the killing of a person murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered. 4 Bl. Com. 197, 306; Co. Litt. 254, b. So, in admiralty law, a claim to property captured as a prize must be interposed within a year and a day, otherwise condemnation follows as of course.

YEAR-Day and Waste.[1]

YEAR to Year. *See* Landlord and Tenant, vol. v. p. 299.

YEARS, Term of. *See* Lease, vol. v. p. 338.

YIELDING and Paying.[2]

[1] An ancient privilege or prerogative of the Crown to have the lands and tenements belonging in fee-simple to persons attainted for murder for a year and a day, and to commit waste therein at pleasure. 4 Steph. Com. 450; 4 Bl. Com. 285.

[2] The initial words of that clause in leases in which the rent to be paid by the lessee is mentioned and reserved; but no technical form is necessary. Words of proviso, such as "Provided always, that W. shall pay to the lessor during the term 120*l.* per annum" (*Harrington v. Wise* or *Wyse*, Cro. Eliz. 486; Noy. 57; Mo. 459. *Doe d. Henniker v. Watt*, 8 B. & C. 308, 316), are sufficient for the purpose, though if rent be expressly reserved, and the lessee covenant to pay in addition ten shillings a-year for every acre of the demised premises which he shall plough up, the last sum is not rent, nor will an action of debt lie for it. *Anon.* 12 Mod. 73–4. On the balance of the authorities it appears that an implied covenant to pay the rent arises on the words "Yielding and paying" (*Anon.* 1 Sid. 447, pl. 9. *Harper v. Burgh* or *Bird*, 2 Lev. 206. *Webb v. Russell*, 3 T. R. 402. *Vyvyan v. Arthur*, 1 B. & C. 416), when contained in an indenture of lease for years executed by both parties, but not, it is apprehended, when contained in a deed-poll or an indenture not executed by the lessee. It is not settled whether the word *reddendum* will support an action of covenant on a lease for life (*Harper v. Bird*, T. Jon. 102); but *see* 8 Anne, c. 14, s. 4, which gave an action of debt against a tenant for life for rent. It seems that the covenant for payment of rent arising on the *reddendum* will run with the land and bind the assignee of the lease. *Brett v. Cumberland*, Cro. Jac. 399. *Porter v. Swetnam*, Sty. 406, 431. If the rent be reserved in a lease by the words of yielding and paying, or rendering, and the lessee covenant to pay yearly, over and above six shillings, a couple of capons, or the like, the latter will not be considered as part of the rent, but as a sum or thing in gross. *Morrice v. Antrobus*, Hardr. 325; and see *Donellan v. Read*, 3 B. & Adol. 899. 2 Platt on Leases, 82.

THE END.

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An agreement that arbitrators shall state a case for opinion of court is waived by appointing an umpire, and allowing him to make an umpirage. In *Re London*

Dock Co. 32 L. J. Q. B.30; 17 L. T. (N. S.) 385.

Revocation of reference is a good plea to an action on an award, when agreement contains no stipulation that it shall be made a rule of court. *Mille v. Bayley*, 32 L. J. (N. S.) 179.

A judge may enlarge time after it has expired and after award made. *Ward v. Secretary-at-War*, 32 L. J. (N. S.) 53.

An award cannot be agreed to in the absence of another arbitrator. *Morgan v. Boult*, 7 L. T. (N. S.) 671.

An award directing a verdict to be entered when no power has been given, may be construed as an opinion that plaintiff is entitled to recover. *Everest v. Ritchie*, 7 H. & N. 698

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Authority of Attorney.—An attorney retained to conduct a cause has authority to settle it in the absence of any express direction to the contrary from his client, *Chowne v. Parrott*, 8 L. T. (N. S.) 391

Country Client and London Agent—Death of Country Client—Revocation of Agent's Authority.—A country attorney, being retained to conduct an action (on behalf of an infant), in which he obtained a verdict, employed, in the latter stages of it, a London attorney as his agent, and died before judgment was signed. The London attorney wrote to the client in the country, stating that he had acted as the agent, and proposing to continue so to do; and receiving no answer, taxed costs, and signed final judgment, without the knowledge of the client: meanwhile the client, without any notice, either to him or to the defendant, had employed another attorney. The court refused a rule to set aside the taxation; the plaintiff's remedy, if any, being against the attorney. *Davis v. Bowen*, 7 L. T. (N. S.) Q. B. 739

Negligence, Liability of Attorney for—Retainer for Purchaser to complete a Purchase—Duty of Attorney to make Inquiry into Title of Seller.—An attorney had been employed by the plaintiff to complete a purchase of a leasehold property, which the plaintiff had made at an auction, on conditions which stipulated that he should take "an under-lease," and not demand an abstract of vendor's title, nor inquire into the title of the "lessor." He made no inquiries, but simply got a pretended lease executed by the seller, who had sold fraudulently, without any title whatever, the lease itself not even reciting any title, and the pretended seller giving actual possession, and not having any deed or document in his possession to adduce as any evidence of title, had he been asked for such evidence, and the purchaser was evicted by the real owner:—*Held*, that there was evidence of negligence on the part of the attorney: and *Held*, also, that the proper measure of damage was the sum the plaintiff had to pay to obtain a title, with interest, and without any deduction for rent, as he was liable over to the true owner for mesne profits during the time he had occupied as owner. *Allen v. Clark, Executrix*, 7 L. J. (N. S.) 781

Attachment—Answer of Matters of Affidavit—Neglect.—A rule *nisi* was obtained calling on an attorney of the court to show cause why he should not answer the matters of an affidavit. The attorney filed no affidavit in answer:—*Held*, that the rule must now be to answer the matters of the affidavit, or in default that the attorney be struck off the rolls. *Eton v. Worman. In the matter of an Attorney*, 7 L. T. (N. S.) 249; *nom. Re Worman*, 32 L. J. (N. S.) 83

Felony, Conviction of—Striking off Rolls—Delay.—The rule to strike an attorney off the rolls may be served on him in person where he is undergoing sentence for felony, and counsel will be allowed to appear for him. He was convicted in June 1861. It is not too late to make an application in M. T. 1862. *Re Thompson, Geo.*, 13 C. B. (N. S.) 288; 7 L. T. (N. S.) C. P. 327

Practice where called on to Answer matters of an Affidavit.—It is no answer to a rule calling on an attorney to answer the matters of an affidavit that the applicant has already obtained a decree in a court of equity for an account with reference to the same transactions. The court will only look to the report when a reference has been made to the masters to examine into the charges and report: counsel for the accused cannot go into the evidence given before the master. *Wright v. M.A. Thomas, Ex-parte*, 13 C. B. (N. S.) 705

Entry of Name on Roll—Change of.—Where an attorney made affidavit that for family reasons, and no other, he was desirous of changing his name, the court directed the master to indorse the proposed alteration on the roll of attorneys, although no royal license had been obtained. *In re Gimlet, an Attorney*, Q. B. 210; 7 L. T. (N. S.) Ex. 563. The ap-

plication should be to the court, and not to a judge at chambers. *Ex-parte an Attorney*, id. 716

Country attorney receiving debt and costs on service of writ sent to him:—Ordered to pay over the same. *Walker v. Pearce*, id. 285

No action will lie for negligence against, unless there is a privity of contract. *Robertson v. Heming*, 4 Macq. H. L. 168. Law List is evidence of certificate being duly taken out. 23 & 24 Vic. c. 127

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ATTORNMENT, ii. 63. *See* also Distress, iv. 78; Landlord and Tenant, v. 296; Use and Occupation, vi. 608

AUCTION, Sale by, ii. 63. The presence of a single puffer is evidence of fraud; whether sale without reserve, or not. *Green v. Haverstock*, 32 L. J. C. P. 181; 8 L. T. (N. S.) 300; and bidder may at any time revoke, 29 L. J. Q. B. 14. *See* also Auctioneer, ii. 65; Abstract of Title, ii. 63; Horses, v. 50; Vendors and Purchasers, vi. 608; Warranty, vi. 637

AUCTIONEER, ii. 65. *See* Abstract of Title, i. 63; Frauds, Statute of, iv. 535; License, v. 381; Principal and Agent, vi. 220; Stamps, vi. 476; Vendors and Purchasers, vi. 418

By 8 & 9 Vic. c. 15, duties on sales by auction were repealed; and by sects 2 and 3 auctioneers must take out annual licenses, upon which there is payable a duty of 10*l*. By sect. 7, an auctioneer, before beginning any auction, shall affix or suspend a ticket or board containing his full christian and surname, and place of residence, in the room where the auction is held, otherwise he incurs a penalty of 20*l*.

AUDIT of Assignees' Accounts, ii. 280, 336

AUDITA Querelâ, ii. 66

AURICULAR Confession. *See* Witness, vi. 670, n.

AUTERFOIS Acquit, ii. 67
Attaint, Plea of, ii. 67
Convict, ii. 69

AUTHORITY. *See* Distress, iv. 78; Master and Servant, v. 461; Power of Attorney, vi. 195; Principal and Agent, vi. 220; Warrant of Attorney, vi. 635; Work and Labour, vi. 678

AUTHORS, ii. 69. *See* Copyright, iii. 245; Lectures, v. 355; Libel, v. 362; Newspaper, v. 538; Printers, vi. 244; Theatres, vi. 526

AVERAGE, ii. 70. *See* Insurance, Marine, v. 179

General Average — Unseaworthiness.— In an action to recover a contribution for an average loss, a plea alleging the ship to have been unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, is good; but it is not a condition precedent to the recovery of general average that the ship should be seaworthy at the commencement of the voyage. *Schloss v. Heriot*, 8 L. T. (N. S.) 246

AVERAGE of Cornfields, ii. 74

AVERMENTS. *See* Begin, Right to, ii. 386; Evidence, iv. 289; Issue, v. 236; Pleading, vi. 135

AVOWRY. *See* Replevin, vi. 331

AWARD. *See* Arbitration, i. 485

AWAY-Going Crop, ii. 79

BACHELOR of Arts or Laws, Service of Articles by, i. 547

BAIL Below, or to the Sheriff, ii. 74. *See* Affidavit to hold to Bail, i. 250; Arrest on Mesne Process, i. 525

BAIL Above, or Special Bail, ii. 81
on Appeals, i. 578
in Ejectment, iv. 187
in Criminal Proceedings, ii. 94
in Error, ii. 261. Not dispensed with because defendants overseers, who ought not to be personally liable for costs. *Reg. v. Ives*, 7 L. T. (N. S.) C. B. 245

BAILEE, Larceny by, v. 319

BAILIE, ii. 98

BAILIFF. *See* Franchise, iv. 528; Sheriffs, vi. 424

BAILIWICK, ii. 98

BAILMENT, ii. 98; as to liability of bailor to third persons, 28 L. J. Q. B. 52

BAIRNS, ii. 118
Part of Gear, ii. 118

BAITING Animals, i. 358

BAKEHOUSE, Act for regulating, 26 & 27 Vic. c. 40

BALANCE of Account, i. 116; ii. 118

BALLOT, Voting by, ii. 119

BANCO, or Bank, ii. 119

BANKERS, ii. 119. *See* also Bank of England, ii. 133; Joint-Stock Banks, ii. 254; Lien, v. 382; Misappropriating, iv. 238; Payment, vi. 117; Principal and Agent, vi. 220; Set-Off, vi. 369

BANKERS' Cash Notes, ii. 130
Cheques, ii. 123. When payable to drawer may be post-dated (23 & 24 Vic. c. 111, s. 17), ii. 529; or, if payable to *order*, and not to bearer, *Whistler v. Forster*, 32 L. J. C. P. 161

BANKING-Hours, ii. 132
Joint-Stock Company, v. 239, 254. *See* 25 & 26 Vic. c. 89. By this act banking companies, since 2d November, 1862, are under precisely the same law as other companies, except, by sect. 44, limited banking companies are required to publish a statement of accounts in form in schedule (sect. 196). By sect. 56, inspection is to be granted on application of one-third of the shareholders. By sect. 182, no banking company issuing notes is to be entitled to acquire limited liability in respect of such issue; and by s. 188, banking company registering with limited liability is to give notice to its customers of its intention to register

BANK-Notes, ii. 137
of England, ii. 133. *See* also Forgery, iv. 500; Stock-Broker and Stock Exchange, vi. 502

BANK-Post Bill, ii. 140

BANKRUPTCY and Insolvency, ii. 141.

The General Orders of 1863 for regulating the practice and procedure of the County Courts, under the Bankruptcy Act, 1861, rescind the orders of 12th Oct. 1861, (set out vol. ii. Appen. 369), and came in force on the 1st Jan. 1864.

Married Woman.—It is questionable whether, under the Bankruptcy Act, 1861, a married woman can obtain her discharge from custody; and whether the court would, in consequence of such inability, vary the rule of practice laid down in *Beynon v. Jones*, 15 M. & W. 566, and *Larkin v. Marshall*, 4 Ex. 804, by ordering the discharge of a married woman, who had been arrested on a judgment obtained against her before marriage. *See* ii. 168

Bills of Sale.—Bill of sale under pressure is not fraudulent as intended to delay creditors within the 12 & 13 Vic. c. 106, s. 67. *Smith v. Timms and Stanton*, 7 L. T. (N. S.) 859

"Book debts" within s. 137 of 24 & 25 Vic. c. 134, mean debts which a trader may enter in his books in the ordinary course of business, whether he makes the entry or not. It does not mean only book debts due and actually entered. *Shipley v. Marshall*, 8 L. T. (N. S.) 430.

A deed of assignment conveying property to trustees for the benefit of all creditors who should execute the same, is a deed of "assignment for the benefit of the creditors of the person making the same," within the exception contained in the 7th section of the 17 & 18 Vic. c. 36. *The General Furnishing Company v. Venn*, 9 Jur. N. S. Ex. 550; 8 L. T. (N. S.) 432.

Composition Deed for benefit of Creditors—24 & 25 *Vic. c.* 134, *ss.* 192, 198.—The plaintiff obtained judgment against the defendant. Previous to the execution being put in the defendant executed a deed of composition with certain of his creditors. The plaintiff did not execute the deed, and it did not express to be made for the benefit of the creditors generally:—*Held*, not available as against the plaintiff. *Ilderton v. Castrique*, C. P. 755. 8 L. T. (N. S.) 537. Nor if, by the provisions of the deed, all creditors are excluded who do not execute it within a stated time (*Berridge v. Abbott*, 13 C. B. (N. S.) 507. *Copeman v. Hart*, 1 N. R. 126): or is a deed of assignment in trust to pay rateably the debts of such of the creditors as should execute the same, or assent thereto in writing. *Dewhurst v. Kershaw*, 32 L. J. (N. S.) Ex. 146; 7 L. T. (N. S.) Ex. 720. But a deed of arrangement made by a debtor with his creditors under sect. 224 of 12 & 13 Vic. c. 106, signed by six-sevenths in number and value of the creditors, releasing defendant from their claims, is good, and is binding on the remaining seventh of the creditors, though they have not signed. *Spitzer v. Chaffers*, 8 L. T. (N. S.) 665. Under 24 & 25 Vic. c. 134, ss. 192, 197, an unreasonable covenant will vitiate the deed (*Woods v. Foote*, 32 L. J. (N. S.) Ex. 199; 7 L. T. (N. S.) Ex. 837; see *Ingelbach v. Nichols*, 8 L. T. (N. S.) 318): so will a fraudulent preference (*Geere v. Mare*, id. 463), or if assent of majority be obtained unduly (*Hemming v. Pugh*, 1 N. R. 239). A deed of arrangement under sect. 185 must be registered under sect. 187 (*Kenwick v. Dale*, 8 L. T. (N. S.) 366), although it do not comply with nor is framed under the 192nd section (*Hodgson v. Wightman*, 9 Jur. N. S. Ex. 309; 32 L. J. (N. S.) Ex. 147; 7 L. T. (N. S.) Ex. 832); but a party arrested before it was registered will, after registration, be released by the court under whose process he is in custody. *Penhall v. Littlejohns*, 1 N. R. 292.

County-court Jurisdiction—24 & 25 *Vic. c.* 134, *ss.* 86, 88, 98.—Where a debtor was in custody for debts above 300*l.*, and had filed his petition *in formâ pauperis* in the county court of the district where he was in custody, cannot be removed to the county court of the district where he had previously resided. *In re Coombs*, 32 L. J. (N. S.) Q. B. 65; 9 Jur. (N. S.) 572. *See Ex parte Harrison*, 32 L. J. (N. S.) 159; 9 Jur. Ex. 338; 7 L. T. (N. S.) Ex. 829.

Execution and seizure *only* before bankruptcy; assignees entitled as against execution creditor. *Young v. Roebuck*, 8 L. T. (N. S.) Ex. 543.

Scotch Bankruptcy Law—Lex fori—lex loci contractûs.—*Quære*, whether set-off is governed by the *lex fori* or the *lex loci contractûs*? *Macfarlane v. Norris*, 9 Jur. (N. S.) Q. B. 74

Non-replacement of stock pursuant to contract is a demand provable under 12 & 13 Vic. c. 106, s. 165, but non-indemnification of plaintiff against calls on mining shares not provable under ss. 177 or 178. *Betteley v. Stainsby*, 12 C. B. (N. S.) 477; 9 Jur. (N. S.) C. P. 441.

Distress by landlord may be for more than a year's rent when made before petition. 9 Jur. (N. S.) Q. B. 579; 32 L. J. (N. S.) Q. B. 96.

Negotiable security given to creditor—void *ab initio*—12 & 13 Vic. c. 106, s. 202; 24 & 25 Vic. c. 134, ss. 166, 230; to forbear opposing discharge is not retrospective. *Read v. Wiggins*, 11 W. R. C. P. 148; 13 C. B. (N. S.) 220; 32 L. J. (N. S.) C. P. 131.

Notice of act of Bankruptcy—Fi. fa.—The execution debtor filed a delaration of insolvency after a levy under an execution, of which the man in possession and the execution creditor had notice before the sale. The goods were sold, but after the sale the debtor was declared bankrupt upon his own declaration of insolvency:—*Held*, that the goods did not pass to the assignees. *Edwards v. Scarsbrook*, 32 L. J. (N. S.) Q. B. 45; 7 L. T. (N. S.) Q. B. 275.

Order and disposition, see *Sparkman v. Miller*, 12 C. B. (N. S.) 659; 9 Jur. (N. S.) C. P. 50. *Edmunds v. Best*, 7 L. T. (N. S.) 279.

Payment of Money into Court.—A plain-

tiff in an action is entitled, as against the assignees, to have the money paid out of court to him. *Murray v. Arnold*, 32 L. J. (N. S.) Q. B. 11; *Cooke v. Bell*, 8 L. J. (N. S.) 431.

Warrant of attorney over ten years old, bankruptcy, and certificate, a bar to entering judgment. *Sherburne v. Lord Huntingtower*, Q. B. 344; 13 C. B. (N. S.) 742.

BANKS, ii. 369. *See* Savings' Banks, vi. 359; and 26 & 27 Vic. c. 87

BANKS of Rivers, ii. 371; vi. 348

BANS, Proclamation of. *See* Marriage, v. 446

BAR, ii. p. 372

Plea in, ii. 372. *See* Estoppel, iv. 280; Pleading, vi. 135

BARGAIN and Sale, ii. 372

BARGEMEN. *See* Carriers, iii. 30

BARON and Feme. *See* Husband and Wife, v. 59

BARRATOR. *See* Champerty, iii. 72

BARRATRY, ii. 372. *See* Insurance, Marine, v. 179

BARRISTER, ii. 373

Fees, a *honorarium*. A promise by a client to pay money to a counsel for his advocacy, or for service incidentally connected with litigation, whether made before, during, or after, the litigation, has no binding effect, and therefore such a promise is not sufficient to support an account stated. *Kennedy v. Broun*, 32 L. J. C. P. 137

BARRISTER, Revising, Appeals from, i. 383

BASTARD, ii. 384. Contract with mother to support, 9 Mee & W. 496; 8 C. B. 378, 5th ed. 437. *See* Affiliation, i. 256

When a woman has made an application in the district in which she resides for an order of affiliation, and the application has been heard and dismissed upon the merits, she cannot renew it in a different district after a residence there for the mere purpose of such application. *Reg. v. Myott*, 32 L. J. (N. S.) M. C. 138; 7 L. J. (N. S.) Q. B. 785

BATHING, vi. 15

BATTERY. *See* Assault and Battery, i. 562

BAWDY-HOUSE, ii. 386. *See* Brothel, ii. 536

The owner of a house let it to weekly tenants. The house was used as a common bawdy-house, but it was not proved that the owner obtained any additional rent by reason of the occupation:—*Held*, an indictment for keeping a common bawdy-house could not be sustained. *Reg. v. Barrett*, 32 L. J. (N. S.) M. C. 36; 7 L. T. (N. S.) C. C. R. 435

BEER-HOUSE. *See* Ale-house, i. 275; Sunday, vi. 508; License to, 24 & 25 Vic. c. 25, ss. 3, 4

BEGIN, Right to, ii. 386

BENEFICE. *See* Advowson, i. 219; Augmentation of Chancellor's, 26 & 27 Vic. c. 120

BENEFIT Building Society, ii. 387. *See* also Friendly Society, iv. 559

BENEFIT of Clergy, iii. 121

BIGAMY, ii. 395

BILL in Chancery. *See* Answer in Chancery, i. 373; Chancery, iii. 73

BILL of Costs. *See* Attorney, ii. 5; and Costs, iii. 287

BILL of Exceptions, ii. 398

of Lading, ii. 490. *See* Charter-Party, iii. 79; Freight, iv. 552; Ship and Shipping, vi. 430; Stoppage in Transitu, vi. 504

BILL of Peace, ii. 494

of Sale, ii. 494. *See* Bankruptcy, ii. 191; Bargain and Sale, ii. 372; Execution, iv. 344; Gift, iv. 604; Sheriffs, vi. 424; Vendors and Purchasers, vi. 618

The plaintiff entered into an agreement in writing with E. for the purchase of some timber; the timber was placed partly on a public wharf, and notice was given to the wharfinger, and partly on a private wharf occupied by E., and adjoining E.'s. house; and it was part of the agreement that the plaintiff should have the use of the house of E., and should purchase the furniture in the house. The furniture and timber were paid for, and the key of the private wharf was delivered to the plaintiff, and the plaintiff went into possession of the house and furniture:—*Held*, not to be a bill of sale requiring registration. *Gough v. Everard*, 8 L. T. (N. S.) 363. The original bill of sale, as well as the copy filed under the statute, stated in the recital that the consideration was 100*l.*, and in the operative part, by mistake, 1000*l.*:—*Held*, a mere clerical error, which was amendable. *Eliott v. Freeman*, 7 L. T. (N. S.) C. B. 715.

A covenant in a bill of sale to pay the money immediately on demand thereof, in writing, &c., with a condition for seizure and sale on default, must be construed reasonably with reference to the time necessary for the debtor either to get the money (supposing he has it ready) at a banker's, or at some place of deposit, or to satisfy himself reasonably of the authority of the party making the demand:—*Held*, that the seizure was wrongful, and that trespass lay, and that if there was no sale before the time when a seizure would have been rightful, the damages might be nominal. *Jones v. Wilson*, 32 L. J. (N. S.) Q. B. 33; 7 L. T. (N. S.) Q. B. 421. *Brightley v. Norton*, 32 L. J. (N. S.) Q. B. 38; 7 L. T. (N. S.) Q. B. 422. Assuming the description in an affidavit to be defective, a bill of sale is not invalid upon that account, on the authority of *Marples v. Hartley* (9 W. R. 334; 30 L. J. Q. B. 92), twenty-one days from the execution of the bill of sale not having elapsed at the time of the seizure by the sheriff. *Banbury v. White*, 8 L. T. 508

Improper Stamp.—The registration of a bill of sale with an insufficient stamp is not void, but the defect may be remedied by payment of the deficiency, and the penalty. *Bellamy v. Saull*, 7 L. T. (N. S.) Q. B. 269

Affidavit entitled in Queen's Bench, but sworn before a commissioner of the Exchequer; such a defect or error in jurat may be amended. *Cheney v. Coristors*, 13 C. B. 634; 32 L. J. (N. S.) C. P. 116

BILLS of Exchange and Promissory Notes, ii. 400. *See* also Accord and Satisfaction,

i. 88; Bankruptcy, ii. 141; Chose in Action, iii. 98; Composition with Creditors. iii. 155; Forgery, iv. 500; Guarantee, iv. 611; Larceny, v. 311; Principal and Agent, vi. 220; Principal and Surety, vi. 236

Three payees may maintain an action on note on demand:—"I promise to pay J. W., T. S., & D. M., or the major part of them, 100*l*." *Watson v. Evans*, 32 L. J. (N. S.) Ex. 137. An action being brought within six years after the death of the maker against his executor, he pleaded the Statute of Limitations:—*Held*, that the plaintiffs were entitled to recover, if not upon the note itself, at all events on a special count setting forth the effect of an arrangement between the parties. *Watkins v. Figg* (*Executor*), 11 W. R. Q. B. 258

Acceptance by one Partner in name of Firm for his separate Debt.—If a partner in a firm give an acceptance in the name of the firm in satisfaction of his own separate liability, the presumption is that he uses the name of his firm without authority, and it is incumbent on the person who takes such acceptance to show that the authority existed. *Leverson v. Lane*, 32 L. J. C. B. 10; 13 C. B. (N. S.) 226; 9 Jur. N. S. 670; 8 L. T. (N. S.) 657.

Part Payment to Indorsee by Drawer—Reduction of Damages.—Although part payment to the indorsee by the drawer of a bill is, in general, no answer to an action by the indorsee against the acceptor for the whole sum, yet where the state of accounts between the acceptor and drawer is such that the drawer is really the debtor of the acceptor, such part payment by the drawer shall be taken in reduction of damages. *Cook and Another v. Lister*, 13 C. B. (N. S.) 543, 565; 32 L. J. C. P. 121

Dishonour, Notice of—Waiver.—A promise made by the indorser to pay a bill after it has become due and dishonoured, is evidence from which a jury may infer either notice or waiver of notice, and that, although the jury find that, in fact, there was no notice. *Woods v. Dean*, 3 B. & S. 101; 32 L. J. (N. S.) Q. B. 1.

Foreign Bills — Loss of first "set."—When a foreign bill is drawn in sets, and the first "set" is lost by the holder, he cannot sue a prior indorser, who neither indorsed to him nor has the other sets in his possession, although he may be entitled to recover them from any party who has possession of them; and *semble*, his remedy is against his own immediate indorser. *Pinard v. Klockman*, Q. B. 260. 32 L. J. (N. S.) Q. B. 82; 9 Jur. N. S. 599.

Fraudulent Misapplication—Cheque.—The holder without indorsement of a draft payable to order, though taken by him *bonâ fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal indorsement. *Whistler v. Forster*, 32 L. J. Q. B. 161

Drawing and indorsing in name of dead or non-existing person is, on traverse of indorsement, an estoppel. *Ashpitel v. Bryan*, 9 Jur. N. S. 791; 32 L. J. (N. S.) 91.

Pleading — Equitable Defence.—Where a note had been given for an old debt, on an agreement that payment should not be required without "ample notice," and nearly four months' notice was given to pay:—*Held*, no defence on either legal or equitable grounds. *Owens v. Pizey*, 7 L. T. (N. S.) 350. The 26 & 27 Vic. c. 105, repeals restriction as to smallness of amount

BIRTH, ii. 502. *See* Child, Concealment of Birth of, iii. 96

BISHOP, ii. 502. *See* Ecclesiastical Persons and Courts, iii. 161

BLACK-LEG, calling Person a, ii. 502

BLANK Acceptance. *See* Bills and Notes, ii. 459

BLANK Transfers, ii. 502. *See* also *Re Swann*, 7 C. B. (N. S.) 400; 31 L. J. Ex. 425; 32 id. 273

BLEACHING Works subject to law of Factories, 25 & 26 Vic. c. 8; 26 & 27, id. c. 38

BLINDNESS, ii. 503

BOARD and Lodging, ii. 503. *See* Landlord and Tenant, v. 296; Lodgings, v. 403

BOARD of Health. *See* Public Health Act, vi. 290; and 11 & 12 Vic. c. 63 (1848); 21 & 22 id. c. 98 (1858); 24 & 25 id. c. 61 (1861)

BOARD of Trade, ii. 503. *See* Railways, vi. 306; Ship and Shipping, vi. 430

BOARD of Works. *See* Metropolis Management Act, 1849, 18 & 19 Vic. c. 120; 19 & 20 id. c. 112; 21 & 22 id. c. 104

BODLEIAN Library, ii. 504

BONA Fides, Question for the Jury, ii. 504
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BOND, ii. 504

BOOKING-Office. *See* Carriers, iii. 29

BOOKSELLER. *See* Copyright, iii. 245

BOOKS of Science, ii. 531

BOROUGH. *See* Corporation, Municipal, iii. 282

BOROUGH-English, ii. 531

BOTE, ii. 533

BOTTOMRY and Respondentia. *See* Respondentia, vi. 337; Ship and Shipping, vi. 447

BOUNDARIES. *See* Evidence, iv. 295; Highways, v. 33; Inclosure, v. 99; Landlord and Tenant, v. 296; Parish, vi. 47; Tithes, vi. 531; Turnpike Roads, vi. 592

BOUND Bailiff. *See* Arrest, i. 519; Bail, ii. 74; Sheriff, vi. 429

BRAWLING, ii. 533

BRIBERY, ii. 535. *See* Election, iv. 213

BRICKMAKING. *See* Nuisance, v. 4. Not necessarily a noxious or offensive business within sect. 64 of 11 & 12 Vic. c. 63, *Wanstead Board of Health v. Hill*, 13 C. B. (N. S.) 479; 32 L. J. C. P. 135

BRIDGES. *See* Highways, v. 46; Nuisance, vi. 1

BROKERS, London, ii. 535. *See* Principal and Agent, v. 220; Stockbroker, vi. 502

BROTHEL, ii. 536

BUBBLE ACT, repealed by 6 Geo. 1, c. 18, repealed by 6 Geo. 4, c. 91

BUGGERY. *See* Unnatural Offence, vi. 606

BUILDER. *See* Architect's Certificate, *ante*, p. 694; Work and Labour, vi. 680, n.[1]
BUILDING ACTS, ii. 536
(Benefit) Society, ii. 387. As to evidence of employment of secretary to receive money as servant, see *R. v. Hastie*, 32 L. J. M. C. 63; 7 L. T. (N. S.) 795
BUILDING Leases by Infants, 1 Wm. 4, c. 65. s. 17.
BUILDING, Negligence in, iii. 1. *See* Negligence, v. 527; Nuisance, vi. 1
BUILDINGS, Right to Support for, iv. 156
BULL-Baiting, i. 358
BULLION. *See* Weights and Measures, vi. 644
BURGAGE Tenure, iii. 2
BURGESS List—Burgess Roll, iii. 282. *See* Corporations, Municipal, iii. 282
BURGLARY, iii. 2
BURIAL, iii. 9. *See* also Anatomy, i. 347
Board, iii. 16; Separate Parishes may apportion expenses, 9 Jur. N. S. 226; as to mortgage of Rates, 25 & 26 Vic. c. 100
BUSINESS or Trade, Distinction between, iii. 20
BYE-LAWS. *See* Custom, iii. 352

CAB-Proprietors not common carriers, iii. 20. Liable although driver hire a cab by the day and receive the fares. *Powler v. Hides*, 25 L. J. Q. B. 331 If two persons ride in a cab with a child under ten years, 6*d.* may be charged for the child. *Norton v. Jones*, 8 L. T. (N. S.) 241
CABLE. *See* Ship and Shipping, vi. 430
CALENDAR, iii. 20
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CALF-Stealing, iii. 52
CALL to, iii. 20
CALLING to Bar, ii. 373
the Plaintiff, iii. 20
CALLS. *See* Joint-Stock Company, v. 249
CAMBRIDGE, Claim of Conusance, iii. 213. *See* Universities, vi. 605
CAMPBELL'S (Lord) ACT; Compensation to relations, v. 532
CANAL, v. 349
Breaking down bank, dam, wall, quay, lock, house, floodgate, iii. 21. *See* Malicious Injuries, v. 413
CANAL, setting fire to buildings belonging to, iii. 21
CANAL, Stealing from Vessels on, iii. 2
CANCELLATION, Effect of, iii. 21
of Bills and Notes, ii. 462, 485
CANCELLATION of Bond, ii. 511; of Wills, vi. 658
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CAPACITY. *See* Aliens, i. 285; Husband & Wife, v. 59; Infant, v. 135; Lunacy, v. 406
CAPIAS ad Respondendum. *See* Arrest on Mesne Process, i. 534
CAPIAS ad Satisfaciendum, iii. 22
in Withernam, iii. 28. *See* Replevin, vi. 531
CAPIAS to hold to Bail. *See* i. 525
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CAPTION to an Indictment, iii. 28
to Depositions, iii. 28
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CARDS. *See* Gaming, iv. 597
CARGO. *See* Bill of Lading, ii. 490; Charter-Party, ii. 79; Freight, iv. 552; Insurance, Marine, v. 179; Ship and Shipping, vi. 438
CARNAL Knowledge. *See* Rape, vi. 308
CARNALLY knowing a Girl under Ten years of Age, iii. 29. *See* Assault, i. 567; Rape, vi. 308
CARRIERS, iii. 29. Under 11 Geo. 4 and 1 Wm. 4, c. 68, if the value be declared, the carrier must *demand* the increased charge. *Great Northern v. Behrens*, 7 H. & N. 950; 8 P. Wms. 523. No general notice by a railway company is valid, for the purpose of limiting common-law liability; but it may be limited by such conditions as the court or a judge may determine just and reasonable: but they must be in writing, and signed by the owner or person delivering the goods. *Peek v. North Staffordshire Railway Co.* 32 L. J. Q. B. 269, H. L. When passenger by excursion train takes luggage, he is liable to pay for it. *Rumsey v. North-Eastern*, 32 L. J. C. P. 244. *See* also Freight, iv. 552; Innkeeper, v. 158; Ship and Shipping, vi. 446
CARRIERS, Larceny by, iii. 50. *See* Larceny, v. 319
CASE, Action on the, iii. 51. *See* i. 143
against Carriers, iii. 29
for Deceit. *See* Deceit, iii. 560
Defamation. *See* Libel, v. 362; Slander, vi. 450
Disturbance of Common. *See* Common, iii. 143
Disturbance of Pews. *See* Pews, v. 128
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Excessive Distress. *See* Distress, iv. 114
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Malicious Arrest. *See* Malicious Prosecution and Arrest, v. 419
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Nuisance. *See* Nuisance, vi. 1
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CASE, Special, vi. 470
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CASUS Omissus, iii. 52
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CATHOLICS. For removing Disabilities of, *see* 10 Geo. 4, c. 7
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Cockfighting.—Persons cannot be convicted of cockfighting unless it is at a place kept or used for that purpose. *Morley v. Greenhalgh*, 11 W. R. 263

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COPYHOLD, Estate of, iii. 223. Where executors who were authorised and directed by will to sell and convey copyholds, and they sold them by auction, and executed a bargain and sale to the purchaser, he is entitled to admission without the previous admission of the heir or executors. *Reg. v. Wilson*, 11 W. R. 70; 3 B. & S. 201; 9 Jur. N. S. 439; 32 L. J. (N. S) Q. B. 9; 7 L. T. (N. S.) Q. B. 326

Copyhold property was transferred to trustees. The surviving trustee died intestate, and his heir afterwards died without having been admitted, having devised the trust estate to his son and heir. During the continuance of the trust the successive *cestuis que trust* had been admitted, and had paid the usual fines. On the death of the last of the *cestuis que trust* who had been admitted, the devisee claimed to be admitted as trustee in order to carry out the objects of the trust:—*Held*, that he was only entitled to be admitted on payment of double fines. *Lord Londesborough v. Foster*, 11 W. R. Q. B. 593; 8 L. T. (N. S.) Q. B. 240. Custom as to felling timber, *Blewett v. Jenkins*, 12 C. B. (N. S.) 16. Act for continuing commissions, 25 & 26 Vic. c. 73

COPYRIGHT, iii. 245. *See* also Lectures, vi. 355, 361; 25 & 26 Vic. c. 68; Photography, *post*, p. 717. Only one witness was necessary to an attestation of an assignment of the copyright in a dramatic piece in the year 1835, and such an assignment is valid. *Cumberland v. Copeland*, 7 L. T. (N. S.) Ex. 334, reversing the judgment of the Exchequer, 9 Jur. (N. S.) Ex. 253

Under the Dramatic Copyright Act, a person cannot be sued as having "caused to be represented" a dramatic piece, unless he had, either personally or by his agent or partner, control over the representation. *Quære*, whether the piece must be registered? *Lyons v. Knowles*, 32 L. J. (N. S.) Q. B. 71; 9 Jur. N. S. 775; as to Fine Arts, *see* 25 & 26 Vic. c. 68. *See* Phillips' Law of; Burke's, id.

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Municipal, iii. 267. The "office" of an attorney is a house, shop, or counting-house, to qualify him for town-councillor. *In re Creek*, 32 L. J. Q. B. 89; 9 Jur. N. S. 647. (Bye-Law.) Excluding persons who have become insolvent means not merely inability to pay debts, but avowed or notorious insolvency; as stopping payment, compounding with creditors. *R. v. Saddlers' Co.* 32 L. J. Q. B. 337, H. L.

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Where the plaintiff sues three defendants, but does not proceed against one of them, his proper course, to entitle the defendant to his costs, is to sign judgment of *non pros.* *Bancroft v. Greenwood*, 9 Jur. N. S. Ex. 160; 32 L. J. (N. S.) Ex. 154.

Appeal.—The court will give the successful party, on an appeal from a judg-

ment of a county court, his costs. *Schroeder v. Ward*, 13 C. B. (N. S.) 410; 7 L. T. (N. S.) C. B. 825.

The number of counsel, and the amount of their fees, is discretionary with the master. *Lockstone v. London and S. C. Railway*, 12 C. B. (N. S.) 243

In an action of contract, if the judge strike out the name of a co-defendant at the trial, he is entitled to a moiety of the costs, just as a co-defendant is in an action of tort, if a verdict is found by the jury in his favour. *Ridgway v. Webber*, 13 C. B. (N. S.) 254; 32 L. J. (N. S.) C. P. 84

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INSTANTLY, v. 174
INSTRUMENTS to procure Abortion: Using or Procuring, v. 174. *See* i. 55; and 24 & 25 Vic. c. 100, s. 58
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INSURANCE, Fire, v. 174; Covenant to Insure, *see* iii. 472
INSURANCE, Life, v. 176. Contracts to insure life or keep policies on foot as a security are construed strictly, even when the security is a warrant of attorney, and authorises the signing of judgment (*Winthorp v. Murray*, 14 Jur. 302); or a covenant not to do any act to vitiate a policy (*Vyse v. Wakefield*, 6 Mee. & W. 442): but suicide by a party incapable of distinguishing right from wrong will not be a breach of covenant *to do all acts* necessary for keeping the policy on foot. *Darmayo v. Borrodaile*, 10 Beav. 335. See *Borrodaile v. Hunter*, 5 C. B. 830. A person covenanting to pay premiums, and if he neglect to do so assignee of policy may pay them, the money is recoverable as money paid. *Barker v. Butcher*, 8 Q. B. 863. Mortgagee paying premium has a lien. 2 Keen, 704. As to reputed ownership of policy, *see* Bankruptcy, ii. 227. As to proof under covenant to insure, *see* id. 262–264
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JURA eodem modo destituuntur quo constituuntur, v. 277
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JURY and Jurors, v. 277. *See* also Trial, vi. 565
JUS accrescendi inter Mercatores locum non habet pro beneficio Commercii, v. 285
JUSTICES of the Peace, v. 285; cannot act in matters in which they are shareholders. *R. v. Hammond*, 12 W. R. 208. As to jurisdiction where residing or being out of the county for which they are justices, *see* 26 & 27 Vic. c. 77. *See* Mandamus, v. 429; Slander, vi. 452
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LANDS Clauses Consolidation Act, v. 310. Under act 1845, claimant entitled to damages likely to accrue from subsidence and vibration. *Croft v. London and North Western Railway Co.* 32 L. J. Q. B. 113. As to special damage from railway works, *see* id. 173. The jury can only inquire into the amount of damage: they have no jurisdiction to inquire into the legal rights of the claimant. *R. v. Metropolitan Railway Co.* id. 367. *See* id. Ex. 167, 225. A sheriff interested as a shareholder cannot summon a jury to assess damages, 12 W. R. 208
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MALA Grammatica non vitiat Chartam, v. 413
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MISAPPROPRIATION by Servants; to amend law as to, 26 & 27 Vic. c. 103. Servants giving master's corn, &c., without authority, to his horses, not felony, but punishable by imprisonment. By bankers, factors, traders, &c., iv. 238
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MOTION. *See* Rules, Motions, and Orders, vi. 352
MULTIPLEPOINDING, v. 501
MUNICIPAL Corporation. *See* Corporations, Municipal, iii. 267
MURDER and Manslaughter, v. 501. As to, committed by persons subject to Mutiny Act, speedy trial of, removal to gaol of Newgate or Dublin, 25 & 26 Vic. c. 45. In defence of lunacy, the question for the jury is, "Was the prisoner insane, and did he do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder."—*Martin, B., in Townley's case, Midland Circuit, 16th Dec.* 1863
MURIATIC Acid Gas, condensing in Alkali Works, 26 & 27 Vic. c. 124
MUSIC, Copyright in. *See* Copyright, iii. 251
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NAME, v. 512. *See* also Attorney, *ante*, p. 695; Bills and Notes, ii. 407, 408; Indictments, v. 112, 113; Marriage, v. 447
NATIONS, Law of, or International Law. *See* Grotius; 1 Kent's *Com.* 1, 2; Wheatstone; Twiss' *Law of Nations*, 1863; Story's *Conflict of Laws*, and list of writers there referred to; Levi's *Law of Commerce;* the *Case* of the *Alexandra*, M. T. 1863, Ex.
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Trial. *See* Trial, vi. 570
NEWSPAPER, v. 538. *See* Advertisement, i. 216; Apology, i. 376; Copyright, iii. 245; Gazette, iv. 603; Libel, v. 367
A writer in a public periodical has no other right than that of any other person of freely discussing the public acts or writings of another, and he is not "privileged," in the proper sense of the word.

If, therefore, an article in a newspaper, commenting on public acts or writings, contain imputations of sordid motives or dishonest conduct, and the acts or writings themselves do not afford a reasonable ground for such imputations, the *bonâ fide* belief of the writer that the imputations are well founded affords no defence to an action for libel. The question is, Is it a fair and reasonable comment on the matter which the critic has a right to discuss? It is not necessarily libellous to impute motives; the inquiry is,—Does the occasion commented on supply a fair foundation for such imputation? *Campbell v. Spottiswood*, 32 L. J. 2, 185. Lord Campbell's Act (6 & 7 Vic. c. 96, s. 6) does not (*see* v. 379) interfere with the doctrine, "greater the truth greater the libel," in criminal proceedings; it only enables a party to plead the truth when the libel relates to *public matter and for the public interest to be stated.*

NIL Capiat, v. 538
Debet, Plea of. *See* Never Indebted, v. 535. The plea of *nil debet* is abolished by R. H. T. 4 Wm. 4, but may be replied to a set-off
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Colonial. By 26 & 27 Vic. c. 76, s. 1, existing letters patent not to take effect in colonies till published or acted on—Acts done under letters patent valid; s. 2. Future letters patent not to take effect in colony till publication; s. 3. Appointments by letters patent to be void unless published within six or nine months; s. 4, 9 & 10 Vic. c. 91, repealed; s. 5. Act to come into operation as soon as proclaimed
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PHYSICIANS, vi. 131. *See* Medical Practitioners, v. 483. Not privileged from disclosing confidential communications. *R. v. Duchess of Kingston*, 20 St. Tr. 573. Best on Ev. 690, 2d ed. Fees in Action by third parties cannot be recovered as damages unless paid. *Dixon v. Bell*, 1 Stark. 289. This applies only where physician a fellow, and within the bye-law of the college
PIERS and Harbours; Act to facilitate formation and management of, 24 & 25 Vic. c. 80. *See* Harbours, v. 16
PIGEONS. The 24 & 25 Vic. c. 96, s. 23, imposing a penalty for unlawfully killing or wounding a house-dove or pigeon, does not apply where the killing is under a *bonâ fide* belief that it is in the exercise of a legal right to protect property. *Taylor v. Newman*, 32 L. J. M. C. 186; 8 L. T. (N. S.) 420
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POACHING. *See* 9 Geo. 4, c. 69; 7 & 8 Vic. c. 29; Arch. C. P. & Ev. 795, 15th edit. Constables may search suspected persons without warrant, 25 & 26 Vic. c. 114. See *Brown v. Turner*, 32 L. J. M. C. 106; and *Cornwell v. Sanders*, id. 6
POINT Reserved, vi. 160
POINTS for Argument. *See* Demurrer, iv. 44; Special Case, vi. 472, n. [1]
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POISONED Grain, Act prohibiting sale or use of, 26 & 27 Vic. c. 113
POLICE. *See* Constable, iii. 182. As to the metropolis, *see* 2 & 3 Vic. c. 47, s. 54, enabling the force to take into custody without warrant any person within their view committing any of the offences therein specified, which include every species of annoyance. See *Justin v. Gosling*, 21 L. J. C. P. 94. They may call any persons to their aid: s. 63
POLICE Court. *See* Justices of Peace, v. 287, 294
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Dated. *See* Bills and Notes, ii. 406–429. Cheques, if payable to maker (23 & 24 Vic. c. 111, s. 17; ii. 429), or to order, and not to bearer, valid. *Whistler v. Forster*, 32 L. J. C. B. 161
POST-Office, vi. 195. *See* Larceny, v. 329
POTIOR est Conditio possidentis. *See* iii. 530; v. 98
POUND and Pound-Keeper. *See* Distress, iv. 85; and Rescue, *post*, p. 719
POUNDAGE, Sheriff's. *See* Execution, iv. 355
POWER of Attorney, vi. 195. Trustee, &c., making payment under, not to be liable by reason of death of donor. 22 & 23 Vic. c. 35, s. 26. *See* also Principal and Agent, vi. 220
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of Appointment
Mode of Execution.—By 22 & 23 Vic. c. 35, s. 12, a deed hereafter (13th August, 1859), executed in the presence of, and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly

required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation, or solemnity. By sect. 13, sale under not to be avoided by reason of mistaken payment to tenant for life. By sect. 14, devisee in trust may raise money by sale, notwithstanding want of express power in the will. By sect. 15, this to extend to survivors, devisees, &c. By sect. 16, executors to have power of raising money, &c. where there is no sufficient devise. By sect. 17, purchasers, &c. not bound to inquire as to powers. By sect. 18, not to extend to devisees in fee or in tail.

PRACTICE, vi. 209. *See* titles according to nature of proceedings

PRÆMUNIRE, vi. 210

PRECEDENCE, vi. 210

PREROGATIVE, vi. 213. *See* Sea-shores, vi. 363; Titles of Honour, vi. 535

PRESCRIPTION, vi. 218. A mode of acquiring title by long and continued usage, especially to incorporeal hereditaments; as, a right of way, common, &c. It is a usage annexed to the PERSON of the owner of an estate, as distinguished from custom, which is properly a local usage. 2 Bl. Com. 264; Co. Litt. 113. It must be certain and reasonable. *See* 4 Beav. 130; 5 Ad. & E. (N. S.) 701. It cannot be for a corporeal hereditament. 2 Bl. Com. 264, and *Wilkinson v. Proud*, 11 Mee. & W. 33. Every prescription pre-supposes a grant to have existed. *See* 2 & 3 Wm. 4, c. 71. *See* Adverse Possession, i. 208; Common, iii. 143; Custom, iii. 533; Easements, iv. 149; Lights, v. 389; Markets and Fairs, v. 441; Toll, vi. 536; Watercourse, vi. 638; Way, vi. 643

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PRINCIPAL and Accessory, vi. 218

and Agent, vi. 220. Ratification of act of, *Hawley v. Sentance*, 13 C. B. (N. S.) 458; 7 L. T. (N. S.) 745. *See* also Auctioneer, ii. 65; Master and Servant, v. 461; Power of Attorney, vi. 196; Stock-Broker, vi. 502

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PRISON, vi. 244. *See* Ca. Sa. iii. 22; County Gaol, iii. 438; Escape, iv. 263

PRISONERS, vi. 245. *See* Arrest, i. 519; Bankruptcy, ii. 141; Habeas Corpus, vi. 619. Removal from Queen's-Bench prison to Whitecross-Street prison, 25 & 26 Vic. c. 104. Latter to be regarded as the Queen's prison; sect. 2.

PRIVATE Acts. *See* Statute, vi. 483

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PRIVILEGE. *See* Ambassador, i. 315; Arrest, i. 519; Attorney, ii. 16; Parliament, vi. 48; Prerogative, vi. 213; Witness, i. 532

PRIVILEGE of Peerage. As to peers convicted of felony, abolished by 4 & 5 Vic. c. 22

PRIVILEGED Communications to attornies, medical men, &c. vi. 670, n. [2]. *See* Libel, v. 368; Slander, vi. 454

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PROCESS. *See* Action, i. 132; Arrest, i. 519; Execution, iv. 344; Limitations, v. 392; Outlawry, vi. 26; Writ of Summons, vi. 681

PROCHEIN Amy. *See* Infant, v. 145

PROCTOR, vi. 289

Admission to practise as Proctor or Attorney.—By 24 & 25 Vic. c. 10, s. 29, "any person who shall have paid on his admission in any court as a proctor, solicitor, or attorney, the full stamp-duty of 25*l.*, and who has been, or shall hereafter be admitted a proctor, solicitor, or attorney (if in other respects entitled to be so admitted), shall be liable to no further stamp-duty in respect of such subsequent admission."

Proctor may act as Agent of Solicitors in Admiralty Court.—By sect. 30, "any proctor of the High Court of Admiralty may act as agent of any attorney or solicitor, and allow him to participate in the profits of, and incident to, any cause or matter depending in or connected with the court; and nothing contained in the 55 Geo. 3, c. 160, shall be construed to extend to prevent any proctor from so doing, or to render him liable to any penalty in respect thereof."

PROFERT and Oyer abolished, vi. 284

PROFIT à Prendre, vi. 284. *See* Common, iii. 143; Custom, iii. 532; Easements, iv. 149

PROHIBITION, vi. 284. *See* Certiorari, iii. 58

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RESCUE and Pound-Breach. As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach, and subjecting himself to an indictment (*Rex v. Bradshaw*, 7 C. & P. 233), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due. 2 Wm. & M. sess. 1, c. 3, s. 4; 11 Geo. 2, c. 19, s. 10; Co. Litt. 47, b. *Costworth v. Be-*

tison, 1 Raym. 104. If the pound is broken, and the goods are taken away, the landlord may follow them and recapture them; but he must not break open the door of a private house or stable or inclosure, nor enter the grounds of a third party, for the purpose of retaking the goods, except it be on fresh pursuit. *Rich v. Woolley*, 5 M. & P. 675; 7 Bing. 651; Bullen on Distress, par. 206
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TERMS Attendant. Usually mortgages for a long period of years, created or kept outstanding for the purpose of attending or waiting upon and protecting the inheritance. 1 Rep. Com. 321; Burton, 276, pl. 860; id. 439, pl. 1428
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TITLE-Deeds, vi. 534. Right to in present tenant for life against a contingent remainderman. *Allwood v. Heywood*, 32 L. J. Ex. 153. *See* also Abstract of Title, i. 63; Deposit of Mortgage Deeds, v. 497. As to registering, *see* 25 & 26 Vic. c. 53
TITLE of Declarations, Pleas, &c., vi. 535. *See* also vi. 143
TITLE to Personal Chattels. *See* also Market Overt, v. 442; Tender, vi. 578; Trover, vi. 577; Vendors and Purchasers, vi. 624. There is no implied warranty of *title* in the contract of sale of a personal chattel; and in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct. *Morley v. Attenborough*, 18 L. J. Ex. 148; 3 Ex. 500. It may be inferred from usage of trade, or from the nature of the trade, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; as where articles are bought in a shop, professedly carried on for the sale of goods. If it be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not give a good title, the purchaser may recover back his money as on a consideration which has failed. (Id.)
TITLES of Honour, vi. 535. Time not run against claims to. Blanchard, Stat. Limitations, 56. *See* Peer, vi. 122; Prerogative, vi. 213
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TORTS under colour of Legal Process, vi. 539. *See* Trespass, vi. 545
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TOWING-Paths, vi. 540. *See* also Banks of Rivers, ii. 371; Rivers and Canals, vi. 348. Not to be interfered with by Local Board of Health, 21 & 22 Vic. c. 98, s. 68

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TRADE, Board of. *See* Ship and Shipping, vi. 435. Power as to railways re-invested in by 14 & 15 Vic. c. 64, s. 1

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TRADE-Marks, vi. 540. *See* Deceit, iii. 569.

At law there is *no property* in a trade-mark. It is merely *a right* that a person may acquire of using a particular mark upon articles he may manufacture. *Collins Co. v. Brown*, 3 K. & J. 426. If a person states in his trade-mark that which is untrue, as, for instance, that the article manufactured is "patent," when such is not the fact, he will not be entitled to maintain an action for its protection. *Flavel v. Harrison*, 10 Hare, 467. *Perry v. Truefit*, 6 Beav. 66. *Pidding v. Howe*, 8 Sim. 473. Where, however, the article on which the trade-mark is stamped was once patented, such trade-mark may be continued, although the patent has expired or been repealed. *Sykes v. Sykes*, 3 B. & C. 541. A statement in the trade-mark which is false *ab initio*, will deprive the plaintiff of all right to relief. This principle was considered by Wood, V. C., not to apply to a case where the falsehood in question was not reasonably calculated to deceive. *The Leather-Cloth Co. (Limited) v. The American Cloth Co. (Limited)*, 1 J. & H. 271. But the Lord Chancellor on appeal (21st Dec. 1863), decided that relief in equity can only be obtained where the party has been guilty of no false representation as to the marks he uses. It is doubtful whether all kinds of trade-marks are the subject of assignment. It was held in *Hall v. Barrows*, 32 L. J. Ch. 548, that trade-marks were of two descriptions, local and personal. The local are attached to a place, and can be sold with the place, but those that are personal are not the subject of alienation; and the distinction that trade-marks are local and personal is recognised by *Willes, J.*, in *Hopkins v. Hitchcock*, 32 L. J. C. P. 155. This is also a doubtful question, and *Hall v. Barrows* is the subject of an appeal, and now stands for judgment. It is also questionable whether a trade-mark will pass under the words "good will," or is a separate and distinct thing. This is also one of the subjects of dispute in *Hall v. Barrows*. *See* Lloyd on Law of Trader. *See* Bankrupt, ii. 170–177. Words spoken of, *see* vi. 452

TRAINING to Arms. *See* 60 Geo. 3, and 1 Geo. 4, c. 1; 20 & 21 Vic. c. 3. Trainer of horses has a lien, v. 384

TRANSFER of Shares, Action for not. *See* v. 251

TRANSITORY and Local Actions. *See* Venue, vi. 624; and particular titles according to form of action

TRANSLATIONS, Copyright in, vi. 541. *See* Libel, v. 372; Slander, vi. 458

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When property has been stolen from a guest in an inn, the innkeeper is liable unless the guest has contributed, by his own negligence, to the loss; but not locking his door is not such negligence. *Filipowski v. Merryweather*, 2 F. & F. 285. *See* Liability of Innkeepers at common law, v. 160; Statute limiting liability, vi. 541; Obligation of Innkeeper to receive, v. 159; Sunday, vi. 508

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WARRANTY, vi. 637. *See* Deceit, iii. 566; Insurance, Fire, v. 175; Insurance, Life, v. 177; Insurance, Marine, v. 205; Vendors and Purchasers, vi. 618. *See* also Title to Personal Chattels, *ante*, p. 723. As to horses, no particular words are necessary to constitute a warranty; saying, "This horse is sound," is a warranty (*Salmon v. Ward*, 2 C. & P. 211); and it is not necessary that the seller should say, "I warrant;" it is sufficient if he assert that the article is of a particular quality, or is fit for a particular purpose. *Jones v. Bright*, 3 M. & P. 173. The general rule is, that whatever the vendor represents at the time of sale is a warranty. *Wood v. Smith*, 4 C. & P. 45. Therefore if a person, at the time of sale, state, "You may depend upon it the horse is perfectly quiet, and free from vice," it is a warranty. *Cave v. Colman*, 3 M. & R. 2. A sound price is not tantamount to a warranty. *Parkinson v. Lee*, 1 East, 323. A *general warranty* is an unconditional undertaking that the horse is what the warrantor professes it to be. A qualified one is where the vendor says, "I never warrant, but he is sound so far as I know."

An action will lie if it can be established that the seller knew of the unsoundness. *Wood v. Smith*, 4 C. & P. 45. It may be a limited or a special warranty. *Wood v. Smith, supra; Bywater v. Richardson*, 1 Ad. & E. 568; S. C. 3 Nev. & M. 748; and see *Best v. Osborne*, 2 C. & P. 74. *Jones v. Cowley*, 4 B. & C. 445; S. C. 6 D & R. 533; and *Hemming v. Parry*, 6 C. & P. 580. If the contract be reduced to writing, nothing which is not found in the writing can be considered as a part of the contract. *Kain v. Old*, 2 B. & C. 627. *Pickering v. Dowson*, 4 Taunt. 785. A warranty is several, though the contract be entire. *Symonds v. Carr*, 1 Camp. 361. A warranty applies to the time of sale. The animal must be reasonably fit for the purpose for which he is sold. *Gray v. Cox*, 4 B. & C. 115. Proof that a horse is a good drawer only will not satisfy a warranty that he is a good drawer and pulls quietly in harness (*Coltherd v. Puncheon*, 2 D. & R. 10); "quiet in all respects" includes being quiet in harness. *Smith v. Parsons*, 8 C. & P. 199. Unfitness must be clearly proved.

Soundness and Unsoundness.—The former is, when a horse is free from hereditary disease, is in the possession of his natural and constitutional health, and has as much bodily perfection as is consistent with his natural formation. *Coate v. Stephens*, 2 M. & Rob. 139. The latter, any defect in the structure of a horse, whether congenital, or arising from subsequent disease or accident, that diminishes his natural usefulness and renders him less than reasonably fit for present use. *Holyday v. Morgan*, 27 L. J. Q. B. Ex. *Kiddell v. Burnard*, 9 Mee. & W. 670. *Coates v. Stephens, supra.* See *Bolden v. Brogden*, 2 M. & Rob. 113. *See* alphabetical list of defects constituting unsoundness, Oliphant on the Law of Horses, p. 49

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London :—Strangeways and Walden, Printers,
28 Castle St. Leicester Sq.